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The Victim Friendly National Childhood Vaccine Injury Compensation Act: You've Got to Be Kidding!

by Stanley P. Kops, Esq.

Anyone who has yet to engage in practice governed by the National Childhood Vaccine Injury Compensation Act, a step required for all current vaccine injury and death claims as a condition precedent to litigation in a private forum, should proceed with great caution. Though the Congressional intent was to create a victim-friendly statute which provided just and fair compensation quickly and without the uncertainties and proof problems inherent in civil actions, frequent practitioners under the Act are in virtually universal agreement that the program, as it has evolved during the past decade and a half, is a perversion of the Congressional intent.

It certainly does not take into consideration the injury suffered by the victim (usually an infant or child), the emotional and psychological effect of the child's injury on the parents, or the quantity of work which an attorney with a case before the Claim Court must accomplish to have any reasonable chance of prevailing on such a claim.

Unmistakably, pursuing a claim through the Act's process is tantamount to litigation in every sense. The only difference is that instead of the vaccine manufacturer, the "defendant" is the United States of America. The lawyers representing the United States are, of course, from the Justice Department, and the Special Masters assigned to hear these matters are employees of the federal government.

The Special Masters uniformly follow established goals of examining the issues presented in an individual case, unaffected by the reality that the United States is their employer. Since they are constantly dealing with tragic events, they feel themselves bound to strictly interpret the administrative procedures for evaluation of claims, not necessarily to the benefit of the victim, but rather to harmonize with prior Claims Court opinions involving matters that arose in unrelated legal contexts.

Equitable tolling is not available under the Act. Under the Federal Tort Claims Act, if an individual injured by a vaccine could prove that the government violated the 21 C.F.R. regulations applicable to that vaccine, it would be entitled under *Berkovitz v. United States* to bring a non-jury federal tort claim. Many such civil actions have been brought in the past: *Berkovitz v. United States*, 486 U. S. 531; *Griffin v. United States*, 351 F.Supp. 10, *aff'd*, 500 F.2d 1059 (CA3 1974); *Loge v. United States*, 662

F.2d 1268 (CA8, 1982); *In Re Sabin*, 763 F.Supp. 811 (D.Md. 1991); *St. Louis University v. United States*, 5 Fed. Appx. 133 (CA4 2001); *Baker v. United States*, 817 F.2d 560 (9th Cir. 1987).

If a victim of the government's negligence could not discover, and did not discover, that it was the government's negligence, at least in part, which caused that plaintiff's injuries, the court would evaluate the claimant's basis for asserting the doctrine of equitable tolling. Proofs would have to be offered as to why that individual had not commenced the action within two years from the first sign of injury, preliminary motions would be brought and hearings held, and discovery would take place to determine whether or not the plaintiff does or does not fit the criteria of cases such as *United States v. Kubrick*, 444 U.S. 111 (1979); *Tyminski v. United States*, 481 F.2d 257 (3rd Cir. 1973); *Ciccarone v. United States*, 486 F.2d 253 (3d Cir. 1973); *Zelevnik v. United States*, 770 F.2d 20 (3rd Cir. 1985).

When that same plaintiff brings an action under the ostensibly victim-friendly Act, no excuse for a late claim is acceptable. Equitable tolling is not permitted: if the claim was not brought within three years from the date of the occurrence, the claim is barred, and any hope of a private damages action in the event an unacceptable claims resolution follows is destroyed. *Brice v. Secretary HHS*, 240 F.3d 1367 (Fed. Cir. 2001). See, also, *Hebern v. Secretary HHS*, 01-0361V. The *Brice* decision was not based on federal tort claim practice, but rather in reliance on the holdings of two run-of-the-mill cases, *Johns-Manville Corporation v. United States*, 893 F.2d 324 (Fed. Cir. 1989); and *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990).

Amending the Act to permit equitable tolling has been discussed recently, but to date, the Secretary of Health and Human Services has not actively supported new legislation which would accomplish that goal.

Death of the Petitioner: Compensation Bonanza for the Government, Its Department of Justice and the Regulatory Agency

Assume the following scenario: A child was given the oral polio vaccine; the father (wage earner), changes the child's diaper and he becomes paralyzed from the neck down because the vaccine administered causes contact polio, a fact known both to the regulator, the vaccine manufacturer and physicians since the early 1960s.

The parent remains completely paralyzed with his motor functions completely destroyed, while his sensory functions are not affected one iota. Basically, he can only move his eyes. The medical expenses for the first 18 months are nearly \$1 million, but he has no insurance. During the 18 months he is aware of everything, but he cannot move any of his limbs or any part of his body, other than his eyes. Eventually, the polio causes respiratory failure and he dies.

It is now time to bury this innocent victim. His widow has no money, since no income was coming in for the last 18 months. The government/respondent not only

will not pay for the funeral, it won't even pay for the burial plot. The government/respondent's position is very simple — if you die the only thing the estate is entitled to is \$250,000; the \$1 million in medical expenses are the obligation of the widow. The costs of the burial and the burial plot are the obligation of the widow.

The fact that during those 18 months the widow, the children and the husband suffered unbelievably, and the widow and the children will continue to suffer for all the years to come, is unimportant. It is not compensable. A victim who dies as a result of the vaccine receives no money for the pain and suffering no matter how long they lived or how severe the suffering was for that victim. This is not a hypothetical case, but rather a recent decision handed down in the case of Clifford v. Secretary of the Department of Health and Human Services, July 30, 2002, No. 01-424V.

The Act's Legal Position

The legal position of this "victim friendly Act" can best be summarized by reviewing a portion of the Government's refusal to pay a funeral bill for a child who was administered the MMR vaccine, who lingered for nearly a week suffering a major encephalopathy, and then expired. The Government was requested to pay the funeral bill; it refused and advised the Special Master of the following:

The Vaccine Act states that compensation for a vaccine-injured claimant's future, unreimbursable, vaccine-related expenses is limited to "diagnosis, medical or other remedial care, rehabilitation, developmental evaluation, special education, vocational training and placement, case management services, counseling, emotional or behavioral therapy, residential and custodial care and service expenses, special equipment, related travel expenses, and facilities determined to be reasonably necessary." 42 U.S.C. §300aa-15(a)(1)(A)(iii)(I)(II). This provision has been found to be an "exhaustive list" of the compensatory expenses allowable under the Vaccine Act. *Potter v. Sec'y, HHS*, 22 Cl.Ct. 701, 704 (1991); *Hulsey v. Sec'y, HHS*, 19 Cl. Ct. 331, 334 (1990). Thus, since future unreimbursable burial costs are not listed as a compensable expense under section 15(a)(1)(A), they cannot be awarded by the Program...no vaccine case has awarded petitioner's burial costs as a compensable expense under section 15...

In death cases, Congress authorized an award of \$250,000 "for the estate of the deceased." 42 U.S.C. §300aa-15(a)(2). This statutory limitation is amplified by the legislative history, which specifies that "allowable death benefits for a vaccine-related death are set at a level of \$250,000." H.R.Rep. No. 99-908, 99th Cong., 2d Sess., reprinted in U.S. Code Cong. & Admin News 2313-2661 (1987) (emphasis added).

In keeping with the statute's plain meaning, the Court of Federal Claims has construed section 15(a)(2) as precluding an estate from receiving anything other

than the expressly permitted death benefit. *Sheehan v. Sec'y. HHS*, 19 Cl.Ct. 320, 312 (1990) (“because compensation for vaccine-related deaths are explicitly limited by the plain language of section 15(a)(2)...this court will not now reach beyond that clear statutory mandate to award additional compensation...”). Even if one were to assume that compensation in addition to the statutory death benefit were available to a decedent’s estate, such an award should logically be limited to the categories of compensation listed in section 15(a)(1)(A).

As noted previously, the cost of burial expenses is not on the list of compensable items for a vaccine-injured claimant under section 15(a)(1)(A). Accordingly, the claim for unreimbursable funeral expenses in this case should be denied.

Experts’ Fees

What more need be said? This is not a victim friendly Act; it is just good old fashioned litigation with limited, nominal financial protection for the injured, the dead and their survivors. The deck is stacked against the petitioner and their counsel. It is in the respondent/U.S. Attorney’s hands to determine when and if petitioner’s experts will be paid.

The respondent’s experts are always paid. It is in respondent’s hands to determine how much petitioner’s expert will be paid. The experts hired by the respondent are guaranteed their hourly charge. Respondents determine how much of a fee counsel for petitioner will receive for representing the petitioner, the widow and the surviving children. Respondents will determine if the fee is reasonable. The respondent will determine the reasonableness of your fee and the reasonableness of the hours spent preparing for the ultimate trial of the matter.

If fairness and equity were the Congressional mandate, the Act is a complete failure. If it is prompt and complete restitution to make the injured child, infant, and/or adult able to be in the same position as if the unfortunate adverse reaction had not occurred, it is a failure. The Act does not use equity, fairness and reasonableness as the criteria.

As the special master stated in Clifford, *supra*, at page 8-9 of her opinion:

Due consideration of the above legislative history and case law compels the undersigned to conclude that petitioner in the instant action is entitled to an award solely of \$250,000 plus reasonable attorney’s fees and costs. She may feel this is an unfair result, but it is consistent with the Act.

Congress, in creating legislation termed the National Childhood Vaccine Injury Act, may not have contemplated its applicability to adult vaccinees who were wage-earners when it enacted the provision determining \$250,000 as the death benefit. Congress also seems not to have envisioned instances where a vaccinee of any age

had prolonged hospitalization before dying from a vaccine injury. Redress in the civil courts is an option in those cases in which economic loss and/or hospitalization costs far exceed the statutory death benefit. Section 300aa-21(a) permits petitioner to elect to file a civil action for injury or death.

After nearly four years, the special master tells the litigant - if you want fairness and you want the bills paid, the Vaccine Act is not the solution.

About the Author

Stanley P. Kops is principal of The Law Offices of Stanley P. Kops in Bala Cynwyd, Pa. Kops has been involved for years in polio litigation, with both the vaccine manufacturer and the United States of America, in connection with cases involving paralytic poliomyelitis caused by the oral polio vaccine. He currently represents plaintiffs allegedly injured by SV40-containing polio vaccines.