

AMBROSE AGBEBAKU and MARY *
GILBERT, Individually, and *
as Parents and Next Friends of *
ALLEN AGBEBAKU, a Minor *

Plaintiffs

v.

SIGMA ALDRICH, INC., et al. *

Defendants

* * * * *

IN THE
CIRCUIT COURT

FOR

BALTIMORE CITY

Case No: 24-C-02-004243*

MEMORANDUM OPINION

*RELATED THIMEROSAL CASE NUMBERS:

24-C-02-004175	24-C-02-004238	24-C-02-004321
24-C-02-004176	24-C-02-004239	24-C-02-004322
24-C-02-004178	24-C-02-004240	24-C-02-004323
24-C-02-004179	24-C-02-004241	24-C-02-004324
24-C-02-004180	24-C-02-004242	24-C-02-004328
24-C-02-004181	24-C-02-004245	24-C-02-004935
24-C-02-004182	24-C-02-004246	24-C-02-005122
24-C-02-004183	24-C-02-004247	24-C-02-005868
24-C-02-004184	24-C-02-004249	24-C-02-005869
24-C-02-004185	24-C-02-004251	24-C-02-005870
24-C-02-004186	24-C-02-004252	24-C-02-005871
24-C-02-004188	24-C-02-004253	24-C-02-005872
24-C-02-004189	24-C-02-004254	24-C-02-005873
24-C-02-004190	24-C-02-004255	24-C-02-005936
24-C-02-004191	24-C-02-004256	24-C-02-007224
24-C-02-004192	24-C-02-004257	24-C-02-007231
24-C-02-004194	24-C-02-004320	24-C-02-007234
		24-C-02-007235

INTRODUCTION

Plaintiffs allege that their minor children suffered an increase risk of developmental harm and specifically, autism, which were proximately caused by the administration of various childhood vaccines containing the preservative thimerosal, the composition of which contains mercury. The Plaintiffs allege that their children suffered injuries resulting from repeated exposure to thimerosal, a mercury containing preservative added to some vaccines and other pharmaceutical products. Plaintiffs further allege that their children's injuries were exacerbated by coal burning power plants owned and operated by Baltimore Gas & Electric Company and Constellation Energy Group. Plaintiffs seek relief, including compensatory and punitive damages on numerous statutory and common law theories.

PROCEDURAL HISTORY

On January 30, 2003, Judge Carol E. Smith (Judge-in-Charge of the Civil Docket for the Circuit Court for Baltimore City) issued "Maryland Thimerosal Litigation"¹ Order Number 1 in the above-captioned cases. These cases include 49 cases that were remanded to this Court from the United States District Court for the District of Maryland by Order of Judge Andre M. Davis dated December 18, 2002. Judge Smith's Order dated January 30, 2003

¹ For ease of reference, these cases will be described as the Maryland Thimerosal Litigation.

established a briefing schedule for the filing of "Master Briefs" as well as other preliminary motions, oppositions and replies supporting or opposing the Master Briefs.

Thereafter, four (4) additional cases were filed in the Circuit Court for Baltimore City (case numbers: 24-C-02-007224, 24-C-02-007231, 24-C-02-007234, and 24-C-02-002735). On March 21, 2003, Judge Smith executed an Order scheduling those cases along with the 49 other cases remanded from the United States District Court before this Court for a hearing on all preliminary motions on April 21 - 22, 2003.

Several preliminary motions were filed including:

1. Vaccine Defendants'² Motion to Dismiss and Request for Stay (filed January 31, 2003);
2. Thimerosal Defendants'³ Motion to Dismiss (filed January 31, 2003);

² There are several categories of Defendants who, for ease of reference, are described as the "Vaccine Defendants," the "Thimerosal Defendants", the "Power Plant Defendants", and "Other Defendants". The Vaccine Defendants include: (1) Aventis Pasteur, Inc. (hereinafter "Aventis"); (2) Baxter Healthcare Corporation (hereinafter "Baxter"); (3) Merck & Co., Inc. (hereinafter "Merck"); (4) SmithKline Beecham Corporation d/b/a GlaxoSmithKline (hereinafter "GSK"); (5) Wyeth (formerly known as American Home Products Corporation); and (6) Antex Biologics. On April 16, 2003, this Court granted a Stay as to Defendant Antex Biologics, Inc., and the proceedings against Antex Biologics were deferred to the Bankruptcy Court in accordance with Section 362 of Title 11 of the United States Code.

³ The "Thimerosal Defendants" include: (1) Sigma-Aldrich, Inc.; (2) American International Chemical, Inc.; (3) Spectrum Laboratory Products, Inc. and (4) Eli Lilly and Company. For reasons unrelated to the merits of these Motions, Eli Lilly and Company filed its Motion to Dismiss separate and distinct from the Thimerosal Defendants' Motion. Nevertheless, Eli Lilly and Company will be considered with the "Thimerosal Defendants" for the purpose of the determination of all preliminary motions.

3. Power Plant Defendants'⁴ Motion to Dismiss (filed January 31, 2003);
4. Other Defendants'⁵ Motion to Dismiss and/or for Stay of All Claims and Proceedings.

The Plaintiff filed its Opposition to all preliminary Motions on February 20, 2003 and requested a hearing on the preliminary Motions. On April 21 and 22, 2003, this Court (Berger, J.) conducted a hearing on the extant Motions and held its decision on all motions sub curia. This Memorandum Opinion addresses all of the outstanding Motions that were ripe at the time of the hearing on April 21, 2003.⁶

STANDARD OF REVIEW

In considering a motion to dismiss for failure to state a cause of action pursuant to Md. R. 322 (b) (2), a trial court must assume the truth of all well-pleaded relevant material facts in the

⁴ The "Power Plant Defendants" include: (1) Baltimore Gas & Electric, Co. (hereinafter "BG&E"); and (2) Constellation Energy Group, Inc. (hereinafter "CEG").

⁵ The "Other Defendants" include: (1) Ortho-Clinical Diagnostics, Inc. (hereinafter "OCD"); (2) Johnson and Johnson; and (3) Human Genome Sciences, Inc. (hereinafter "HGS"). Prior to the hearing on April 21, 2003, counsel for the Plaintiff and Human Genome Sciences, Inc. agreed to dismiss this action against HGS without prejudice. This Court granted the dismissal of HGS without prejudice by Order dated April 25, 2003.

⁶ On the first day of the hearing, Plaintiffs' counsel presented the Court with an additional pleading captioned as "Supplemental Memorandum of Law in support of Maryland Thimerosal Plaintiffs' Opposition to Thimerosal-Laden Product Defendants (aka Vaccine Defendants) Motion to Dismiss and Request for Stay." Inasmuch as said filing was not authorized by the Scheduling Orders signed by Judge Smith, this Court neither considered the filing nor allowed oral argument on the contents of this filing at the hearing on April 21 - 22, 2003.

Complaint and all inferences reasonably drawn therefrom. Bobo v. State, 346 Md. 706, 708 (1997); Bd. of Education of Montgomery County v. Browning, 333 Md. 281, 286 (1994) (“[the court] must accept as true all well-pleaded facts and allegations in the complaint”); Stone v. Chicago Title Ins. Co., 330 Md. 329, 333 (1993); Bennett Heating & Air Conditioning v. Nations Bank, 103 Md. App. 749, 757 (1995), rev’d on other grounds, 342 Md. 169 (1996). Additionally, in the context of a motion to dismiss, it would be improper to ask a judge to make any findings of fact. Morris v. Osmore, 99 Md. App. 646, 658 (1994).

It is well settled that the facts comprising the cause of action must be pleaded with sufficient specificity. Bobo v. State, supra, 346 Md. at 708. Indeed, the Maryland Rules expressly provide that “a pleading that sets forth a claim for relief ... shall contain a clear statement of the facts necessary to constitute a cause of action and a demand for judgment for relief sought ...” Md. Rule 2-305. “Bald assertions and conclusory statements by the pleader will not suffice.” Id.; Professional Staff Nurses Assoc. v. Dimensions Health Corp., 110 Md. App. 270, 285 (1996). Thus, the “grant of a motion to dismiss is proper if the complaint does not disclose on its face a legally sufficient cause of action.” Lubore v. RPM Assoc., 109 Md. App. 312, 322 (1996), cert. denied, 343 Md. 565 (1996).

Alternatively, the motion to dismiss must be denied when the

facts, if proven, would entitle Plaintiff to relief. Morris v. Osrose Wood Preserving, 99 Md. App. 646, 653 (1991) (citing Stone v. Chicago Title Ins. Co. of Md., 330 Md. 329 (1993)). When moving to dismiss, a Defendant is asserting that even if the allegations of the Complaint are true, Plaintiff is not entitled to relief as a matter of law. Lubore, supra, 109 Md. App. at 322.

SUBJECT MATTER JURISDICTION

A. Vaccine Defendants

Defendants argue that the Plaintiff's injuries are governed by what is commonly referred to as the Vaccine Act. Specifically, 42 U.S.C.S. § 300aa-11(a)(2)(A), provides that:

No person may bring 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 the effective date of this part, and no such court may award damages in an amount greater than \$1,000 in a civil action for damages for such a vaccine-related injury or death, unless a petition has been filed, in accordance with 42 U.S.C.S. § 300aa-16, for compensation under the Program for such injury or death.

Further, Defendants contend that Plaintiff's Complaint must be dismissed because Plaintiffs failed to exhaust any and all remedies provided by the Vaccine Act's no-fault compensation program before they filed a civil Complaint. Defendants maintain that before filing a Complaint against manufacturers and distributors of a vaccine, Plaintiffs must first file a petition for compensation in a specially constituted court of special masters that is part of

the United States Court of Federal Claims (hereinafter the "Vaccine Court").

Plaintiffs argue that they are exempt from filing a Vaccine Act claim in the Vaccine Court for several reasons, including but not limited to: (1) there is no federal preemption of vaccine-related injury claims; (2) the Homeland Security Act makes it clear that thimerosal claims should not have been and will not in the future be handled by the Vaccine Act; (3) Defendants have not established that Plaintiffs' claims 'qualify' under the Vaccine Act; and (4) Plaintiffs have no outstanding administrative remedy within the Vaccine Act, and therefore, they are not required to exhaust it.

Initially, this Court must determine whether the thimerosal preservative in vaccines is an 'adulterant' or 'contaminant' as defined in the Vaccine Act. If the thimerosal preservative is an 'adulterant' or 'contaminant,' the Plaintiffs are exempt from filing a claim in the Vaccine Court. The Vaccine Act defines broadly the term 'vaccine related injury' as "an illness, injury, condition, or death associated with" vaccines listed in the Act, but not a condition "associated with an adulterant or contaminant intentionally added to such a vaccine." 42 U.S.C. § 300aa-33(5).

Numerous courts have ruled on this issue and have held, as a matter of law, that thimerosal is **not** an adulterant or contaminant and have dismissed claims, identical to those brought here by

Plaintiff, for lack of subject-matter jurisdiction.⁷ Significantly, a Texas court held recently that the "language of the Vaccine Act unambiguously and specifically indicates that injuries caused by vaccine preservatives (i.e., thimerosal) are within its scope...it is clear that Congress has spoken to the precise question at issue." Owens v. Am. Home Prods. Corp., 203 F. Supp. 2d 748, 756 n. 11 (S.D. Tex. 2002).

Clearly, case law issued after the Vaccine Act and rules of statutory interpretation support the conclusion that injuries allegedly caused by the thimerosal preservative constitute vaccine-related injuries. Accordingly, this Court finds that the Plaintiffs' injuries caused by the thimerosal preservative indeed constitute vaccine-related injuries.⁸

⁷ See Liu v. Aventis Pasteur, Inc., 219 F. Supp. 2d 762 (W.D. Tex. 2002); Owens v. Am. Home Prods. Corp., 203 F. Supp. 2d 748 (S.D. Tex. 2002); O'Connell v. Am. Home Prods. Corp., No. G-02-184 (S.D. Tex. May 7, 2002); Blackmon v. Am. Home Prods. Corp., No. G-02-179 (S.D. Tex. May 8, 2002); Collins v. Am. Home Prods. Corp., No. 3:01CV979LN (S.D. Miss. Aug. 2, 2002); McDonald v. Abbott Labs, Inc., 3:02CV77LN (S.D. Miss. Aug. 2, 2002); Stewart v. Am. Home Prods. Corp., No. 3:02CV427LN (S.D. Miss. Aug. 2, 2002); Greene v. Aventis Pasteur, Inc., No. L-1228-012 (N.J. Super. Ct. Aug. 8, 2002); Colson v. Aventis Pasteur, Inc., No. L-1351-02 (N.J. Super. Ct. Aug. 8, 2002); Russak v. Aventis Pasteur, Inc., No. A-02-CA-480-SS (W.D. Tex. Sept. 9, 2002); Carabine v. Aventis Pasteur, Inc., No. A-02-CA-501-SS (W.D. Tex. Oct. 8, 2002); Holder v. Abbott Labs., No. 4:02-CV-148LN (S.D. Miss. Oct. 15, 2002); Wax v. Aventis Pasteur, Inc., No. CV 02-2018 (JBW) (E.D.N.Y. Oct. 28, 2002); Mead v. Aventis Pasteur, Inc., No. 0107-07136 (Or. Cir. Ct. Nov. 6, 2002); Radulovic v. Am. Home Prods. Corp., No. 02-05033 (Fl. Cir. Ct. Nov. 19, 2002); Cheskiewicz v. Aventis Pasteur, Inc., No. 0952 (Pa. C. Dec. 16, 2002); Young v. Aventis Pasteur, Inc., No. A-02-CA-734-SS (W.D. Tex. Jan. 6, 2003); Botter v. Aventis Pasteur, Inc., No. 9:02-CV-181 (E.D. Tex. Jan. 13, 2003); Shanaughy v. Wyeth, No. 02-1517 CAWS (Fl. Cir. Ct. Jan. 17, 2003); Murphy v. Aventis Pasteur, Inc., No. 1:02-CV-2257-CAP (N.D. Ga. Feb. 25, 2003).

⁸ Plaintiffs argue that the Act does not apply to their claims because of the adulterant/contaminant exception of 42 U.S.C. § 300aa-33(5). Although the terms 'adulterant' and 'contaminant' are not defined in the Act, established principles of statutory construction mandate the conclusion thimerosal, when used as a preservative in licensed vaccines, is a constituent

The Vaccine Act provides that:

No person may bring a civil action for damages in an amount greater than \$1,000...against a vaccine administrator or manufacturer in a State or Federal court for damages arising from a vaccine-related injury...unless a petition has been filed, in accordance with section 300aa-16 of this title, for compensation under the Program for such injury...

42 U.S.C. § 300aa-11(a)(2)(A). It is well settled that the Court must look at the plain language of the statute when determining its meaning. Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992). As long as the language of the statute is clear, the function of the court is to enforce it according to its terms. United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242 (1989).

However, if the plain language is ambiguous, the Court must look to the legislative history of the statute. The Vaccine Act expressly provides that: "[n]o person may bring a civil action for damages in an amount greater than \$1,000" for damages incurred from a vaccine-related injury unless a petition has been filed in the Vaccine Court. 42 U.S.C. § 300aa-11(a)(2)(A). As virtually all of the Courts interpreting the Vaccine Act have held, this Court finds that the language in the Vaccine Act is clear and unambiguous. See, e.g., Owens v. An. Home. Prods. Corp., supra, 203 F. Supp. at

ingredient of the vaccines and not an adulterant or contaminant. In addition, both the Vaccine Court and the Secretary of the Health and Human Services have determined that thimerosal-related claims are included within the statutory definition of "vaccine related injury" because thimerosal is not an 'adulterant' or 'contaminant.' Amendola v. Secretary of HHS, 989 F.2d 1180, 1186 (Fed. Cir. 1993); Leroy v. Secretary of HHS, No. 02-392V (Fed. Cl. Oct. 11, 2002).

756; O'Connell v. Am. Home Prods. Corp., No. G-02-184 (S.D. Tex. May 7, 2002); Blackmon v. Am. Home Prods. Corp., No. G-02-179 (S.D. Tex. May 8, 2002).

Although this Court need not look to the legislative history in interpreting the Act, a review of the legislative history solidifies the Act's plain meaning: "All individuals injured by a vaccine administered after the date of enactment of the legislation are required to go through the compensation program ... before other remedies may be pursued." H.R. Rep. No. 99-908, at 3, reprinted in 1986 U.S.C.C.A.N. at 6344.⁹ It is only after a claimant has exhausted the no-fault compensation system that the claimant may elect to refuse any award or compensation and file a civil action. 42 U.S.C. § 300aa-21(a). This Court finds that Plaintiffs' injuries from the thimerosal preservative constitute vaccine-related injuries within the contemplation of the Vaccine Act. Accordingly, Plaintiffs failed to exhaust their remedies in the Vaccine Court before filing their action in this Court.

Further, the express terms of the Act are instructive. Section 42 U.S.C. § 300aa-11(a)(2)(B) expressly provides that: "If a civil action which is barred under [§ 300aa-11(a)(2)] is filed in

⁹ The effective date of the Vaccine Act is November 15, 1988. In their oral argument, Plaintiffs stated that two to three minors of the 53 minor Plaintiffs included in the Complaint were exposed to thimerosal before October 1, 1988. However, Defendants maintain that according to Plaintiffs' Complaint, only one minor plaintiff was born before Congress enacted the Act (one minor plaintiff was born November 8, 1988). However, at oral argument on April 21, 2003, the Court was advised that the one minor plaintiff did not receive any vaccinations until six weeks after his birth, thereby making the plaintiff's exposure to thimerosal a post Vaccine Act case.

a State or Federal court, the court shall dismiss the action.” Furthermore, state and federal courts have dismissed such cases for lack of subject-matter jurisdiction to decide the merits of vaccine-related injury claims. See Brown v. Secretary of HHS, 874 F. Supp. 238, 241 (S.D. Ind. 1994) (granting motion to dismiss for lack of subject-matter jurisdiction on this basis), aff’d mem., 61 F.3d 905 (7th Cir. 1995), 1995 WL 395753; Greene v. Aventis Pasteur & Colson v. Aventis Pasteur, Nos. L-1288-02, L-1351-02, slip op. at 5 (N.J. Super. Ct. Aug. 8, 2002) (dismissing thimerosal-related claims because “Plaintiffs’ alleged injuries are vaccine-related and this Court lacks jurisdiction in these matters”). Accordingly, inasmuch as Plaintiffs’ filed their claim in State court without first exhausting their remedies in the Vaccine Court, this Court must dismiss the vaccine-related injury claims for lack of subject-matter jurisdiction.

Moreover, Plaintiffs contend that the repeal of the Homeland Security Act amendments¹⁰ to the Vaccine Act demonstrate that Congress did not intend to include thimerosal claims within the Vaccine Act. However, the mere fact that Congress clarified specific sections of the Vaccine Act and subsequently repealed

¹⁰ Before its repeal, sections the Homeland Security Act (“HSA”) clarified the definition of a vaccine-related injury by adding that “an adulterant or contaminant shall not include any component or ingredient listed in a vaccine’s product license application or product label.” Homeland Security Act of 2002, Pub. L. No. 107-296, § 1715. Section 1716 of the HSA clarified the definition of a vaccine to include “all components and ingredients listed in the vaccine’s product license application and product label.”

those clarifications does not indicate any intention of Congress to exclude thimerosal-related claims from vaccine-related injuries. On the contrary, the clarifications confirm the holdings of courts that had addressed whether thimerosal-related injuries are covered under the Vaccine Act before Congress enacted the HSA amendments.¹¹ See, e.g., Owens v. Am. Home Prods. Corp., 203 F. Supp. 2d, 748, 755 (S.D. Tex. 2002) (holding that “because the children’s injuries are allegedly linked to a vaccine ingredient, their injuries are definitely ‘vaccine-related’”).

This Court is not persuaded by Plaintiffs’ assertion that the HSA amendments “for the first time include Thimerosal claims within the Vaccine Act.” State and federal courts have included thimerosal claims within the Vaccine Act for at least three months before the effective date of the HSA in November, 2002.¹² Indeed, state and federal courts continue to reach the same conclusion that thimerosal claims are within the Vaccine Act after Congress enacted the HSA amendments without regard to those amendments.¹³

¹¹ Prior to the effective date of the HSA (November 15, 2002), numerous courts decided that vaccines include all constituent materials identified in the biological license such as preservatives (i.e. thimerosal), and injuries attributed to any such constituent are “vaccine-related” claims covered by the Vaccine Act and its administrative filing requirement. See supra note 7.

¹² See supra note 7.

¹³ See Wax v. Aventis Pasteur, Inc., No. CV 02-2018 (JBW), slip op. at 4 (E.D.N.Y. Dec. 16, 2002) (declining to consider whether the HSA amendments apply and dismissing complaint “based on the law prior to the effective date of the amendment”); Young v. Aventis Pasteur, Inc., No. A-02-CA-734-SS (W.D. Tex. Jan. 6, 2003), slip op. at 6 n.3 (“Because these amendments are quite new and the Court has relied in its previous thimerosal rulings on more established authorities, the Court need not interpret these amendments in this Order.”).

The repeal of the HSA amendments is identified as “non-prejudicial.” Because the amendments merely clarified existing law, the repeal changes nothing. Significantly, in its repeal, Congress included the following language:

(a) Repeal. - In accordance with subsection (c), sections 1714-1717 of the [HSA] are repealed.

(b) Application of the Public Health Service Act. - The Public Health Service Act (42 U.S.C. 201 et seq.) shall be applied and administered as if the sections repealed by subsection (a) had never been enacted.

(c) Rule of construction. - No inference shall be drawn from the enactment of sections 1714 through 1717 of the [HSA], or from this repeal, regarding the law prior to the enactment of sections 1714 through 1717 of the [HSA]. Further, no inference shall be drawn that subsection (a) or (b) affects any change in that prior law, or that *Leroy v. Secretary of Health and Human Sevs., Office of Special Master, No. 02-392V (October 11, 2002)*¹⁴ was incorrectly decided. (Emphasis added).

H.J. Res. 2, 108th Cong. § 102(a-c). In sum, this Court finds -- as a matter of law -- that injuries related to the preservative thimerosal are encompassed within the definition of “vaccine-related injuries” in the Vaccine Act. This conclusion is based on several independent sources, including: (1) the decisions of state and federal courts before and after Congress enacted the HSA amendments; (2) the plain language of the repeal; (3) the repeal’s express language reaffirming the Leroy decision; and (4) the

¹⁴ The Vaccine Court in Leroy held that the “thimerosal preservative in vaccines is not an ‘adulterant’ or ‘contaminant’ under § 33(5) of the Vaccine Act” and that “petitioners alleging an injury ... from the thimerosal preservative in vaccines are statutorily obligated to file their claims against a manufacturer ... in the Court of Federal Claims, *in the first instance.*” Slip op. at 26 (emphasis in original).

legislative history of the Act. As a result, Plaintiffs must first file their claim with the Vaccine Court. Inasmuch as this Court lacks subject-matter jurisdiction to preside over Plaintiffs' primary claims for vaccine-related injuries against the Vaccine Defendants, it must dismiss such claims for vaccine-related injuries.¹⁵

B. Thimerosal Defendants¹⁶

The Thimerosal Defendants have adopted and incorporated the Vaccine Defendants' arguments regarding this Court's lack of subject-matter jurisdiction. For reasons stated previously (see discussion at pp. 6 -15), this Court finds that the causes of action arising out of vaccines containing thimerosal are vaccine-related. Further, this Court holds, as the Vaccine Court held in Leroy v. Secretary of the Dept. of Health & Human Servs., No. 02-382V (Fed. Cl. Oct. 11, 2002), that the preservative thimerosal is not an adulterant or contaminant because a "preservative is not an intentionally added ingredient of the vaccine meant to make impure, inferior, or contaminate the vaccine end product." Id. at 7.

¹⁵ Plaintiffs also allege that they are exempt from filing their claim in Vaccine Court because they are not qualified to do so, as they are beyond the 36-month statute of limitation time period to file a claim. This Court finds such reasoning illogical. Plaintiffs' argument, if considered valid, would allow all future vaccine-related injured plaintiffs to simply "sit on their hands" and wait for the 36-month statute of limitations to pass in order to bypass the no-fault compensation program in the Vaccine Court and go straight to state or federal court. Such an approach is "counter to the intent of Congress." See McDonald v. Lederle Labs , 775 A.2d 528, 532 (N.J. Super. Ct. App. Div. 2001).

¹⁶ In their Complaint, Plaintiffs have alleged that the Thimerosal Defendants manufactured and marketed thimerosal.

Rather, as a vaccine preservative, thimerosal is a constituent part or component part of the vaccine, thereby further buttressing this Court's decision that thimerosal-related injuries fall within the ambit of vaccine-related injuries. Accordingly, Plaintiffs must first exhaust all administrative remedies in Vaccine Court before filing a civil action in this Court. Because Plaintiffs failed to file their claims in the Vaccine Court "in the first instance", this Court must dismiss the action against the Thimerosal Defendants for lack of subject-matter jurisdiction.

STATE CAUSES OF ACTION - THIMEROSAL AND VACCINE DEFENDANTS

A. Intentional Infliction of Emotional Distress - Count 16

In order to establish a prima facie case for intentional infliction of emotion distress ("IIED"), Plaintiffs must allege and prove facts showing that: 1) the conduct in question was intentional or reckless; 2) the conduct was extreme and outrageous; 3) a causal connection exists between the conduct and the emotional distress; and 4) the emotional distress was severe. Alcalde v. Deaton Specialty Hospital, Inc., 133 F. Supp. 2d 702, 712 (D. Md. 2001). A complaint that fails to allege sufficient facts in support of each element of IIED must be dismissed. Id.

Defendants assert that the Court must dismiss Plaintiffs' claims because Plaintiffs can not establish the intent or extreme and outrageous conduct elements of the tort of IIED. In that context, Defendants maintain that they manufactured and distributed

FDA-approved vaccines. Defendants further argue that Plaintiffs failed to plead the intent, severe, and extreme and outrageous conduct elements of severe emotional distress with the specificity required by Maryland law. Specifically, Defendants contend that Plaintiffs failed to allege that Defendants either desired to inflict severe emotional distress, knew that such distress was certain or substantially certain to result from Defendants' conduct, or acted recklessly in deliberate disregard of a high degree of probability that the emotional distress would follow.

Plaintiffs reply that Defendant's failure to include proper warnings with the vaccine about the known adverse side effects of thimerosal, coupled with the fact that the Defendants had actual knowledge at all relevant times that thimerosal is classified as a hazardous material, constitute intentional, extreme and outrageous conduct. Plaintiffs further maintain that by alleging in their Complaint that Defendants intentionally added thimerosal to the vaccine, and widely marketed and distributed the vaccine to the public, they have satisfied the intentional conduct element of the IIED tort.

Further, Defendants assert that Plaintiffs have failed to allege the requisite evidentiary particulars necessary to sustain a claim of IIED. Specifically, Defendants allege that Plaintiffs have not stated any facts describing with specificity the nature and extent of any severe emotional distress the Plaintiffs suffered

or whether any medical or psychological treatment was needed.

Moreover, Plaintiffs argue that Defendants failure to test the cumulative effects of persons repeated exposure to thimerosal demonstrate a causal connection between the Defendants' conduct and the Plaintiffs' injuries. Plaintiffs further allege that Defendants knowingly or intentionally exposed Plaintiffs to thimerosal, a mercury poison, which resulted in brain damage. As a result, Plaintiffs contend that they have satisfied the specificity requirement of pleading the severity element of IIED. Plaintiffs maintain that all that is necessary for them to sustain this cause of action is for them to allege that the parent Plaintiffs must care for their children, the minor Plaintiffs, who now suffer from brain damage due to Defendants' intentional and reckless conduct.

To meet the "intentional or reckless" criterion of the first element, Plaintiffs must allege and show with particularity that Defendants "either *desired* to inflict severe emotional distress, *knew* that such distress was *certain* or *substantially certain* to result from [their] conduct, or acted recklessly in deliberate disregard of a high degree of probability that the emotional distress will follow." Foor v. Juvenile Servs. Admin., 78 Md. App. 151, 175 (1989) (emphasis in original). This Court finds -- as a matter of law -- that Plaintiffs have failed to demonstrate that Defendants desired to inflict severe emotional distress, or knew that such distress was certain or substantially certain to result

from their conduct. Further, Plaintiffs have failed to show that Defendants' conduct generated a "high degree of probability" that emotional distress would result.

In their Complaint, Plaintiffs allege that Defendants manufactured, distributed, supplied, promoted, labeled, packaged, licensed, designed, sold and/or profited from the sale of thimerosal-laden products. Plaintiffs also allege that Defendants had actual knowledge of the toxicity of thimerosal. However, Plaintiffs' Complaint is devoid of any allegation that Defendants intended to harm Plaintiffs.

In Walser v. Resthaven Memorial Gardens, Inc., 98 Md. App. 371 (1993), the Court of Special Appeals considered whether, in an IIED cause of action, a Complaint which merely asserted Defendant's conduct but failed to assert any motivation behind that conduct could survive a motion to dismiss. The Court held that although an act may be intentional, the consequence of inflicting emotional distress may not be intentional. In such a case, the infliction of emotional distress may be the result of conduct undertaken for a wholly different purpose. Id. at 395. Simply stated, "An actor is not liable where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress." Id. (internal citations omitted).

Here, Defendants undisputably intended to add thimerosal into

the vaccine; without the preservative, the vaccine could not maintain its effectiveness. Further, the Defendants clearly intended to expose minor Plaintiffs to the vaccine. Plaintiffs have not demonstrated that Defendants ever intended to cause severe emotional distress or to cause brain damage. The intent here was to add thimerosal into a vaccine to maintain the effectiveness of the vaccine, a motivation and act clearly "within its legal rights".

As pointed out in Alcade v. Deaton Specialty Hospital Home, Inc., supra, 133 F. Supp. 2d at 712, a significant issue is whether Defendants desired Plaintiffs to suffer severe emotional distress or acted with the appropriate degree of recklessness. Based on the Complaint and the written submission by the parties, Plaintiffs have failed to satisfy that Defendants' conduct was intentional or reckless. Because Plaintiffs failed to set forth sufficient facts establishing the first element of the tort as identified in Alcade, supra, 133 F. Supp. 2d at 712, this Court need not consider whether the remaining allegations are sufficient to support a cause of action for IIED. For the foregoing reasons, this Court grants Defendants' Motion to Dismiss Count 16 of the Amended Complaint.

B. Fraud - Counts 11 and 13

1. Fraud

Defendants assert that Plaintiffs Amended Complaint is grossly deficient in alleging the facts necessary to sustain a cause of

action for fraud. Defendants maintain that the Complaint merely contains "broad, general, and conclusory allegations that have been deemed insufficient to sustain a claim of fraud." Defendants' Initial Memorandum at p. 44. Specifically, Defendants contend that Plaintiffs failed to plead facts establishing that Defendants made representations or withheld information with the intent to deceive Plaintiffs.

Plaintiffs assert that although there must be sufficient facts and circumstances pled to sustain a claim of fraud, they need not specifically detail the transaction in which the fraud was predicated.

In a cause of action for fraud, the Plaintiffs must set forth the facts constituting fraud with certainty and particularity. It is well settled that "a general allegation of fraud, however strong in expression, is not sufficient unless there is an allegation of the facts and circumstances relied on as constituting the alleged fraud." Sims v. Ryland Group, Inc., 37 Md. App. 470, 473 (1977) (internal citations omitted). Merely because a plaintiff uses the word "fraudulent" does not mean that the facts are sufficiently pled. Brack v. Evans, 230 Md. 548, 553 (1963). Charges of fraud, without allegations of facts and circumstances which constitute the fraud, does not sustain a sufficient pleading of the fraud. Id. There are no strict guidelines for the Court to determine how well facts and circumstances must be pled. As long as the allegations of fraud are supported by specific facts and circumstances, the Court must deny a motion to dismiss for failure

to state a claim for the relief granted.

To establish a claim for fraud, Plaintiffs must allege that: 1) Defendants made a false representation to Plaintiffs; 2) Defendants knew of the falsity or made representations with reckless indifference to its truth; 3) Defendants made the misrepresentation for the purpose of defrauding Plaintiffs; 4) Plaintiffs relied on the misrepresentation and had the right to rely on it; and 5) Plaintiffs suffered compensable injury resulting from the misrepresentation. Environmental Trust v. Graynor, 370 Md. 89, 97 (2002); McGraw v. Loyola Ford, Inc., 124 Md. App. 560, 584-85 (1999). Plaintiffs' Amended Complaint is very detailed; indeed its length is forty pages. In their Amended Complaint, Plaintiffs allege that Defendants made a false representation about the vaccines because they failed to:

properly label, brand and warn about the toxic mercury contained in the [vaccine]. They specifically failed to identify the quantity of mercury in their products. Their products were in violation of the Maryland Food, Drug and Cosmetic Act, Md. Code Ann., Health-General II § 21-218 (2000).

Plaintiffs' Amended Complaint, ¶ 42.

Plaintiffs also allege that Defendants knowingly concealed material facts that Defendants had a duty to disclose, such as the presence of toxic mercury in the vaccines, the risks of mercury exposure, and the amount of mercury in each dose. Plaintiffs' Amended Complaint, ¶ 124. Plaintiffs allege that Defendants concealed such information with the intent to deceive Plaintiffs and that Plaintiffs relied and had a right to rely upon the

assumption that the concealed and undisclosed facts did not exist or were not harmful. Plaintiffs' Amended Complaint, ¶¶ 125-128. Finally, Plaintiffs allege that the acts or omissions of Defendants were a proximate cause of Plaintiffs' injuries and damages. Plaintiffs' Amended Complaint, ¶ 129.

This Court finds that Plaintiffs' allegations in their Amended Complaint are sufficient to support a claim of fraud. Plaintiffs specifically allege that Defendants failed to properly label, brand or warn about the toxicity of thimerosal in the vaccines. Plaintiffs allege facts and circumstances which -- if proven -- may constitute common law fraud. Accordingly, this Court denies Defendants' motion to dismiss Count 11 for failure to state a claim upon which relief can be granted.

2. Fraud on the Marketplace (Fraudulent Misrepresentation/Fraudulent Concealment)

Count 13 of Plaintiffs' Complaint alleges fraudulent misrepresentation under Section 310 of the Restatement (Second) of Torts, otherwise known as fraud on the marketplace. Section 310 provides:

An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or third person in reliance upon the truth of the representation, if the actor

(a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and

(b) knows

(i) that the statement is false, or

(ii) that he has not the knowledge which he professes.

The Restatement provides examples of third party liability to illustrate how Section 310 should be interpreted. One such example is as follows:

A seller of an automobile who paints over a defective wheel or axle and so conceals its dangerously defective character is liable not only to his immediate buyer who is harmed by the collapse of the wheel or axle, but also to any person to whom the immediate buyer by sale, lease, or license transfers the use of the car, and to other travelers who sustain bodily harm or whose cars are damaged when the defective car gets out of control through the collapse of the wheel or axle.

Simply stated, a plaintiff claiming fraud on the marketplace is relieved of the burden of demonstrating their personal reliance on any alleged misrepresentations. The theory of fraud on the marketplace presumes reliance, while common law fraud requires proof of actual reliance. In re Medimmune, Inc. Sec. Litig., 873 F. Supp. 953, 968 (D. Md. 1995). Maryland courts have consistently held that "under Maryland law, there is no fraudulent misrepresentation cause of action for statements made to third parties." Estate of White v. R.J. Reynolds Tobacco Co., 109 F. Supp. 2d 424, 430 (D. Md. 2000) (citing Parlette v. Parlette, 88 Md. App. 628, 635 (1991)); see also Strange v. Sofamor Danek Group, Inc., 1999 U.S. Dist. 19717, at *2 (D. Md. 1999); In re Medimmune, supra, 873 F. Supp. at 968; Cofield v. Lead Indus. Assoc., No. MJG-99-3277 (D. Md. Aug. 17, 2000).

This Court finds that Plaintiffs' claim for fraudulent misrepresentation of third parties must fail as a matter of law because such a cause of action is inconsistent with venerable Maryland case law regarding fraud.¹⁷ A claim for fraudulent misrepresentation of third parties does not require the injured party to have relied upon the alleged misrepresentation. Maryland law requires the injured person to actually rely on the alleged misrepresentation. Accordingly, Defendants' motion to dismiss Count 13 is granted.¹⁸

C. Maryland Consumer Protection Act - Count 14

The Consumer Protection Act ("CPA") prohibits a person from engaging in any unfair or deceptive trade practice in connection with certain enumerated activities. MD. CODE ANN., COMM. LAW § 13-101 et seq. (2000 Repl. Vol). Among the activities subject to the CPA are the "sale, lease, rental, loan, or bailment of any consumer goods, consumer realty, or consumer services. MD. CODE ANN., COMM. LAW § 13-303. The General Assembly enacted the CPA and set minimum standards for the protection of consumers in response to

¹⁷ See supra Part B, section 1 for common law fraud under Maryland law.

¹⁸ Further, this Court finds that no confidential or fiduciary relationship existed between the parties which would have incurred a duty on Defendants to disclose to Plaintiffs any potential risks of its product. Plaintiffs argue that such a relationship exists because Defendants, not the physicians and other practitioners, had superior knowledge of the alleged defect in its product. However, in their Memorandum, Plaintiffs note that FDA panels have conducted studies that have proven the toxic effect of thimerosal. Plaintiffs' Opposition Motion at pp. 57-58. These studies serve as notice to physicians and other practitioners that indeed, thimerosal may have harmful effects.

concerns of the lack of "public confidence in merchants offering goods, services, realty, and credit." Md. CODE ANN., COMM. LAW § 13-102(b).

In their Complaint, Plaintiffs assert that the thimerosal-laden vaccine is a consumer good. A consumer good is defined as goods sold "which are primarily for personal, household, family, or agricultural purposes." Md. CODE ANN., COMM. LAW § 13-101(d). Plaintiffs support their argument with reference to the case of T-Up Inc. v. Consumer Protection Division, 145 Md. App. 27 (2002). In the T-Up case, defendants were alleged to have marketed deceptively to the general public an aloe vera extract that would cure diseases from cancer to AIDS.

Contrary to Plaintiffs' argument, the T-Up, Inc. case is wholly distinguishable from the issues present in this case. The defendants in T-Up used the following tactics to deceive potential victims: 1) Defendants falsely claimed they had Ph.D. degrees and even carried counterfeit diplomas from Germany; 2) Defendants mailed audio tapes entitled "There is Hope" to thousands of potential victims by using a purchase list; 3) the audio tape was a staged lecture with the Defendant acting as the speaker who held a question-answer session at the end of the tape; 4) Defendants gave false hope to the recipients of the audio tapes by including at the end of the recording "You and you alone can avoid becoming another statistic;" and 5) Defendants operated their corporation by

having telephone salespersons answer questions about the aloe vera extract using a desk reference manual. Id., at 39-41. In the present case, Plaintiffs have not alleged that Defendants engaged in any such tactics for the purpose of profiting from the vaccine. Further, in T-Up, the defendants were directly dealing with the consumers and victims. Here, Defendants were never in contact with Plaintiffs, nor did they directly market its products to the Plaintiffs. Defendants are bona fide manufacturers and distributors producing and providing an FDA-approved vaccine to knowledgeable physicians who professionally administer the vaccine. This Court finds that such a claim is not actionable under the Consumer Protection Act.

In addition, section 13-104 of the CPA exempt certain professional services from the Act, including "medical or dental practitioners." MD. CODE ANN., COMM. LAW § 13-104. Vaccines are part of the medical services that physicians and other medical personnel recommend and administer to patients. Under the CPA, the physicians and other medical personnel who actually select, recommend, and administer the vaccine are exempt from liability should any injuries result. Accordingly, the manufacturer or distributor of the vaccine, an entity even more attenuated from the injured person than the medical practitioner who selected, recommended, and administered the vaccine, must also be exempt from liability under the CPA.

For the above-mentioned reasons, even if vaccines were consumer goods as defined by the CPA, any manufacturer or distributor of the vaccines would be exempt from liability under section 13-104. Accordingly, this Court grants Defendants' motion to dismiss Count 14 of Plaintiffs' Complaint.

ORTHO-CLINICAL DIAGNOSTICS, INC. and JOHNSON & JOHNSON

During the relevant time periods, Ortho-Clinical Diagnostics, Inc. ("OCD") manufactured and distributed RhoGAM, a hemoglobin product that contains mercury-based Thimerosal. RhoGAM was injected into Rh negative mothers immediately before they gave birth, exposing their fetuses in utero to the thimerosal. RhoGAM is not considered a vaccine under the Vaccine Act.

Plaintiffs argue that they need not file any claims against OCD and Johnson & Johnson (hereinafter "J&J") in the Vaccine Court because OCD and J&J are not vaccine manufacturers within the Vaccine Act and its products are not vaccines. Therefore, according to Plaintiffs, the injuries caused by OCD's and J&J's products are not vaccine-related injuries. Defendants argue that the fact that RhoGAM is not listed as a vaccine under the Vaccine Act does not relieve Plaintiffs from first exhausting all remedies against all Defendants in the Vaccine Court. Defendants maintain that all of Plaintiffs' claims are for vaccine-related injuries and expenses that must first be adjudicated in the Vaccine Court.

Plaintiffs contend that their injuries resulted from

accumulated exposure of RhoGAM and thimerosal. This Court has already established that any thimerosal-related injury must first be addressed in the Vaccine Court. Plaintiffs' Complaint is devoid of any allegation that maternal exposure to RhoGAM caused any minor plaintiff's injury. On the contrary, of the three minor Plaintiffs exposed to RhoGAM, all three were born "perfectly normal and healthy." Plaintiffs' Complaint at ¶¶ 36, 72). Consequently, any injury could only occur from an accumulation of exposure to RhoGAM and thimerosal, thereby making injuries from exposure to RhoGAM vaccine-related injuries. All vaccine-related injuries must first be adjudicated in Vaccine Court before being tried in state or federal court.¹⁹ Further, should this Court entertain Plaintiffs' cause of action against OCD and J&J for their vaccine-related injuries, the Vaccine Act would prohibit Plaintiffs from seeking compensation through the Vaccine Court.²⁰

This Court has already held that Plaintiffs must first exhaust their administrative remedies in Vaccine Court before filing any claims in state court. Recently, in Liu v. Aventis Pasteur, Inc., 219 F. Supp. 2d 762 (W.D. Texas 2002), a Texas court dismissed the plaintiff's thimerosal-related injury claims against non-vaccine manufacturers, in addition to vaccine manufacturers, until

¹⁹ See supra, pp. 6- 15.

²⁰ The Vaccine Act states: "If a plaintiff has pending a civil action for damages for a vaccine-related injury or death, such a person may not file a petition under subsection (b) for such injury or death." 42 U.S.C. § 300aa-11(a) (5) (B).

Plaintiff first exhausted all remedies in the Vaccine Court. The Texas court stated that entertaining the non-vaccine related injuries “would be wholly inconsistent with Congress’ goal of minimizing litigation costs...” Id. at 767-68. Here, Plaintiffs’ claim against OCD and J&J is clearly related to their claims against the Thimerosal Defendants and Vaccine Defendants. Therefore, Plaintiffs must first exhaust their remedies against OCD and J&J in the Vaccine Court. Accordingly, this Court grants Defendant OCD’s and J&J’s motion to dismiss.

POWER PLANT DEFENDANTS

A. Constellation Energy Group

Plaintiffs maintain that Constellation Energy Group (“CEG”) owns, operates, maintains and markets energy created in part by fossil-fuel/coal-burning power plants. To the contrary, CEG is a holding company which “holds” the stock of its various subsidiaries, one of which is Baltimore Gas and Electric (“BGE”). As a holding company for various subsidiaries, including BGE, CEG’s primary function is to hold their stock.

CEG can only be an appropriate party if Plaintiff convinces this Court that they should be permitted to pierce the corporate veil. A party may pierce the corporate veil when the corporation or company has committed fraud. Plaintiffs fail to set forth any allegations in its Complaint that would necessitate piercing the corporate veil. Further, contrary to Plaintiffs’ pursuit of this

litigation against CEG, this Court cannot - - and will not - - allow Plaintiffs to "discover" whether they have a viable claim against CEG after filing suit CEG. Plaintiffs must have a good faith basis for filing suit in the first instance. Southern Leasing Partners, Ltd. v. McMullan, 801 F. 2d 783, 788 (5th Cir. 1986) ("Appellants sued Phillips without knowing how he fit into the picture, apparently hoping that later discovery would uncover something"). Accordingly, this Court finds that CEG is an inappropriate party to this litigation and grants CEG's motion to dismiss for failure to state a claim against CEG.

B. BGE

1. Public Nuisance - Count 19

Public nuisance is defined as "an unreasonable interference with a right common to the general public." Tadger v. Montgomery County, 300 Md. 539, 552 (1984), citing Restatement (Second) of Torts § 821B. Examples of an unreasonable interference with a public right include conduct that significantly interferes with the public health, public safety, public peace, or public convenience. Id. The individual must suffer "some special or particular damage, different not merely in degree, but different in kind from that experienced in common with other citizens." Hoffman v. United Iron & Metal Co., 108 Md. App. 117, 135 (1996), citing, Baltimore & O.R. Co. v. Gilmore, 125 Md. 610, 617 (1915). Further, conduct that is prohibited by statute, ordinance, or administrative regulation also

support a finding of public nuisance. Id.

Defendants are authorized to manufacture, sell, and furnish electric power in any municipal corporation or county of the State in accordance with directives and licensing proceedings implemented by the Public Service Commission. Defendants maintain that because it operates its power plants in accordance with authorizations from several sources including the Public Service Commission, the Maryland Department of the Environment, and the United States Environmental Agency, Plaintiffs' claim for public nuisance must fail as a matter of law. Defendants assert that the cases Plaintiffs have supplied to support their public nuisance claim are distinguishable in that all of the cited cases involve claims seeking recovery for private nuisance rather than public nuisance. Defendants further argue Plaintiffs' suffered harm different in degree, but not in kind, than the general public. This allegation, Defendants contend, is insufficient, as a matter of law, for a claim against Defendants for public nuisance.

Plaintiffs contend that "[v]irtually any conduct may amount to a nuisance so long as it would be offensive or inconvenient to the normal person." Plaintiffs' Response to Power Plant Defendants' Motion to Dismiss, p. 20. Plaintiffs maintain that neither the legislature nor the Maryland Code would authorize Defendants to poison the public with mercury and then cloak them with immunity for causing or contributing to mercury poisoning. In their oral

argument, Plaintiffs contended that absent a clause exempting Defendants from liability where they complied with the statute but harm nevertheless results, Defendants remain liable for injuries incurred by the manufacturing of its products. Plaintiffs further allege that their claim of "debilitating brain damage" satisfies the public nuisance requirement that the Plaintiffs' injury is different in kind and degree from that experienced by the general public.

This Court finds, for the reasons that follow, that Plaintiffs' claim for public nuisance fails, as a matter of law. It is uncontradicted that Maryland has authorized Defendants to produce electricity by power plants that emit mercury. The Plaintiffs do not contend that Defendants have operated its power plants in contravention of such authorization and in derogation with directives and licensing proceedings implemented by the Public Service Commission. Pursuant to the Restatement (Second) of Torts § 821(B), "[a]lthough it would be a nuisance at common law, conduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability." Restatement (Second) of Torts § 821(B) at Note F (1979). Moreover, "if there has been established a comprehensive set of legislative acts or administrative regulations governing the details of a particular kind of conduct, the courts are slow to declare an activity to be a public nuisance if it complies with the regulations." Id. Further, although this Court is cognizant of

§ 821(B) of the Restatement (Second), it does not root its decision solely on the Restatement.²¹

This Court is persuaded by Defendants' argument that Plaintiffs suffered injuries different in degree, but not in kind. In a public nuisance action, a plaintiff must allege that he or she has suffered a harm that is different in kind from that shared by the general public; to allege that any harm is different in degree is insufficient to support a public nuisance cause of action. See, e.g., Venuto v. Owens-Corning Fiberglas Corp., 22 Cal. App. 3d 116, 125 (1971) (Court considered an allegation that the public was suffering from a general irritation to the respiratory tract but plaintiffs were suffering a more severe irritation solely indicated that plaintiffs and the public were suffering from the same kind of harm but plaintiffs suffered to a greater degree). In Venuto, the California Appellate Court found that such an allegation did not support an action for public nuisance. See also, Page v. Niagra Chem. Div. of Food Mach. & Chem. Corp. 68 So.2d 382, 384 (Fla. 1953) (holding that plaintiffs failed to allege that their injuries were different in kind, not merely in degree, from the injury to the public and therefore such allegations were insufficient to sustain a public nuisance claim).

Here, Plaintiffs allege that while BGE's emissions affected all people by exposing them to mercury emissions, Plaintiffs'

²¹ The Court notes that as of the date this Opinion is issued, Maryland has not enacted any specific regulations regarding the emission of mercury.

children suffered greater harm than the general public because of their "heightened vulnerability." Complaint at ¶ 63. According to case law, if an individual who has an ailment, allergies for example, and files a public nuisance cause of action against a manufacturing plant alleging that pollution emitted aggravates their allergies and injures the health of the public, then the Court must dismiss the action for failing to allege a harm different in kind and not degree.²² This hypothetical is analogous to the case at bar. The same mercury emissions that Plaintiffs allege caused injury to them, allegedly caused injury to the general public in that area. Merely because Plaintiffs might be affected to a greater degree would not, under the case law, support a claim for public nuisance.

Accordingly, for all the reasons set forth, this Court grants Defendants motion to dismiss Count 19 of Plaintiffs' Complaint.²³

2. Negligence - Count 20

Defendants contend that Plaintiffs' negligence claim should be dismissed as a matter of law because it owed no duty to Plaintiffs. Specifically, Defendants argue that the United States Environmental

²² On the other hand, if an ordinary person with ordinary sensibilities brings a public nuisance claim against the same manufacturing plant and alleges that pollution emitted has injured his or her respiratory tract and the health of the public, then a cause of action for public nuisance exists.

²³ In their response to Defendants' motion to dismiss, Plaintiffs cite and discuss several cases to support their public nuisance claim. However, the cases cited by the Plaintiffs involve causes of action for private nuisance, not public nuisance. Therefore, this authority is distinguishable from Plaintiffs' public nuisance claim.

Protection Agency studies the emissions of metals and other substances from power plants, regulating the power plants to the extent deemed appropriate. Further, the Maryland Department of the Environment, the Maryland Public Service Commission, and the federal Clean Air Act coexist for many purposes, including to "control the type and level of emissions that Power Plant Defendants may emit from their power generating facilities." Defendants' Motion to Dismiss at p. 14. Defendants maintain that it operated its coal-fired power plant in compliance with all regulations and that it had no duty to self-impose further obligations to avoid a suit for negligence. Further, by complying with the statute and regulations, Defendant maintain that they have satisfied any duty owed to Plaintiffs.

Plaintiffs argue that the duty Defendants owe to them arises from the responsibility each person or entity has to exercise due care to avoid unreasonable risks of harm to others. Plaintiffs' Response at 17. Plaintiffs further argue that an unreasonable risk, such that would give rise to a duty, can be determined by whether a reasonable person would or should know the harm is foreseeable. Id. at 17-18. Plaintiffs maintain the Defendants knew it was emitting dangerous levels of mercury, that Defendants knew of the potential harmful effects of its conduct, and still, Defendants failed to cease such emission or reduce it to safe levels.

To sustain a cause of action for negligence, Plaintiffs must show that: 1) Defendants owed a duty to Plaintiffs; 2) Defendants breached that duty; 3) Plaintiffs suffered injury; and 4) Plaintiffs' injury was proximately caused by Defendants' breach of its duty. Valentine v. On Target, 353 Md. 544, 549 (1999). Thus, there can be no negligence when no duty is due. In negligence actions, 'duty' is defined as "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." Grimes v. Kennedy Krieger Institute, Inc., 366 Md. 29, 86 (2001), citing Prosser and Keeton [on Torts] §§ 53 [(W. Keeton 5th ed. 1984)]. In order to determine whether a duty exists, a Court must consider several factors; foreseeability being arguably the most important factor. Grimes, supra, 366 Md. at 82. Whether harm is foreseeable is generally determined by asking if a reasonable person knew or should have known that the alleged conduct would constitute an unreasonable risk of harm to another. B.N. v. K.K., 312 Md. 135, 141 (1988).

The issue of foreseeability is typically a question of fact for the trier of fact to determine. Yonce v. SmithKline Beecham Clinical Lab., 111 Md. App. 124, 141 (1996). However, merely because a result could be or should be foreseeable does not necessitate a finding that a duty exists. Grimes, supra, 366 Md. at 86. A duty is created when policy considerations lead the law to say that a particular plaintiff is entitled to protection. Ashburn v. Anne Arundel County, 306 Md. 617, 627-28 (1986). Such

policy considerations include "convenience of administration, capacity of the parties to bear the loss, a policy of preventing future injuries, [and] the moral blame attached to the wrongdoer." Id. (internal citations omitted). When determining whether a duty exists, the Court must also look to the seriousness of the potential harm along with the probability that harm will result. Faya v. Almaraz, 329 Md. 435, 449 (1993) (holding that a surgeon with AIDS had a duty to inform his patients he was infected because it was foreseeable that the surgeon would transmit the virus to his patients during surgery). Additionally, the Court must also consider the relationship that exists between the parties. Bobo v. State, 346 Md. 706, 715 (1997). Such a relationship can arise in a number of ways: "(1) by statute or rule; (2) by contractual or other private relationship; or (3) indirectly or impliedly by virtue of the relationship between the tortfeasor and the third party." Id. (internal citations omitted).

There is no relationship between Plaintiffs and Defendants that arises from statute or rule or by a contractual or other private relationship. Consequently, the only relationship that could exist between Plaintiffs and Defendants is one of an indirect or implied nature. Certain parties have an implied or indirect relationship: a lifeguard and swimmers on the lifeguard's shift, parents and children, researchers and human subjects, doctors and patients, common carriers and passengers, employers and employees, owners of land and licensees or invitees, innkeepers and their

guests, and custodians and their wards. Restatement (Second) of Torts, §§ 314A-314B (1965). There is no such relationship between a coal-fired power plant and the general public, including Plaintiffs.²⁴ Absent some special relationship, Defendants do not have a duty to act affirmatively for the benefit of Plaintiffs. See Diane E. Hoffmann & Karen H. Rothenberg, Whose Duty is it Anyway?: The Kennedy Krieger Opinion and its Implications for Public Health Research, 6 J. Health Care L. & Pol'y 109, 112 (2002), quoting Dan B. Dobbs, The Law of Torts, § 227, at 579 (2000).

Neurological injury is most certainly a serious harm; however, this Court finds that it is not probable that such an injury would result from Defendants' ordinary operation of coal-fired power plants. The facts in Faya v. Almaraz, supra, provide an example of the "seriousness of harm/high probability of resulting harm" element of a duty. In Faya, a surgeon infected with the AIDS virus operated on numerous patients but failed to inform his patients that he had the virus. Faya, supra. Medical literature indicates the seriousness of potential harm, should one contract AIDS. Further, it is foreseeable that a surgeon might transmit the AIDS virus to his patients during invasive surgery. The seriousness of the potential harm, coupled with its probability, creates a duty to prevent it.

²⁴ Moreover, Plaintiffs have never alleged that a special relationship exists between Defendant Power Plant and Plaintiffs or the general public.

Here, there is no indication that the emission of mercury caused or was a substantial factor in causing the minor Plaintiffs' neurological disorders. If, in fact, emission of mercury was a cause or a substantial factor in causing the disorders, it would indeed be considered a severe harm. Further, Plaintiffs have failed to allege that there is a high probability that the emission of mercury caused the neurological disorders in the minor Plaintiffs. Accordingly, Plaintiffs have not satisfied the "seriousness of harm/high probability of resulting harm" element of determining whether a duty exists on behalf of Defendants.

Maryland Courts must look to see whether the legislature has proffered various policy considerations that would dictate whether a duty exists. Grimes, supra, 366 Md. at 100. Absent any voice from the legislature, courts must look to case law. Id. Here the legislature has spoken by assigning the United States Environmental Protection Agency the responsibility of regulating and studying mercury emissions from power plants. 42 U.S.C. § 7412.²⁵ When determining whether a duty exists, policy considerations are taken into account in order to compensate injured parties and deter the alleged wrongdoer from undesirable or risky behavior. Hoffman & Rothenberg, supra, at 113.

These objectives arise from broader societal goals including

²⁵ Section 7412(n) provides for various studies and regulations pertaining to mercury emissions from "electric utility steam generating units, municipal waste combustion units, and other sources, including area sources." 42 U.S.C. § 7412(n).

"moral responsibility and corrective justice between parties and societal welfare." Hoffman & Rothenberg, at 113. The corrective justice goal stems from the desire to instill "personal and institutional responsibility [within persons and entities] for their harmful actions and to correct wrongs through some form of redress or compensation." Id. at 114. Because the corrective justice goal can sometimes conflict with the goal of societal welfare, courts use a cost-benefit analysis to "take into account the social utility of a particular outcome." Questions arise including whether the result is so beneficial to society as to warrant the alleged tortfeasor to continue its conduct? Id. Further, are the plaintiff's interests entitled to legal protection against the conduct of the defendant? The production of power is patently essential to our everyday lives. The legislature has taken steps to ensure Defendants operation of its power plants complies with regulations. There is no claim that Defendants have not operated their power plants in the manner authorized by the various agencies that supervise them.

Inasmuch as Plaintiffs have failed to successfully allege factors this Court must consider when determining whether a duty exists, this Court finds that the issue of foreseeability is instructive in determining whether a duty exists. Was it foreseeable that Defendants' conduct, which resulted in mercury emissions, would create an unreasonable risk of harm to others?

The concept of duty and the idea of foreseeability create a conundrum: to be charged with a duty, one must look to the foreseeable harm, yet foreseeability is an issue for the trier of fact and duty is a question of law for the Court to decide. Nonetheless, when determining whether a duty exists, Courts have consistently applied the "foreseeability of harm" test. Rosenblatt v. Exxon Co., 335 Md. 58, 77 (1994); Henley v. Prince George's County, 305 Md. 320, 333 (1986). This test is based on the concept that no duty exists for unreasonably remote consequences. The key word here is "unreasonable."

In evaluating whether harm is foreseeable, this Court must again look to the relationship between the parties. There exists no relationship or privity between Plaintiffs and Defendants which would have made it reasonably foreseeable that Defendants' acts or failure to act would result in harm to Plaintiffs.²⁶ The relationship between the parties here is too attenuated to charge Defendants with foreseeability and duty. To do so would hold Defendants liable to the entire general public. Plaintiffs provide no indication that the majority of the general public suffer from the wholly unfortunate disorders that afflict minor Plaintiffs. As such, minor Plaintiffs' injuries are unreasonably remote

²⁶ The Court of Appeals in Rosenblatt, supra, deferred to the foreseeability test and lack of relationship between the parties when it found that Exxon, a former occupant of land, owed no duty to Rosenblatt, a subsequent occupant of same land, when it was found that the land was contaminated.

consequences from any alleged harm that Defendants may have caused. Defendants cannot be held liable for unreasonably remote consequences.

For the foregoing reasons this Court finds that no duty exists upon Defendants for unreasonably remote consequences. Absent any finding of a duty due to Plaintiffs, Defendants could not have breached a duty to Plaintiffs. Therefore, no cause of action for negligence exists. Accordingly, Defendants' motion to dismiss Count 20 is granted.²⁷

3. Punitive Damages - Count 21

Inasmuch as this Court has granted Defendants' motion to dismiss the public nuisance claim, the punitive damages claim of Count 21 is dismissed as it relates to Plaintiffs' claim for public nuisance.

Plaintiffs' claim for punitive damages for Defendants' alleged negligence is also dismissed. This Court has granted Defendants' motion to dismiss Count 20, which in effect eliminates any claim for punitive damages based upon negligence. As a result, Count 21 is dismissed in its entirety.

4. Battery - Count 22

On December 30, 2002, Plaintiffs amended their Complaint, and

²⁷ This Court is cognizant of Judge Andre M. Davis' Remand Order wherein Judge Davis outlined the possibility of a viable negligence claim under Maryland Law. However, after studying the plethora of filings and being fully briefed oral argument, this Court finds that Plaintiffs have failed to successfully allege a claim for negligence against Baltimore Gas & Electric Company.

thereafter, added four more Plaintiffs for a total of 53 Plaintiffs. The Plaintiffs allege that Defendant Power Plant committed a battery through its emission of mercury during the production of energy.

A battery is the intentional touching of a person without that person's consent. McQuiggan v. Boy Scouts of America, 73 Md. App. 705, 714 (1988). Touching includes the intentional putting into motion of anything which touches another person. Id. To establish a claim for battery, Plaintiffs must show that the unwanted touching is harmful or offensive. Ghassemieh v. Schafer, 52 Md. App. 31, 42-43 (1982).

Defendants argue that Plaintiffs cannot infer the requisite general intent. Defendants further argue that there was no offensive touching. Defendants liken Plaintiffs' argument to the average person emitting pollution while driving his car. It would be unreasonable, according to Defendants, to hold each driver liable for battery merely because the pollution emitted from the car 'touches' the general public.

Plaintiffs argue that Defendants need not intend to have harmed them, only that Defendants violated the legally protected interest of another. Plaintiffs further argue that Defendants intended to produce energy, thereby intending to emit mercury, resulting in harm that did not involve the Plaintiffs' consent.

This Court finds that no cause of action for battery exists

for the activities alleged in the Amended Complaint. Plaintiffs are correct in arguing that it is immaterial whether Defendants intended to do harm.²⁸ However, Plaintiffs have not inferred the requisite general intent required to sustain a cause of action for battery against the Defendants. Specifically, Defendants must have intended to unlawfully invade Plaintiffs' physical well-being through the emission of mercury from its power plants. See, e.g., Nelson v. Carroll, 355 Md. 593, 602 (1999). This Court finds that Defendants, through its ordinary conduct of producing energy, did not commit a battery on the minor Plaintiffs. As a result, Defendants are not liable to Plaintiffs for battery. See, e.g., Nelson, supra 355 Md. at 603 (recognizing that a defendant would be liable to a plaintiff for harmful contact if the contact resulted from a volitional act where the defendant intended to invade the plaintiff's legally protected interests). Accordingly, this Court grants Defendants' motion to dismiss Count 22 of the Amended Complaint.

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM

On April 21, 2003, the morning of the first day of oral argument, Plaintiffs introduced a supplemental memorandum alleging the unconstitutionality of the Vaccine Act. This Court refused to accept or consider the supplemental memorandum at the hearing, as it was introduced clearly at the eleventh hour. At the hearing on

²⁸ For example, horseplay or a prank can be a battery. Ghassemeiah v. Schafer, 52 Md. App. 31 (1982).

April 21, 2003, this Court stated that it will not entertain Plaintiffs' supplemental memorandum as it plainly does not comply with Judge Smith's Order which set forth a briefing schedule with deadlines for Defendants' Motion to Dismiss, Plaintiffs' Opposition, and Defendants' Reply. Plaintiffs had ample opportunity in their thorough Opposition to expand on any unconstitutionality argument. Additionally, Plaintiffs' attempt to introduce the supplemental memorandum does not comply with the Maryland Rules.

Further, the unconstitutionality issues Plaintiffs raise in the supplemental memorandum are not based on new precedent that was unavailable when Plaintiffs filed their Opposition. Neither case law nor statutory law has changed since the filing of Plaintiffs' Complaint or Opposition that would precipitate raising these issues.

In light of this Court's decision, it is unnecessary to reach the Plaintiffs' argument that the Vaccine Act is unconstitutional. Accordingly, this Court grants Defendants motion to strike Plaintiffs' supplemental memorandum.

STAY OF REMAINING CLAIMS

The state law claim that survives this Court's ruling on the preliminary motions is Count 11, Plaintiffs' claim of fraud. For the reasons set forth previously, this Court finds that Count 11 is viable under applicable state law.

Clearly, it is within this Court's discretion whether to grant or deny a stay. Bancroft Info. Group v. Comptroller of the Treas., 91 Md. App. 100, 107 (1992), quoting Dodson v. Temple Hill Baptist Church, Inc., 254 Md. 541, 546 (1969). A court may "stay proceedings before it pending the determination of another proceeding that may affect the issues raised," especially if "many of the factual and legal issues in [one] action are identical to or are interrelated with and dependent on factual and legal issues in the [other] action." Vaughn v. Vaughn, 146 Md. App. 264, 279-81 (2002).

Courts in other thimerosal actions have consistently stayed remaining claims. In Liu v. Aventis Pasteur, Inc., 219 F. Supp. 2d 762 (W.D. Tex. 2002), the court noted that "[c]ourts often stay proceedings to avoid interference with related proceedings in another forum and to avoid the waste of duplication." Id. at 768 (citations omitted). The court stayed all proceedings in the parents' individual causes of action against all defendants until their child's claims were heard in the Vaccine Court. Id.; see also, Carabine v. Aventis Pasteur, Inc., No. A-02-CA-501-SS (W.D. Tex. Oct. 8, 2002); Russak v. Aventis Pasteur, Inc., No. A-02-CA-480-SS (S.D. Tex. Sept. 7, 2002).

Based on this authority, this Court will stay all remaining non-vaccine related claims against Defendants pending resolution of minor Plaintiffs' primary claims in the Vaccine Court. As a

result, Count 11 will be stayed. To allow Plaintiffs to conduct discovery on some Defendants during the pendency of Plaintiffs' other claims in the Vaccine Court would be "wholly inconsistent with Congress's goal of minimizing litigation costs." Liu, supra, 219 F. Supp. 2d at 767-68. Accordingly, this Court will stay Count 11 and not permit discovery until Plaintiffs have satisfied all mandatory requirements of the Vaccine Act.

Conclusion

Accordingly, all claims brought by or on behalf of the minor plaintiffs, and all claims brought by the parents of the minor plaintiffs for costs and expenses arising from the minors' alleged vaccine-related injuries are dismissed without prejudice for lack of subject matter jurisdiction pursuant to the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300 aa - 10 et seq. Further, Defendants' Motion to Dismiss Count 11 is denied. Moreover, for the reasons stated in this Opinion, this Court grants Defendants' Motion to Dismiss Counts 13, 14, 19, 20, 21 and 22 with prejudice. The remaining non-vaccine related claim against Defendants will be stayed pending a resolution of the minor Plaintiffs' primary claims in the Vaccine Court.

Stuart R. Berger
Circuit Court for Baltimore City

cc: All Counsel of Record