

**MARKOVICH V. SECRETARY OF HEALTH AND HUMAN SERVICES:  
AN OUNCE OF CURE FOR A POUND OF PREVENTION**

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*There's an old saying that "an ounce of prevention is worth a pound of cure." Vaccinations seem to exemplify this, allowing people to avoid diseases entirely by submitting to a simple injection, rather than forcing them to worry about the more difficult alternative of treating the disease once it is contracted. Markovich v. Secretary of Health and Human Services is a case in which an infant suffered severe injuries resulting from a vaccination. To address such rare situations, the National Childhood Vaccine Injury Act establishes a system through which injured parties may recover medical costs from the government. This Recent Development examines a failure of that system to serve its intended purpose. It looks at ways in which the court's decision in Markovich runs counter to the policies underlying the creation of the system. It also considers the court's erroneous interpretation of statutory language and the injustice of denying compensation to infants injured by vaccines that results from this misapplication. Markovich illustrates how the few children injured by vaccines may be offered precious little financial restitution for the unintended consequence of a technology that keeps the rest of us healthy.*

**I. INTRODUCTION**

The vaccine is one of the greatest discoveries of medical science. As a preventative medical procedure,<sup>2</sup> vaccines are able to spare society the dire ramifications of epidemics<sup>3</sup> in exchange

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<sup>2</sup> STEDMAN'S MEDICAL DICTIONARY 1922 (27th ed. 2000) [hereinafter STEDMAN'S] (defining vaccine as "any preparation intended for active immunologic prophylaxis").

<sup>3</sup> As an extreme example, *Yersinia pestis*, also known as "plague," killed between twenty-five and forty-five percent of the population of Europe between

for the small personal burden of a trip to the doctor and a needle-stick. However, in a minority of cases, the patient may suffer a serious adverse physiological reaction to the vaccination.<sup>4</sup> In these instances, the burden borne by the individual becomes enormous.<sup>5</sup> When the legal mechanism developed to provide relief to these affected persons falls short of achieving its compensatory goals, the proper functioning of the vaccination program as a whole is threatened.

In 2007, the United States Court of Appeals for the Federal Circuit<sup>6</sup> decided *Markovich v. Secretary of Health and Human Services*,<sup>7</sup> a case that had arisen in the “vaccine court”<sup>8</sup> under the

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1347 and 1351. 2 ROBERT S. GOTTFRIED, *DICTIONARY OF THE MIDDLE AGES* 257 (Joseph R. Strayer ed., Charles Scribner’s Sons 1983).

<sup>4</sup> JOHN D. DINGELL, *NATIONAL CHILDHOOD VACCINE INJURY ACT OF 1986*, H.R. DOC. NO. 99-908, at 6 (2d Sess. 1986); see also *National Childhood Vaccine Injury Compensation Act of 1985: Hearing on S. 827 Before the S. Comm. On Labor and Human Resources*, 99th Cong. 8 (1985) [hereinafter *Hearing*] (statement of Sen. Dale Bumpers); CTRS. FOR DISEASE CONTROL, U.S. DEPT. OF HHS, *VACCINE INFORMATION STATEMENT FOR HAEMOPHILUS INFLUENZAE TYPE B (HIB) VACCINE (1998)* (“The risk of Hib vaccine causing serious harm or death is extremely small.”); CTRS. FOR DISEASE CONTROL, U.S. DEPT. OF HHS, *VACCINE INFORMATION STATEMENT FOR DIPHTHERIA, TETANUS, & PERTUSSIS VACCINES (2007)* (listing possible moderate to severe injuries [with rates of occurrence]: seizure [1/14,000], non-stop crying for three hours or more [1/1,000], fever over 105 degrees Fahrenheit [1/16,000], serious allergic reaction [less than 1/1,000,000], long-term seizures, coma, or lowered consciousness [too rare to attribute to vaccine]); CTRS. FOR DISEASE CONTROL, U.S. DEPT. OF HHS, *VACCINE INFORMATION STATEMENT FOR POLIO VACCINE (2000)* (“The risk of a polio shot causing serious harm, or death, is extremely small.”).

<sup>5</sup> 42 U.S.C. § 300aa-14(a) (2000) (recognizing the possibility of many serious consequences of vaccination, up to and including death).

<sup>6</sup> 28 U.S.C. § 1295(a)(3) (2000) (“The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction . . . of an appeal from a final decision of the United States Court of Federal Claims.”).

<sup>7</sup> *Markovich v. Sec’y of Health and Human Services*, 477 F.3d 1353 (Fed. Cir. 2007) [hereinafter *Markovich III*], *cert. denied*, 128 S. Ct. 92 (2007).

<sup>8</sup> “Vaccine court” is an informal term for the Office of Special Masters, the adjudicative body established under the U.S. Court of Federal Claims and responsible for hearing petitions for compensation under the National Vaccine Injury Compensation Program. Persons who believe themselves to have been

U.S. Court of Federal Claims. The decision affirmed the holding of the special master,<sup>9</sup> which denied the action of the petitioner due to the expiration of the statute of limitations under the National Vaccine Injury Compensation Program (“VICP”)<sup>10</sup> of the National Childhood Vaccine Injury Act (“NCVIA”).<sup>11</sup> The court accepted the government’s position that the three-year statute of limitations,<sup>12</sup> controlling the time during which a petitioner may bring suit for damages resulting from vaccine-related injuries, had been triggered by an objective, not a subjective, indicator.<sup>13</sup> This holding is an unfortunate misstep in NCVIA jurisprudence.

By finding that an objective measure<sup>14</sup> of injury triggers the statute of limitations,<sup>15</sup> the court undermined the intent of Congress to create a “user-friendly” vaccine-injury recovery system that

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injured by a vaccination listed in the National Childhood Vaccine Injury Act’s Vaccine Injury Table are prohibited from bringing a civil action for more than \$1,000 against either the vaccine administrator or manufacturer unless they first file a petition in vaccine court. Judgments of the vaccine court are appealable to the U.S. Court of Federal Claims and, then, to the U.S. Court of Appeals for the Federal Circuit. U.S. Court of Federal Claims, Vaccine Program/Office of Special Masters, <http://www.usfc.uscourts.gov/vaccine-programoffice-special-masters> (last visited Oct. 21, 2008) (on file with the North Carolina Journal of Law & Technology).

<sup>9</sup> Petitions for relief under the VICP are heard by officers known as special masters. Special masters are lawyers appointed by the judges of the United States Court of Federal Claims for four-year terms. 42 U.S.C. § 300aa-12(c) (2000); <http://www.hrsa.gov/vaccinecompensation/> (select “Frequently Asked Questions” from links at left; in the “Search By” dropdown menu, select “Answer ID” and search for “354”) (last visited Oct. 21, 2008) (on file with the North Carolina Journal of Law & Technology); *see also* U.S. Court of Federal Claims, *supra* note 8.

<sup>10</sup> 42 U.S.C. §§ 300aa-10 to -34 (2000).

<sup>11</sup> *Id.* §§ 300aa-1 to -34.

<sup>12</sup> *Id.* § 300aa-16(a)(2) (“[N]o petition may be filed for compensation under the Program . . . after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset . . .”).

<sup>13</sup> *Markovich III*, *supra* note 7, at 1360.

<sup>14</sup> *Id.* By “objective standard,” the court means to say that the statute of limitations begins to run when a vaccinated person exhibits some evidence that a member of the medical profession would take as indicative of an injury. *Id.*

<sup>15</sup> *Id.*

supplements traditional tort litigation.<sup>16</sup> This decision threatens public interest goals, with consequences reaching beyond the parties that bring suit; it impacts both the broader purpose of the NCVIA to act as an attractive alternative to tort litigation and the place of vaccination in public health strategy.

Part I of this Recent Development summarizes the history of the NCVIA and the *Markovich* decision. Part II, subpart A, explains the petitioner-friendly nature of the VICP in light of certain features of the vaccine court proceedings and the NCVIA's legislative history. It argues that by limiting the Markoviches' ability to recover, the court's decision stands in conflict with the VICP's purpose. Subpart B looks at the text of the VICP's statute of limitations and argues that the court's incorrect understanding of the word "symptom" led to a misapplication of the statute.

## II. HISTORY AND CONTEXT OF THE NCVIA AND THE MARKOVICH DECISION

During the 1980s, a large number of lawsuits<sup>17</sup> filed against the makers of the DTP vaccine<sup>18</sup> caused an increase in the price-per-dose<sup>19</sup> of the vaccine and forced its makers to withdraw from the

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<sup>16</sup> DINGELL, *supra* note 4, at 12 ("The system is intended to be expeditious and fair. It is also intended to compensate persons with recognized vaccine injuries without requiring the difficult individual determinations of causation of injury and without a demonstration that a manufacturer was negligent or that a vaccine was defective.").

<sup>17</sup> The number of lawsuits against diphtheria-tetanus-pertussis vaccine manufacturers rose from four in 1980 to a peak of 255 in 1986. In 1988—the year the VICP went into effect—lawsuits filed were at 114 and they continued to decline thereafter. The total from 1980 to 1988 was 904. Edmund W. Kitch, Geoffrey Evans & Robyn Gopin, *U.S. Law, in VACCINES* 1165, 1182 (Stanley A. Plotkin & Walter A. Orenstein eds., 3d ed. 1999).

<sup>18</sup> "Abbreviation for . . . diphtheria toxoid, tetanus toxoid, and pertussis . . ." STEDMAN'S, *supra* note 2, at 542.

<sup>19</sup> *Hearing, supra* note 4, at 5 (statement of Sen. Paula Hawkins) (attributing the rise in the price of the DTP vaccine from \$0.11 in 1983 to \$4.29 in 1985 to lawsuits against vaccine manufacturers).

market.<sup>20</sup> Congress sought a solution to “stabilize the supply of childhood vaccines and restore public confidence in the Childhood Immunization Program.”<sup>21</sup> Public health officials expressed concern that the decreasing confidence in vaccinations, coupled with their increasing price, would threaten “herd immunity.”<sup>22</sup> In response, Congress passed the National Childhood Vaccine Injury Act which contained provisions establishing the National Vaccine Injury Compensation Program.<sup>23</sup> Under the VICP, patients injured by the administration of a vaccine<sup>24</sup> may bring suit against the government in vaccine court.<sup>25</sup> Successful petitioners can recover the costs associated with their injuries<sup>26</sup> from a Vaccine Injury Compensation Trust Fund,<sup>27</sup> which is funded by a tax on vaccines.<sup>28</sup>

Michael and Melissa Markovich exemplify typical parents seeking relief under the VICP for an injured child. They brought an action for compensation on behalf of their two-month-old

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<sup>20</sup> *Id.* (noting the withdrawal from the market of two of the three manufacturers of the DTP vaccine).

<sup>21</sup> *Id.* at 6.

<sup>22</sup> “[T]he resistance to invasion and spread of an infectious agent in a group or community, based on the resistance to infection of a high proportion of individual members of the group . . . .” STEDMAN’S, *supra* note 2, at 878; see Stephen D. Sugarman, *Cases in Vaccine Court—Legal Battles over Vaccines and Autism*, 357 NEW ENG. J. MED. 1275, 1276 (2007) (indicating that fears of losing herd immunity figured into Congress’s decision to create the VICP).

<sup>23</sup> 42 U.S.C. § 300aa-10(a) (2000) (“There is established the National Vaccine Injury Compensation Program . . . under which compensation may be paid for a vaccine-related injury or death.”); Sugarman, *supra* note 22 (“Health officials feared the loss of herd immunity, and Congress responded by creating the VICP.”).

<sup>24</sup> Only certain vaccines—those listed in the NCVIA’s Vaccine Injury Table, *infra* note 51—are covered by the act. See 42 U.S.C. § 300aa-11(c)(1)(A).

<sup>25</sup> *Id.* § 300aa-11(b)(1)(A) (“[A]ny person who has sustained a vaccine-related injury, [or] the legal representative of such person if such person is a minor or disabled, . . . may . . . file a petition for compensation under the Program.”).

<sup>26</sup> *Id.* § 300aa-15 (listing the range of recoverable costs).

<sup>27</sup> *Id.* §§ 300aa-15(i) to -15(j) (describing the source of the compensation to be paid to petitioners and authorizing appropriations for a fund).

<sup>28</sup> 26 U.S.C. § 9510 (2000) (establishing the Vaccine Injury Compensation Trust Fund).

daughter, Ashlyn,<sup>29</sup> who received the DTaP, polio, and *Haemophilus influenzae type b* vaccinations, on July 10, 2000.<sup>30</sup> Later that day and in the weeks that followed, the Markivoches observed their daughter blinking her eyes rapidly, an action they did not recognize as symptomatic of any possible illness but only a sign of fatigue.<sup>31</sup> On August 30, 2000, Ashlyn suffered her first grand-mal seizure.<sup>32</sup> Ashlyn continued to have seizures, which caused her parents to seek the opinions of several doctors.<sup>33</sup> In January 2002, a neurologist diagnosed Ashlyn as having had “four types of seizures: (1) repeated eye blinking; (2) clonic movement of the face, arm, and leg; (3) generalized seizures with or without focal onset; and (4) partial motor seizures.”<sup>34</sup>

The Markoviches filed their VICP petition on August 29, 2003, two years and three-hundred-sixty-four days after the date of Ashlyn’s first grand-mal seizure but three years and fifty days after the date of Ashlyn’s vaccination and first eye-blinking episode.<sup>35</sup> The special master presiding over hearing the case held that Ashlyn’s eye-blinking seizure was the first symptom of injury, thus triggering the three-year statute of limitations.<sup>36</sup> As a result, the special master dismissed the Markoviches’ action.<sup>37</sup> The Court of

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<sup>29</sup> Markovich v. Sec’y of Health and Human Services, No. 03-2015V, 2005 WL 6117470, at 1 (Fed. Cl. 2005) *available at* <http://www.uscfc.uscourts.gov/sites/default/files/Sweeney.Markovich.pdf> [hereinafter *Markovich I*].

<sup>30</sup> *Markovich III*, *supra* note 7, at 1354.

<sup>31</sup> *Id.*

<sup>32</sup> “[A] generalized [seizure] characterized by the sudden onset of tonic contraction of the muscles often associated with a cry or moan, and frequently resulting in a fall to the ground . . . .” STEDMAN’S, *supra* note 2, at 1614; *Markovich III*, *supra* note 7, at 1354–55.

<sup>33</sup> *Markovich III*, *supra* note 7, at 1355.

<sup>34</sup> Markovich v. Sec’y of Health and Human Services, 69 Fed. Cl. 327, 329–30 (Fed. Cl. 2005) [hereinafter *Markovich II*].

<sup>35</sup> *Markovich III*, *supra* note 7, at 1354–55.

<sup>36</sup> *Markovich I*, *supra* note 29, at 17.

<sup>37</sup> *Id.*

Federal Claims<sup>38</sup> and the Court of Appeals for the Federal Circuit affirmed this decision.<sup>39</sup>

The Markoviches filed their petition for relief within three years of Ashlyn's first grand-mal seizure.<sup>40</sup> This seizure marked the first time the Markoviches recognized that their daughter was having a possible reaction to the vaccinations and, consequently, it was the first time they might have had a reason to seek recovery.<sup>41</sup> The court disagreed and held that the eye-blinking episode on July 10, 2000, was the first event that medical science could consider an indication of injury; therefore, this event triggered the beginning of the three year statute of limitations.<sup>42</sup> By filing their petition three years and fifty days after July 10, 2000, the Markoviches missed their opportunity to recover.<sup>43</sup>

### III. ERRONEOUS POLICY AND INTERPRETATION

#### A. *Undermining the Goals of the NCVIA*

The position on the statute of limitations espoused by the special master and the reviewing courts is disconcerting in that it hinders the goals that Congress, through the NCVIA, sought to achieve.<sup>44</sup> One of these goals was the creation of a compensatory system for victims of vaccine injuries that was favorable to petitioners, rather than use the system of tort litigation.<sup>45</sup> This

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<sup>38</sup> *Markovich II*, *supra* note 34, at 335–36.

<sup>39</sup> *Markovich III*, *supra* note 7, at 1360.

<sup>40</sup> *Id.* at 1354–55.

<sup>41</sup> *Id.* at 1356.

<sup>42</sup> *Id.* at 1360.

<sup>43</sup> *Id.*

<sup>44</sup> See DINGELL, *supra* note 4, at 7 (listing “the inadequacy—from both the perspective of vaccine-injured persons as well as vaccine manufacturers—of the current approach to compensating those who have been damaged by a vaccine” as one of the “overriding concerns [that] have led to the development of [the NCVIA]”).

<sup>45</sup> *Id.*; Russell G. Donaldson, Annotation, *Construction and Application of National Childhood Vaccine Injury Act (42 U.S.C.S. §§ 300aa et seq.)*, 129 A.L.R. FED. 1, § 3 (1996).

important goal has been recognized by courts hearing NCVIA cases.<sup>46</sup>

Congress framed the NCVIA in several ways to be particularly favorable to petitioners. For example, Congress provided an accelerated processing time for claims under the VICP, which operates more quickly than does the tort system.<sup>47</sup> Adding another advantage for petitioners, Congress instituted a relaxed protocol regulating the introduction of evidence before the special master,<sup>48</sup> which does not require compliance with the complex Federal Rules of Evidence.<sup>49</sup> Also, petitioners are not required to produce proof of actual causation for certain claims.<sup>50</sup> The NCVIA incorporates a “Vaccine Injury Table,” which describes possible links between certain vaccinations and injuries that could result from them.<sup>51</sup> If a petitioner proves that he or she suffered an injury within the predicted time period listed in the table, then the petitioner creates a rebuttable presumption that the vaccine caused the injury.<sup>52</sup> Even if the petitioner is unable to make such a showing, he or she may independently demonstrate that the vaccine actually caused the

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<sup>46</sup> See *Graham v. Wyeth Laboratories, a Div. of American Home Products Corp.*, 666 F. Supp. 1483, 1491 (D. Kan. 1987).

<sup>47</sup> *Shalala v. Whitecotton*, 514 U.S. 268, 269 (1995); see also 42 U.S.C. § 300aa-12(d)(2)(A) (2000) (requiring that rules for special masters provide that proceedings be “expeditious”).

<sup>48</sup> 42 U.S.C. § 300aa-12 (d)(2)(B) (2000) (requiring that rules for special masters “include flexible and informal standards of admissibility of evidence”); §§ 300aa-12(d)(3)(A) to (B) (giving special masters broad discretion in allowing evidence).

<sup>49</sup> *Hines on Behalf of Sevier v. Sec’y of Health and Human Services*, 940 F.2d 1518, 1525 (Fed. Cir. 1991).

<sup>50</sup> *Donaldson*, *supra* note 45, at § 15[A].

<sup>51</sup> 42 U.S.C. § 300aa-14(a) (The Table lists the vaccines covered by the VICP, the kinds of injuries that the vaccine court is willing to presume result from the vaccinations, and the time period in which those injuries must occur in order for the court to presume that the vaccines were the cause.).

<sup>52</sup> *Donaldson*, *supra* note 45, at § 15[A]. If the petitioner can show by a preponderance of the evidence that he or she received a vaccination on the Vaccine Injury Table, suffered a listed injury listed, and did so within the listed time period, then the government may prevail by showing by a preponderance of the evidence that the vaccine did not cause the injury. *Id.*



injury.<sup>53</sup> Regardless, the VICP often provides some form of compensation, even if the petitioner is unsuccessful in proving a claim on the merits.<sup>54</sup> For instance, unsuccessful petitioners whose claims are reasonable and made in good faith may recover attorneys' fees and expenses.<sup>55</sup> In comparison, successful petitioners can recover further damages, including certain costs associated with the injury,<sup>56</sup> reasonable attorneys' fees,<sup>57</sup> and petition expenses.<sup>58</sup> In the case of death resulting from a vaccination, the estate may be compensated for the death.<sup>59</sup> Finally, bringing an initial suit in the VICP has additional advantages for petitioners because the petitioners may institute a tort claim *even after losing on the merits* before the special master.<sup>60</sup> These explicit, petitioner-friendly features of the VICP

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<sup>53</sup> 42 U.S.C. § 300aa-11(c)(1)(C)(ii) (requiring that a petition for compensation that does not demonstrate the occurrence of a symptom or manifestation of onset listed on the Table within the Table's prescribed time period include evidence that the petitioner suffered an injury "not set forth in the Vaccine Injury Table but which was caused by a vaccine [in the Table] . . . , or [suffered an injury] . . . set forth in the Vaccine Injury Table the first symptom or manifestation of the onset . . . of which did not occur within the time period set forth in the Table but which was caused by a vaccine referred to [in the Table] . . .").

<sup>54</sup> *Id.* § 300aa-15(e)(1) (permitting awards of attorneys' fees to petitioners, even those who are unable to succeed on their cases' merits); HRSA – National Vaccine Injury Compensation Program, [http://www.hrsa.gov/vaccinecompensation/statistics\\_report.htm](http://www.hrsa.gov/vaccinecompensation/statistics_report.htm) (last visited Oct. 21, 2008) (on file with the North Carolina Journal of Law & Technology).

<sup>55</sup> 42 U.S.C. § 300aa-15(e)(1).

<sup>56</sup> *Id.* § 300aa-15(a)(1) (allowing compensation for costs that have been or are predicted to be incurred as a result of the vaccine-related injury, including costs of medical care, diagnosis, therapy, special equipment, travel expenses, and several other things).

<sup>57</sup> *Id.* § 300aa-15(e)(1)(A).

<sup>58</sup> *Id.* § 300aa-15(e)(1)(B).

<sup>59</sup> *Id.* § 300aa-15(a)(2) (describing awards that survivors of decedents may be given if successful).

<sup>60</sup> *Id.* §§ 300aa-11(a)(2)(A), 300aa-21 (allowing petitioners, even those whose claims were not found worthy of compensation by the special master, to file actions against vaccine manufacturers or administrators in civil court).

go further than any mere statements made in committee hearings<sup>61</sup> in evincing a Congressional intent to make the VICP a simpler, quicker, and more favorable system than civil tort litigation for victims of vaccine injury.

However, the *Markovich* court's holding that the statute of limitations accrues upon the occurrence of indicia that would be recognized as evidence of an injury by the *medical profession* undermines the spirit of the NCVIA. As previously discussed, one purpose of the Act is to provide relief to parents whose children have been injured by vaccination. By finding that the statute of limitations accrues upon the first occurrence of an event that a *medical professional* would view as evidence of an injury, many parents will be left without a remedy. The holding imputes to parents the professional medical knowledge that would be required to know that something as seemingly insignificant as rapid eye-blinking was evidence of a serious medical problem. This ruling effectively denies petitioners, who do not possess a sophisticated understanding of pediatric pathology, the opportunity to recover.<sup>62</sup> Not only are such petitioners denied relief under the VICP, but the NCVIA prohibits them from seeking redress in civil court.<sup>63</sup> This means that petitioners who lose on the merits before the special master have a second chance, while those who are time-barred from engaging the VICP altogether are left with no opportunity to recover.<sup>64</sup>

There also exists the possibility that the court's adoption of an objective standard concerning the accrual of the statute of limitations may serve as a disincentive for public vaccinations. This threatens the government's public health interests, including individual and herd immunity. While the recent near-record-high

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<sup>61</sup> See DINGELL, *supra* note 4, at 7 (calling the "inadequacy" of the tort system one of the "overriding concerns" leading to the NCVIA).

<sup>62</sup> *Markovich I*, *supra* note 29, at 17.

<sup>63</sup> 42 U.S.C. § 300aa-11(a)(2)(A); *see also* § 300aa-16 (The ability to file a claim in civil court is contingent upon having already filed a petition in vaccine court. The three year statute of limitations describes the period beyond which no petition may be filed.).

<sup>64</sup> 42 U.S.C. § 300aa-11(a)(2)(A); *see also* § 300aa-16.

rates of childhood vaccination in this country result in part from the faith that citizens have in vaccine safety,<sup>65</sup> a small but vocal community of parents, health care practitioners, and researchers, who argue vehemently against vaccination, has emerged. They allege, among other things, that many vaccines contribute to autism.<sup>66</sup> Any loss of faith in the vaccine system (including in the VICP) has the potential to drive parents to consider the arguments of the anti-vaccination community and refuse to consent to vaccination of their children.

B. *Inaccurate Statutory Interpretation*

The section of the NCVIA that limits actions under the VICP provides that “no petition may be filed for compensation under the Program for [a vaccine-related injury] after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset . . . .”<sup>67</sup> The court held that the NCVIA requires the statute of limitations to have accrued when Ashlyn Markovich’s eye-blinking episodes began.<sup>68</sup> In presenting its holding as mandated by statute, the court discussed the sovereign immunity doctrine<sup>69</sup> and its effect on an interpretation of the NCVIA.<sup>70</sup> The court stated that it was required to “strictly and narrowly construe[] [the NCVIA] because it is ‘a condition on the

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<sup>65</sup> CDC—Press Release Sept. 4, 2008, <http://www.cdc.gov/media/pressrel/2008/r080904.htm>. Undoubtedly, compulsory vaccination laws deserve some of the credit. *See, e.g.* 10A N.C. ADMIN. CODE 41A.0401–.0406 (2008) (requiring that children in North Carolina receive various vaccines, including DTP).

<sup>66</sup> *See generally* Vaccine information, <http://www.vaccinetruth.org> (last visited Oct. 22, 2008) (on file with the North Carolina Journal of Law & Technology). The Vaccine information homepage contains links to over forty hosted pages, as well as external links, about the perceived dangers of vaccination. *Id.*

<sup>67</sup> 42 U.S.C. § 300aa-16(a)(2).

<sup>68</sup> *Markovich III*, *supra* note 7, at 1360.

<sup>69</sup> *See United States v. Nordic Village Inc.*, 503 U.S. 30, 34 (1992) (“[T]he traditional principle [of sovereign immunity doctrine is] that the Government’s consent to be sued ‘must be construed strictly in favor of the sovereign, and not enlarged beyond what the statute requires’ . . . .”).

<sup>70</sup> *Markovich III*, *supra* note 7, at 1360.

waiver of sovereign immunity by the United States, and courts should be careful not to interpret [a waiver] in a manner that would extend the waiver beyond that which Congress intended.”<sup>71</sup> However, the VICP represents a waiver of sovereign immunity only in a limited form. The money paid to petitioners under the VICP does not come from the public treasury of the United States, but from an *ad hoc* trust fund.<sup>72</sup> This is unlike other statutes, such as the Federal Tort Claims Act,<sup>73</sup> which does entail disbursements from the treasury as a waiver of sovereign immunity.<sup>74</sup> While granting aggrieved parties an unrestricted opportunity to seek recovery from the public treasury could pave the way for unlimited financial liability, there is no such risk when the only money that may be paid out comes from an isolated, limited fund<sup>75</sup>.

Another feature distinguishing the VICP from ordinary waivers of sovereign immunity is the fact that it serves a remedial purpose.<sup>76</sup> It is true that the Court of Federal Claims declined to accept the proposition that the remedial nature of the statute required it to “provide compensation to injured persons whenever possible,”<sup>77</sup> but the Court saw its ruling as a way to avoid “absurd scenarios.”<sup>78</sup> It can hardly be said that the Markoviches’ proposed subjective trigger for the statute of limitations—which would merely present parents with a chance to have actual knowledge of their child’s injury before the VICP clock begins to tick—invites absurd scenarios.

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<sup>71</sup> *Id.*

<sup>72</sup> 42 U.S.C. § 300aa-15(i); 26 U.S.C. § 9510.

<sup>73</sup> 28 U.S.C. §§ 2671–2680.

<sup>74</sup> Randy J. Sutton, Annotation, *Construction and Application of Federal Tort Claims Act—United States Supreme Court Cases*, 24 A.L.R. FED. 2D 329, § 4 (1997).

<sup>75</sup> 26 U.S.C. § 9510(d) (limiting the liability of the United States under claims filed against the Vaccine Injury Compensation Trust Fund to the amount of money in that fund).

<sup>76</sup> See *McGowan v. Sec’y of Health and Human Services*, 31 Fed. Cl. 734, 740 (Fed. Cl. 1994) (referring to the “remedial nature of [the NCVIA]”).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 739.

Even disregarding the larger policy contradictions that the objective standard entails, it naturally results in a conflict between the meaning of the words in the statute and the court's interpretation of them. The court focuses on particular language in the portion of the NCVIA that addresses the statute of limitations: "no petition may be filed . . . after the expiration of 36 months after the date of the occurrence of the first *symptom or manifestation of onset* . . . ."<sup>79</sup> The court read the disjunctive word "or" separating "symptom" and "manifestation of onset" to indicate Congressional intent to begin the accrual of the statute of limitations at the earlier of the two.<sup>80</sup> Therefore, the *Markovich* court concluded, Ashlyn Markovich's eye-blinking episodes—the first "symptom" of her seizure disorder—triggered the statute of limitations.<sup>81</sup>

However, this interpretation is based upon an incorrect understanding of the word "symptom."<sup>82</sup> A symptom is a "morbid phenomenon or departure from the normal in structure, function, or sensation, experienced by the patient and indicative of disease."<sup>83</sup> This is as distinguished from a "sign" ("an objective indication of disease, in contrast to a symptom, which is a *subjective* indication of disease")<sup>84</sup> or a "manifestation" ("[t]he display or disclosure of

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<sup>79</sup> 42 U.S.C. § 300aa-16(a)(2) (emphasis added).

<sup>80</sup> *Markovich* III, *supra* note 7, at 1357 (emphasis added); *see also* 1A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION 184–188 § 21:14 (6th ed. 2002) ("['And' and 'or'] are not interchangeable, and their strict meaning should be followed when their accurate reading does not render the sense of the statute confusing and there is no clear legislative intent to have the words not mean what they strictly should.")

<sup>81</sup> *Markovich* III, *supra* note 7, at 1360.

<sup>82</sup> While "symptom" has an unambiguous, precise meaning, *see infra* note 83, the nuance of the word may be lost on people untrained in the science of medical diagnosis.

<sup>83</sup> STEDMAN'S, *supra* note 2, at 1742; *see also* ATTORNEY'S ILLUSTRATED MEDICAL DICTIONARY S90 (1997) [hereinafter DICTIONARY].

<sup>84</sup> STEDMAN'S, *supra* note 2, at 1635 (emphasis added); *see also* DICTIONARY, *supra* note 83, at S27; *cf.* 20 C.F.R. § 416.928 (2008). This subpart of the Social Security Administration's regulations describes the difference between symptoms and signs: "[s]ymptoms are [one's] own description of . . . physical or mental impairment. [In the case of a child under age 18, the Administration] will accept as a statement of this symptom(s) the description [of] . . . a

characteristic signs or symptoms of an illness.”).<sup>85</sup> The Markoviches stated that they believed their daughter’s rapid eye-blinking to be simply an indication that she was tired and certainly nothing about which to be concerned.<sup>86</sup> Without having the ability to gauge the subjective experience of Ashlyn, her eye-blinking episode is better labeled a sign, not a symptom. Under the NCVIA, the presence of bare signs not constituting a manifestation is not a listed as a trigger for the accrual of the statute of limitations.<sup>87</sup>

A symptom is a subjective indicator.<sup>88</sup> In any objective standard based on a subjective indicator, subjectivity remains a necessary component. The inherently subjective nature of symptoms, coupled with the inability of a person of Ashlyn’s age to communicate her subjective experiences in a meaningful way, suggests that the “symptom” prong of the statute of limitations is poorly suited to address injuries to infants.<sup>89</sup> An older child or an adult is able to communicate the subjective experience that is associated with an objectively observable sign, thereby communicating a symptom. Conversely, an infant is only able to

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parent . . . . Signs are anatomical, physiological, or psychological abnormalities which can be observed, apart from [symptoms].” *Id.*

<sup>85</sup> STEDMAN’S, *supra* note 2, at 1062; *see also* DICTIONARY, *supra* note 83, at M10.

<sup>86</sup> *Markovich III*, *supra* note 7, at 1354.

<sup>87</sup> *See* 42 U.S.C. § 300aa-16(a)(2). The Act does not explicitly state that signs not arising to the level of manifestations do not trigger the statute of limitations, but that much is apparent by negative implication—symptoms and manifestations are listed as triggering events, while signs are not. It cannot be presumed that the Act treats signs and symptoms identically, as elsewhere it makes mention of “signs and symptoms . . . .” *See id.* § 300aa-14(b)(3)(A). The conjunctive “and” indicates an understanding that “sign” and “symptom” are not identical, and, thus, they ought not to be treated as such.

<sup>88</sup> STEDMAN’S, *supra* note 2, at 1635; *see also* DICTIONARY, *supra* note 83, at S27; *cf.* 20 C.F.R. § 416.928.

<sup>89</sup> *See Definition, Diagnosis, Disease Types, and Classification of Asthma*, 136(suppl. 1) INT. ARCH. ALLERGY IMMUNOL. 3, 3 (2005) (advising that although symptoms are usually used to diagnose a condition [dyspnea, in this case], because symptoms are subjective and infants are unable to communicate subjective experiences, signs should be used to diagnose the condition).

display signs, manifestations, or some combination of signs within manifestations.<sup>90</sup> Ashlyn's grand-mal seizure on August 30, 2000, was such a manifestation, and the court should have interpreted this event, rather than the eye-blinking episode, as the trigger for the statute of limitations.<sup>91</sup>

#### IV. CONCLUSION

In adopting an objective indicator as the standard for accrual of the VICP statute of limitations, the *Markovich* court established a precedent that tends to undermine congressional intent to create a petitioner-friendly alternative to civil tort litigation and ensure that children are vaccinated. Furthermore, the objective standard is unwieldy in light of the possible subjective nature of a triggering event, which the court failed to appreciate. The *Markovich* decision will only hurt, not help, the important interests served by immunization policy and the NCVIA.

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<sup>90</sup> STEDMAN'S, *supra* note 2, at 1062; *see also* DICTIONARY, *supra* note 83, at M10.

<sup>91</sup> *Markovich III*, *supra* note 7, at 1357.