

APPENDIX A

United States Court of Appeals  
For the Eighth Circuit

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No. 17-2070

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Brad Stephen Francis; Christine Carol Francis

*Plaintiffs – Appellants*

v.

United States of America

*Defendant – Appellee*

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Appeal from United States District Court  
for the Western District of Missouri - Kansas City

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Submitted: December 28, 2017

Filed: January 3, 2018

[Unpublished]

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Before BENTON, BOWMAN, and KELLY, Circuit  
Judges.

PER CURIAM.

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Brad and Christine Francis appeal from the order of the District Court<sup>1</sup> dismissing their civil suit challenging their liability for federal taxes and penalties under the Internal Revenue Code.

After careful review, we conclude that dismissal was proper for the reasons explained by the district court. See LeMay v. U.S. Postal Serv., 450 F.3d 797, 799 (8<sup>th</sup> Cir. 2006) (standard of review). The judgment is affirmed. See 8<sup>th</sup> Cir. R. 47B.

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<sup>1</sup> The Honorable Greg Kays, Chief Judge, United States District Court for the Western District of Missouri.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT  
FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION

BRAD STEPHEN FRANCIS and )  
CHRISTINE CAROL FRANCIS, )  
 )  
Plaintiffs, )  
 )  
v. ) No. 4:16-cv-0672-DGK  
 )  
UNITED STATES OF AMERICA, )  
 )  
Defendant. )  
 )

**ORDER GRANTING MOTION TO DISMISS**

This lawsuit arises out of *pro se* Plaintiffs Brad and Christine Francis' belief that they do not owe any income taxes or penalties for fiscal years 2010 through 2015. Plaintiffs contend all their income during this period was exempt from tax and, therefore, incorrectly reported as income by third parties. As a remedy, Plaintiffs request the Court issue injunctive relief requiring the Kansas City Area Director of the Internal Revenue Service ("IRS") to issue refunds, withdraw penalties, and refrain from taking further action against them.

Now before the Court is Defendant United States of America's motion to dismiss (Doc. 14). Defendant contends that since early 2014 Plaintiffs

have been attempting to avoid their obligations to pay federal income taxes. Defendant argues Plaintiffs' claims are based on "tax protester" arguments that courts have repeatedly rejected.

Holding that the Court lacks subject matter jurisdiction to hear Plaintiffs' claims, Defendant's motion is GRANTED. The Court dismisses all claims with prejudice.

### **Background**

Plaintiff's First Amended Complaint lists six counts,<sup>1</sup> but it contains more than six claims because some of Plaintiffs' causes of action, such as their claim(s) brought pursuant to 26 U.S.C. § 7433, are pled in the "Jurisdictional Allegations" section. *See, e.g.,* Am. Compl. ¶¶13-15

All of the claims seek injunctive relief (that is, writs of mandamus), instructing the Kansas City Area Director of the IRS to issue refunds to Plaintiffs, and to refrain from imposing tax penalties on them or otherwise use his authority against them. Am. Compl. ¶¶ 206-07, 253-55, 272-74, 294-96, 333-35, 344. Plaintiffs' claims stem from their allegations that the IRS wrongly rejected Plaintiffs' Forms 1040 and 1040X for multiple years in which Plaintiffs claimed zero wages, zero compensation, and zero income from other sources, despite filings from third

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<sup>1</sup> Claim One is for "Mala Fides Appeals", Claim Two asserts "Intrinsic Fraud," Claim Three alleges "Malicious Assessment," Claim Four pleads "Assault with Intent," Count Five brings a claim(s) of "Tampering; Unlawful Use of the Courts," and it is somewhat unclear what Count Six pleads. It is captioned "Count Six."

parties indicating Plaintiffs had, in fact, received such income.

### Standard

Defendant moves to dismiss the First Amended Complaint (Doc. 5) under Federal Rules of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and 12(b)(6) for failure to state a claim upon which relief can be granted. Because Defendant's subject matter jurisdiction arguments are dispositive, the Court need not address the 12(b)(6) arguments.

Dismissal under Rule 12(b)(1) is appropriate where the court lacks subject matter jurisdiction to hear the case. There are two types of challenges to subject matter jurisdiction under Rule 12(b)(1), "facial" attacks and "factual" attacks. *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8<sup>th</sup> Cir. 1990). A facial attack challenges subject matter jurisdiction based on the bare allegations in the complaint, and the Court assumes the allegations in the complaint are true.

A factual attack considers matters extrinsic to the pleadings to determine if it has subject matter jurisdiction.

### Discussion

The pending motion is a facial attack because Defendant argues that even if the First Amended Complaint's allegations are true, the Court lacks subject matter jurisdiction because: (1) the Anti-Injunction Act prohibits the requested relief; (2) writs of mandamus are not available against the

United States; (3) the Court cannot consider Plaintiff's refund claims because they have not complied with the jurisdictional prerequisites to bring a tax refund suit against the United States; and (4) the Court cannot hear Plaintiffs' purported claim under 26 U.S.C. § 7433 because it does not provide jurisdiction for lawsuits challenging tax assessments, only for damages stemming from unauthorized tax collections.

Plaintiffs respond that they are seeking judicial review under 5 U.S.C. § 702 and under 26 U.S.C. § 7433. Suggestions in Opp'n 13-14 (Doc. 18). They contend the Court has jurisdiction under § 7433 because the First Amended Complaint makes allegations about collection activities. *Id.* at 13. Finally, they contend that writs of mandamus are their only remedy to stem Defendant's lawlessness and escalating abuse against them. *Id.*

The Court rules as follows.

First, the Anti-Injunction Act prohibits Plaintiffs' request for injunctive relief. The Anti-Injunction Act provides that, subject to certain statutory exceptions that Plaintiffs have not argued are applicable here, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a); see *Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401, 405 (4<sup>th</sup> Cir. 2003) (noting "courts lack jurisdiction to issue injunctive relief in suits seeking to restrain the assessment or collection of taxes"). The purpose of 26 U.S.C. § 7421 is to protect the collection of revenue and minimize pre-collection judicial intervention with that process. See *South Carolina v. Regan*, 465 U.S. 367, 376 (1984). In this

case, Plaintiffs request to enjoin the Kansas City Area Director of the IRS from imposing tax penalties, or using his authority against Plaintiffs, would violate the Anti-Injunction Act. Therefore, these claims must be dismissed for lack of subject matter jurisdiction.

Second, Plaintiffs' claims seeking writs of mandamus must be dismissed because injunctive relief is available against an officer or employee of the United States only, not the United States itself. Granted, the Amended Complaint specifically seeks a writ enjoining the Kansas City Area Director of the IRS, an employee of the United States, but this individual was not named in the lawsuit so the Court lacks personal jurisdiction over him. The United States is the only Defendant, and injunctive relief is not available against it.

Third, the Court lacks jurisdiction to hear any refund claims because Plaintiffs have failed to comply with jurisdictional prerequisites before filing suit. As a threshold matter, Plaintiffs are seeking refunds: all six enumerated claims seek a "refund" for different amounts. Am. Compl. ¶¶ 206, 253, 272, 294, 334, 344. But the statutory authority for waiving sovereign immunity to sue for a tax refund provides that taxpayers may not bring refund suits "until a claim for refund or credit has been duly filed with the Secretary [of the Treasury], according to the provisions of law in that regard, and the regulations of the Secretary." 26 U.S.C. § 7422(a). While a tax return or amended return can be an administrative refund claim, 26 C.F.R. § 301.6402-3(a)(5), Plaintiffs purported tax returns improperly identifying zero income are not duly filed refund claims. *Waltner v. United States*, 679 F.3d 1329, 1333-34 (Fed. Cir.

2012) (collecting cases). Plaintiffs' returns improperly identified zero income, despite informational returns from third parties showing such income, as well as Plaintiffs' own signed returns for the 2010-2012 fiscal tax years attesting to having such income.

Fourth, Plaintiffs' purported § 7433 claims must be dismissed for lack of subject matter jurisdiction because the statute allows lawsuits for damages stemming from unauthorized tax *collections* only, not lawsuits such as Plaintiffs' challenging a tax assessment. Section 7433(a) states, in relevant part:

If, in connection with any *collection* of Federal tax with Respect to a taxpayer, any officer or employee of the Internal Service recklessly or intentionally, or by reason of negligence disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

26 U.S.C. § 7433(a) (emphasis added). It is a means for taxpayers to challenge tax collections, not tax assessments. *Kim v. United States*, 632 F.3d 713, 716 (D.C. Cir. 2011) ("Section 7433 applies only to collection-related activities."). The Amended Complaint asserts the IRS improperly assessed taxes and penalties against the Plaintiffs. For example, paragraph 62 alleges Plaintiffs' corrected returns represent their true liability; and paragraph 64 alleges the IRS erred by ignoring this evidence in assessing Plaintiffs' tax liabilities. Am. Comp. ¶¶62,64. Although Plaintiffs argue paragraphs 276 through 293 specifically make allegations regarding

collection activities, a close reading of these allegations shows that they all rest on claims that Defendant erred in *assessing* their taxes and imposing penalties. *See, e.g.*, Am. Compl. ¶¶ 276, 278. The Amended Complaint does not allege the IRS disregarded any Internal Revenue statute or regulation in connection with any *collection* activities against them. Hence, the Court lacks jurisdiction to hear these claims.

Finally, Plaintiffs assertion that 5 U.S.C. § 702 provides the Court with subject matter jurisdiction is unavailing. Section 702 entitles any person wronged by an agency action to judicial review, *except* where any other statute expressly or impliedly forbids the relief sought.<sup>2</sup> Here, the statutes Plaintiffs are invoking to sue provide narrow waivers of sovereign

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<sup>2</sup> It states:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. *Nothing herein* (1) affects other limitations on relief on any other appropriate legal or equitable ground; or (2) *confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids that relief which is sought.*

5 U.S.C. § 702 (emphasis added).

immunity which expressly forbid Plaintiffs from bringing this type of lawsuit. Consequently, § 702 does not provide subject matter jurisdiction for this lawsuit.

### **Conclusion**

For the reasons discussed above, Defendant's motion (Doc. 14) is GRANTED. All claims are dismissed with prejudice for lack of subject matter jurisdiction.

### **IT IS SO ORDERED**

Date: May 4, 2017

/s/ Greg Kays  
GREG KAYS, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

**IN THE UNITED STATES DISTRICT COURT  
FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION**

|                             |   |                      |
|-----------------------------|---|----------------------|
| BRAD STEPHEN FRANCIS and )  | ) |                      |
| CHRISTINE CAROL FRANCIS, )  | ) |                      |
|                             | ) |                      |
| Plaintiffs, )               | ) |                      |
|                             | ) |                      |
| v. )                        | ) | No. 4:16-cv-0672-DGK |
|                             | ) |                      |
| UNITED STATES OF AMERICA, ) | ) |                      |
|                             | ) |                      |
| Defendant. )                | ) |                      |

**JUDGMENT IN A CIVIL ACTION**

\_\_\_\_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

  X   **Decision by Court.** This action has been considered and a decision has been rendered by the Court.

**IT IS ORDERED AND ADJUDGED** that all claims are dismissed with prejudice for lack of subject matter jurisdiction.

May 4, 2017  
Dated

Paige Wymore-Wynn  
Clerk of Court

May 4, 2017  
Dated

/s/ Tracy Strodtman  
(by) Deputy Clerk

**APPENDIX C**

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

No: 17-2070

Brad Stephen Francis and Christine Carol Francis

Appellants

v.

United States of America

Appellee

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Appeal from U.S. District Court for the Western District  
of Missouri - Kansas City (4:16-cv-00672-DGK)

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**ORDER**

The petition for rehearing en banc is denied.

The petition for rehearing by the panel is also  
denied.

February 26, 2018

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

**APPENDIX D**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION**

BRAD STEPHEN FRANCIS and     )  
CHRISTINE CAROL FRANCIS,    )  
                                      )  
          Plaintiffs,            )  
                                      )  
          v.                        ) No. 4:16-cv-0672-DGK  
                                      )  
UNITED STATES OF AMERICA,    )  
                                      )  
          Defendant.            )  
                                      )

**ORDER DENYING MOTION TO CORRECT  
JUDGMENT AN ORDER**

This lawsuit arises out of Plaintiffs Brad and Christine Francis' belief that they do not owe any income taxes or penalties for fiscal years 2010 through 2015. Plaintiffs contend all their income during this period was exempt from tax.

On May 4, 2017, the Court granted the United States of America's motion to dismiss with prejudice. Plaintiffs appealed. On March 13, 2018, the Eighth Circuit issued its mandate affirming the Court's dismissal.

No before the Court is Plaintiffs' "Motion to Correct Judgment and Order Under Federal Rule of Civil Procedure 60(b)(4)" (Doc. 36). Plaintiffs contend

that the order and judgment dismissing their case are void due to violations of the Federal Rules of Civil Procedure which Plaintiffs contend resulted in substantive violations of their rights.

Plaintiffs disagree with the Court's decision. Because the Court has previously stated its reasons for granting the motion to dismiss and the Eighth Circuit has affirmed this decision, the Court will not re-hash its reasoning in another order. The motion is DENIED.

IT IS SO ORDERED.

Date: March 27, 2018

/s/ Greg Kays

GREG KAYS CHIEF JUDGE  
UNITED STATES DISTRICT COURT

**APPENDIX E**

**918 F.2d 724 (1990)**

**Joseph OSBORN and Pamela Osborn, individually  
and as father and mother and guardians ad litem of  
Shawna Osborn, Appellants,**

**v.**

**UNITED STATES of America, Appellees.**

**No. 89-5349.**

**United States Court of Appeals, Eighth Circuit.**

**Submitted May 14, 1990.  
Decided November 5, 1990.**

**725\*725 Lembhard G. Howell, Seattle, Wash., for  
appellants.**

**Mary McElroy Leach, Dept. of Justice, Washington,  
D.C., for appellees.**

**Before JOHN R. GIBSON, FAGG and WOLLMAN,  
Circuit Judges.**

**JOHN R. GIBSON, Circuit Judge.**

**Joseph and Pamela Osborn, individually and as  
parents and guardians ad litem of their daughter,  
Shawna Osborn, appeal from the dismissal of their  
federal tort claim action asserting that a United  
States Air Force clinic negligently administered a  
diphtheria, pertussis, and tetanus (DPT) vaccination,  
causing Shawna to develop seizures and neurological  
injury. The sole issue in the case is when did the**

Osborns, and more specifically Pamela Osborn, first have sufficient knowledge of Shawna's injury and its cause so as to trigger the running of the two-year statute of limitations, 28 U.S.C. § 2401(b) (1988). The district court held that Mrs. Osborn had sufficient knowledge no later than her May 6, 1983, conversation with Dr. Bruce Oksol and that the Osborns' claim was therefore time-barred. Osborn v. United States, 713 F.Supp. 341, 346 (D.N.D.1989). The Osborns argue that their claims were timely because they did not have sufficient knowledge until a conversation with Dr. Dennis Bartholomew on March 8, 1984. We reverse the judgment of the district court.

Shawna Osborn was born March 18, 1981, (Osborns' App. at 77) and was, for the first seventeen months of her life, an apparently healthy child. (Osborns' App. at 52, 105, 128.) On June 22, August 24, and October 28 of 1981, she received her first, second, and third DPT vaccinations. (Osborns' App. at 95, 102.) A corpsman at the Immunization Clinic of the Grand Forks Air Force Base Hospital administered the shots. The clinic provided no oral or written information about the potential adverse reactions to the DPT shot, nor did Shawna in fact appear to suffer any ill effects from any of her first three DPT vaccinations. (Osborns' App. at 103-04.)

On August 7, 1982, Shawna suffered her first seizure while sitting in her high chair eating dinner. (Osborns' App. at 106-07.) She was rushed to the base's emergency room and was admitted to the hospital, where she stayed for two days. The doctors diagnosed her as having had a febrile seizure (seizure with fever) along with an ear infection.

(Osborns' App. at 23.) Doctors told Mrs. Osborn that many children under age two have occasional febrile seizures and that most outgrow them. (Osborns' App. at 108-110).

On September 14 and November 1, 1982, Shawna again had febrile seizures and was admitted to the hospital. (Osborns' App. at 26, 111, 33.) During the September hospitalization, she had a second seizure within twenty-four hours, resulting in a diagnosis of "complex febrile seizures." (Osborns' App. at 28-29.) In November, doctors diagnosed Shawna as having "complex seizure disorder." (Osborns' App. at 34.) They prescribed Phenobarbital to prevent further seizures. (Osborns' App. at 31.) An electroencephalogram taken on October 12 showed normal results. (Govt.'s App., Vol. I at § 11.)

On December 7, 1982, Mrs. Osborn took Shawna to the immunization clinic for her fourth DPT shot. Before the shot was administered, Mrs. Osborn stopped at the 726\*726 base's pediatric clinic and had a brief conversation with Dr. Andrew Schuman, one of Shawna's pediatricians. (Osborns' App. at 122.) Mrs. Osborn expressed concern that the DPT could give Shawna a fever that could, in turn, trigger another seizure. Dr. Schuman assured Mrs. Osborn that "the shot was perfectly safe" and "not to worry." (Osborns' App. at 123.) Approximately one hour after receiving her fourth DPT vaccination, Shawna experienced her first non-febrile seizure. (Osborns' App. at 123.) Her mother took her to the family practice clinic, where she was examined and sent home. Shortly after returning home, Shawna suffered a grand mal seizure. (Osborns' App. at 124.) Her parents took her to the emergency room where

doctors examined her and found nothing wrong. That evening at home, Shawna had another seizure. (Osborns' App. at 124.) Her parents took her to the emergency room, where she had a petit mal seizure. One of Shawna's pediatricians examined her, then sent her home. (Osborns' App. at 124.)

Following a referral from the base's family practice clinic, Dr. Ross Pettit, a pediatric neurologist, examined Shawna on December 16. (Osborns' App. at 51-53.) He diagnosed her as having a seizure disorder, but identified no cause for her problem. (Osborns' App. at 52.) He did note on his report, a copy of which he forwarded to the Osborns, that the December 7 seizures followed DPT and oral polio vaccinations. (Osborns' App. at 51.) Because of her adverse reaction to Phenobarbital, Shawna was switched to another medication, Dilantin. (Osborns' App. at 56-57.) Mrs. Osborn testified in a deposition that Dr. Pettit assured her, as had one of Shawna's pediatricians, that after a minimum of one year on Dilantin, Shawna would probably be free of seizures. (Dep. of Pamela Ann Osborn, Osborns' App. at 128.) According to Dr. Pettit, if she remained seizure-free for two years after being weaned from Dilantin, then she probably would have no further problem. *Id.*

On January 12, 1983, Shawna had another EEG, this time with abnormal results. (Osborns' App. at 54; Govt.'s App., Vol. I at § 15.) Over the next several months, she continued to have seizures and was hospitalized on several occasions. (Osborns' App. at 39, 43, 44, 62, 65.) On May 6, 1983, Mrs. Osborn had a conversation with Dr. Bruce Oksol, a physician at the pediatric clinic, regarding immunizations to prepare Shawna for preschool. At that time, Dr.

Oksol wrote on Shawna's immunization record: "Seizure disorder. Not to get any more DPT vaccine (no pertussis)." (Osborns' App. at 21.) Dr. Oksol also told Mrs. Osborn that Shawna should not get any more of the pertussis vaccine. (Osborns' App. at 133.) Mrs. Osborn concluded that pertussis was the "disease that gives you the fever so that [stopping pertussis] was fine with me." (Osborns' App. at 133.)

On September 14, 1983, Dr. Pettit again evaluated Shawna. (Osborns' App. at 58-59.) His record stated that he did not know the etiology of Shawna's seizures. (Osborns' App. at 59.) Shawna's disorder continued to grow worse, and, in November 1983, she was sent to Wilford Hall, U.S. Air Force Medical Center at Lackland Air Force Base, Texas, where she was evaluated by pediatric neurologists for two weeks. (Osborns' App. at 47-50.) Drs. John Malstrom and Richard Tredeau at Wilford Hall told Mrs. Osborn they did not know the cause of Shawna's seizures; Dr. Malstrom told Mrs. Osborn that Shawna would probably outgrow the seizures. (Osborns' App. at 137-38.)

On March 8, 1984, Shawna suffered multiple seizures and Mrs. Osborn took her to the emergency room. (Osborns' App. at 138.) At the emergency room, Mrs. Osborn spoke with Dr. Dennis Bartholomew. After taking an extensive medical history, Dr. Bartholomew told Mrs. Osborn that the DPT vaccination can cause seizures and that the seizures Shawna had on December 7, 1982, may have been precipitated by the DPT shot she had received earlier that day.<sup>[1]</sup> Dr. Bartholomew further stated that 727\*727 children with "a low threshold" for seizures, such as Shawna, should not be given the

pertussis vaccine and that it was improper for the clinic to have administered the fourth DPT shot to Shawna.<sup>[2]</sup>

The Osborns filed a claim with the United States Air Force on October 15, 1985, alleging negligence in the December 7, 1982, administration of the DPT vaccination to Shawna. The Air Force investigated the claim and denied it on June 19, 1986. On September 11, 1986, the Osborns filed this action, claiming that Shawna suffered from a generalized seizure disorder as a result of the December 1982 vaccination. The Osborns sued the United States, 728\*728 Wyeth Laboratories, Inc., and Connaught Laboratories, Inc. The court later dismissed Wyeth Laboratories from the case. Connaught entered into a settlement with the Osborns, which was followed by a dismissal. After substantial discovery, including more than 50 depositions, the United States moved for summary judgment based on the statute of limitations.

Applying the preponderance of evidence standard, the district court concluded that the Osborns' claim accrued on or before May 6, 1983, when Dr. Oksol told Mrs. Osborn that Shawna should not be given any more pertussis vaccine. 713 F.Supp. at 346. The district court outlined a number of facts and conclusions on which it relied, including: that Shawna's initial seizures were febrile; that Shawna's first non-febrile seizures occurred shortly after the fourth DPT shot; that Shawna's mother observed a "drastic change" in Shawna's condition starting two months after the fourth DPT shot; that none of the physicians "stated an opinion that the seizures were caused by the DPT shots"; and that the statement of

Dr. Bartholomew in March 1984 that Shawna should receive no more DPT did not provide any additional information beyond what Dr. Oksol had told Mrs. Osborn in May 1983. *Id.* at 345-46. Accordingly, the district court held that the Osborns had not met their burden of establishing that their claim was filed within two years of its accrual, and it was therefore barred by 28 U.S.C. § 2401(b).<sup>31</sup> *Id.* at 346.

# I.

Compliance with the statute of limitations of 28 U.S.C. § 2401(b) is a jurisdictional prerequisite to suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680 (1988). *Radman v. United States*, 752 F.2d 343, 344 (8th Cir.1985). Arguing that the court lacked subject matter jurisdiction, the government moved for summary judgment under Fed.R.Civ.P. 56 and so captioned its motion. In supporting exhibits and memoranda, the government urged that the statute of limitations barred the Osborns' claim. On appeal the government renewed, with the Osborns' concurrence, its argument that summary judgment standards should be applied to the review of the district court's decision.

The district court rejected the government's characterization of its motion and explicitly treated the motion as one to dismiss for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1). 713 F.Supp. at 341 n. 2. The court did not restrict itself to deciding whether or not the jurisdictional issue presented a question for the trier of fact. Rather, the court carefully considered the whole record, consisting of numerous depositions and exhibits, then decided by a preponderance of the evidence that

the Osborns' claim accrued more than two years before its filing and therefore failed to satisfy the jurisdictional requirement.

Because the district court looked to matters outside the pleadings on a motion that it construed as one for dismissal under Rule 12(b)(1),<sup>[4]</sup> two questions arise: (1) What standard governs the district court's determination of a motion under Rule 12(b)(1) when matters outside the pleadings are considered; and, (2) What is the proper standard of review on appeal?<sup>[5]</sup>

729\*729 The district court was correct in recognizing the critical differences between Rule 12(b)(1), which governs challenges to subject matter jurisdiction, and Rule 56, which governs summary judgment. Rule 12 requires that Rule 56 standards be applied to motions to dismiss for failure to state a claim under Rule 12(b)(6) when the court considers matters outside the pleadings. Fed.R.Civ.P. 12(b) & (c); *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir.1977)(Motion under Rule 12(b)(6) raising matters outside pleadings is converted to a Rule 56 motion). Rule 12 does not prescribe, however, summary judgment treatment for challenges under 12(b)(1) to subject matter jurisdiction where a factual record is developed. Nonetheless, some courts have held that Rule 56 governs a 12(b)(1) motion when the court looks beyond the complaint. *In re Swine Flu Immunization Prod. Liab. Litig.*, 880 F.2d 1439, 1442-43 (D.C.Cir.1989); *In re Swine Flu Prod. Liab. Litig.*, 764 F.2d 637, 642 (9th Cir.1985). We agree, however, with the majority of circuits that have held to the contrary. See, e.g., *Mortensen*, 549 F.2d at

891 (disputed issues of material fact will not prevent trial court from deciding for itself merits of jurisdictional claims); Mims v. Kemp, 516 F.2d 21, 23 (4th Cir.1975) (only motion under Rule 12(b) that can properly be converted to one for summary judgment is a motion filed under 12(b)(6)); Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir.) (district court has power to decide disputed factual issues in a motion under Rule 12(b)(1)), *cert. denied*, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981); Crawford v. United States, 796 F.2d 924, 928 (7th Cir.1986)(jurisdictional issue must be resolved before trial); Wheeler v. Main Hurdman, 825 F.2d 257, 259 (10th Cir.) (as a general rule, 12(b)(1) motion may not be converted to one for summary judgment), *cert. denied*, 484 U.S. 986, 108 S.Ct. 503, 98 L.Ed.2d 501 (1987).

The reason for treating a 12(b)(1) motion differently than a 12(b)(6) motion, which is governed by Rule 56 when matters outside the pleadings are considered, "is rooted in the unique nature of the jurisdictional question." Williamson, 645 F.2d at 413. It is "elementary," the Fourth Circuit stated, that a district court has "broader power to decide its own right to hear the case than it has when the merits of the case are reached." *Id.* Jurisdictional issues, whether they involve questions of law or of fact, are for the court to decide. *Id.* Moreover, because jurisdiction is a threshold question, judicial economy demands that the issue be decided at the outset rather than deferring it until trial, as would occur with denial of a summary judgment motion.

In a thoughtful opinion authored by Judge Posner, the Seventh Circuit stated:

We are not being nitpickers in insisting on the difference between a jurisdictional determination and summary judgment. The purpose of summary judgment is to determine whether a trial can be averted. If the party moving for summary judgment fails to demonstrate that there is no triable issue, the case proceeds to trial.... But no case can properly go to trial if the court is not satisfied that it has jurisdiction. The fact that the summary judgment proceeding may not resolve a jurisdictional issue definitively is no ground for assuming jurisdiction and proceeding to trial. The jurisdictional issue must be resolved first.

Crawford, 796 F.2d at 928.

In *Mortensen*, the Third Circuit explained the unique nature of a factual<sup>6</sup> challenge to jurisdiction under 12(b)(1):

730\*730 [H]ere the trial court may proceed as it never could under 12(b)(6) or Fed.R.Civ.P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction — its very power to hear the case — there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

549 F.2d at 891.

If the defendant thinks the court lacks jurisdiction, the proper course is to request an evidentiary hearing on the issue. Crawford, 796 F.2d at 928. The motion may be supported with affidavits or other documents. *Id.* If necessary, the district court can hold a hearing at which witnesses may testify. *Id.*

As no statute or rule prescribes a format for evidentiary hearings on jurisdiction, "any rational mode of inquiry will do." *Id.* at 929. Once the evidence is submitted, the district court must decide the jurisdictional issue, not simply rule that there is or is not enough evidence to have a trial on the issue. *Id.* The only exception is in instances when the jurisdictional issue is "so bound up with the merits that a full trial on the merits may be necessary to resolve the issue." *Id.*

In the case before us, the statute of limitations inquiry is clearly severable from the merits of the Osborns' claim. The district court correctly rejected the parties' characterization of the motion as one for summary judgment and instead decided the jurisdictional issue. If we were to review the jurisdictional decision under summary judgment standards, we would be deciding only whether there was a factual issue for decision, a question not presented by the court's order. The final decision of the district court as to jurisdiction deserves our final decision as to its correctness.

We therefore turn to the appropriate standard of review on appeal. In *Williamson*, the court concluded that when the district court's decision to dismiss for lack of subject matter jurisdiction is based on the complaint alone, or on the complaint supplemented

by undisputed facts evidenced in the record, the appellate court's review is "limited to determining whether the district court's application of the law is correct and, if the decision is based on undisputed facts, whether those facts are indeed undisputed." 645 F.2d at 413. If the court relied, however, on its own determination of disputed factual issues, the appellate court must then review those findings under the "clearly erroneous" standard. *Id. See also Eaton v. Dorchester Development, Inc.*, 692 F.2d 727, 732 (11th Cir.1982) (the clearly erroneous standard governs findings of jurisdictional fact).

The material facts are undisputed in the record before us, so the clearly erroneous rule is therefore inapplicable. There was no conflicting deposition testimony concerning Shawna's clinical course or the content of the critical conversations with Drs. Oksol and Bartholomew. Moreover, the judge was not required to and did not make any credibility evaluations. Because the material facts are undisputed, the issue boils down to whether the evidence is sufficient to support the district court's legal conclusion — namely that Mrs. Osborn possessed or should have possessed the requisite knowledge concerning the cause of her daughter's injury no later than the May 1983 conversation with Dr. Oksol.

Our approach in considering the sufficiency of the evidence is similar to the approach used by the *Crawford* court. In 731\*731 Crawford, the Seventh Circuit concluded that evidence of the plaintiff's incapacity was not sufficient to toll the statute of limitations. 796 F.2d at 930.

Although the facts of this case are lengthy, the jurisdictional issue centers on the limited question of whether, as the government argues, Mrs. Osborn possessed or should have possessed the requisite knowledge following the conversation with Dr. Oksol, or whether, as the Osborns argue, she did not have the necessary information until the conversation with Dr. Bartholomew.

## II.

When a claim "accrues" under the FTCA is a matter of federal law. Brazzell v. United States, 788 F.2d 1352, 1355 (8th Cir.1986); Radman, 752 F.2d at 344; Snyder, 717 F.2d at 1195. The general rule is that a claim accrues at the time of the plaintiff's injury. Wehrman v. United States, 830 F.2d 1480, 1483 (8th Cir.1987). Courts recognize, however, an exception for medical malpractice cases, *id.*, in which the injury and cause are not immediately known. Wollman v. Gross, 637 F.2d 544, 547 (8th Cir.1980), *cert. denied*, 454 U.S. 893, 102 S.Ct. 389, 70 L.Ed.2d 207 (1981). Under the "discovery rule," which this court applies to medical malpractice cases under the FTCA, the claim accrues when the plaintiff discovers, or should have discovered the cause of injury. Brazzell, 788 F.2d at 1355-56. The party who is "claiming the benefit of [the discovery rule] ... bears the burden of showing that he is entitled to it." Wollman, 637 F.2d at 549.

The district court correctly set out the rule from United States v. Kubrick, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979), governing the accrual of medical malpractice claims under 28 U.S.C. § 2401(b). Under Kubrick, the claim does not

accrue until the plaintiff is aware both of the injury and its cause. *Id.* at 120-21, 100 S.Ct. at 358-59. The Court rejected the conclusion of an appeals court which held that a claim does not accrue until the plaintiff "knows or should suspect that the doctor who caused his injury was legally blameworthy." *Id.* at 121, 100 S.Ct. at 359. For statute of limitations purposes, a plaintiff's ignorance of his legal rights should not be treated the same as the plaintiff's ignorance of the existence and cause of his injury. *Id.* at 122, 100 S.Ct. at 359. The Court explained:

That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask. If he does ask and if the defendant has failed to live up to minimum standards of medical proficiency, the odds are that a competent doctor will so inform the plaintiff.

*Id.*

*Kubrick* focused on the plaintiff's duty, once "armed with the facts about the harm done to him" to seek advice regarding the possibility of legal action. *Id.* at 123, 100 S.Ct. at 360. Whether the advice received is competent or incompetent makes no difference to the accrual of his claim. *Id.* at 124, 100 S.Ct. at 360. *Kubrick* makes clear that the statute of

limitations begins to run as soon as the plaintiff is aware of the fact and cause of his injury. *Id.* at 122-25, 100 S.Ct. at 359-61.

Although *Kubrick* did not address the plaintiff's duty to attempt to discover the harm in the first place, this court has held that the proper statute of limitations question is when the plaintiff "actually knew, or in the exercise of reasonable diligence should have known, the cause and existence of his injury." *Wehrman*, 830 F.2d at 1483 (quoting *Snyder v. United States*, 717 F.2d 1193, 1195 (8th Cir.1983)). See also *Brazzell*, 788 F.2d at 1356 ("we believe that [the plaintiff] ought to be charged with ... knowledge [of the cause of her injuries] as soon as she could have discovered the vaccination was the cause 732\*732 by asking a doctor"); *Reilly v. United States*, 513 F.2d 147, 148 (8th Cir.1975) ("the claim 'accrues' when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice....")

Cases in other circuits agree that the plaintiff must exercise reasonable diligence. In *In re Swine Flu Immunization Products Liability Litigation*, the District of Columbia circuit held that an injured plaintiff cannot claim the benefit of the discovery rule simply by waiting passively for the cause of injury to be revealed. Instead, the "plaintiff has a duty to inquire into the unknown cause of a known injury." 880 F.2d at 1443. Similarly, in *Chamness v. United States*, 835 F.2d 1350 (11th Cir.1988), the court observed: "Medical malpractice suits have been conditioned by the exercise of due diligence by those injured." *Id.* at 1352.

### III.

We now turn to the question of whether there is sufficient evidence to support the district court's determination that it lacked subject matter jurisdiction. We do so accepting the facts as set forth in the district court's opinion.

The issue is what Mrs. Osborn knew or should have known from December 7, 1982, when the fourth DPT shot was administered, until October 15, 1983, the date two years prior to the filing of the Osborns' claim. The Osborns argue that not only were they ignorant of the cause of the injury, they were initially not aware even of the injury itself. Drs. Pettit and Malstrom, both pediatric neurologists, told Mrs. Osborn that Shawna probably would outgrow the seizure disorder.<sup>[7]</sup> Dr. Pettit also said that things would be "just fine."<sup>[8]</sup> The Osborns contend that Mrs. Osborn persistently tried to discover the cause of Shawna's disorder, and, that despite her repeated inquiries, doctors could provide no explanation.

The government counters that Mrs. Osborn possessed the necessary information no later than May 1983, pointing to several facts that it argues gave Mrs. Osborn actual or constructive knowledge of Shawna's injury and its cause: that Shawna's first non-febrile seizures occurred shortly after her fourth DPT shot; that these seizures were supposedly more serious and different from her previous seizures; that Shawna started to regress behaviorally within the next few months; and that Dr. Oksol told Mrs. Osborn that Shawna should receive no more pertussis vaccine. The government argues that Mrs. Osborn should have investigated further by asking

Dr. Oksol whether the pertussis vaccine was responsible for Shawna's problems.

The record demonstrates that Mrs. Osborn diligently inquired as to the cause of Shawna's seizures and that her efforts were unavailing. Doctors, including one of Shawna's pediatricians, Dr. Schuman, repeatedly told her they could find no reason for Shawna's problems. Dr. Pettit, the pediatric neurologist, stated in a September 1983 report — more than four months after 733\*733 the government contends Mrs. Osborn was aware of the cause of injury — that he did not "have an etiology" and Shawna was a "diagnostic and therapeutic enigma." (Osborns' App. at 59.) In November 1983, Drs. Malstrom and Tredeau, the pediatric neurologists at Wilford Hall, also could not identify a cause for the seizures despite two weeks of examination and testing. Moreover, their medical records stated: "there is no relation to [sic] seizures to *immunizations*, head trauma, or emotional triggers." (Osborns' App. at 47.) (emphasis added.)

The government's argument that Mrs. Osborn should have been alerted by the temporal proximity of the fourth DPT shot to Shawna's first non-febrile seizure is unconvincing. Shawna had had three previous DPT shots and had suffered no apparent ill effects. She also had already had several seizures, with no apparent connection to anything except fever-producing illness. Shawna's doctors had given Mrs. Osborn no written or oral information regarding possible adverse effects of the vaccine. Moreover, Dr. Schuman had assured her just before the fourth shot was given that it was "perfectly safe." In essence, the government's argument is that Shawna's mother

should have known the cause of Shawna's difficulties when the doctors, including specialists in pediatrics and pediatric neurology, had not yet reached a conclusion. The argument simply answers itself.

Dr. Oksol's statement to Mrs. Osborn that Shawna was to receive no more pertussis and his written notation on Shawna's immunization record did not impart sufficient information to the Osborns so that they can be charged with actual or constructive knowledge. Dr. Oksol's statement may have demonstrated understandable caution and conservative medical judgment, but it utterly failed to address the issue of causation, which is the critical question before us. His statement, even when considered in conjunction with the temporal proximity of the fourth DPT shot to the first non-febrile seizure, provides an insufficient basis for concluding that Mrs. Osborn knew or should have known in May 1983 what caused Shawna's condition.

This court and several other circuits have held that a plaintiff is entitled to rely on the advice of his doctors. In *Brazzell*, we held that the plaintiff should be charged with knowledge of her injuries at the point when "she could have discovered the vaccination was the cause by asking a doctor." 788 F.2d at 1356. Similarly, in *Reilly*, we stated that while a plaintiff has a duty to exercise reasonable diligence in bringing suit, the concept of reasonable diligence does not "ignore the appellant's reliance on the statements of her doctors that the tracheal stenosis was a normal occurrence of the treatment she had received or her faith in their efforts to cure it." 513 F.2d at 150. The plaintiff can only be charged with the knowledge that a particular medical

procedure caused his injuries "when by 'inquiry among doctors with average training and experience in such matters' the plaintiff could have discovered the cause." Brazzell, 788 F.2d at 1357 (quoting *Kubrick*). See also Nicolazzo v. United States, 786 F.2d 454, 456 (1st Cir.1986) (the plaintiff can only be charged with the knowledge that he could have acquired by making inquiry among doctors with average training); Rosales v. United States, 824 F.2d 799, 805 (9th Cir.1987) ("[p]atients may reasonably rely on assurances by physicians that complications are normal and do not indicate that an actual injury has occurred.")

The Osborns, too, were entitled to rely on the statements of Shawna's physicians. And, until March 1984, their discussions were devoid of any suggestion that the fourth DPT shot may have played a role in the causation of Shawna's seizure disorder.

The government also argues that changes in Shawna's behavior around the time of her second birthday should have alerted Mrs. Osborn that the DPT shot administered three months earlier may have harmed Shawna. While these changes are relevant to the issue of Shawna's injuries, they do not bear strongly on the issue of cause. Moreover, this court stated in *Brazzell* that a plaintiff's "suspicions ~~734~~\*734 about the cause of her injuries" were not sufficient to charge her with the kind of knowledge necessary to start the running of the statute of limitations. 788 F.2d at 1356. In any event, Mrs. Osborn testified that at that time, she had "no idea" that the DPT shot may have been responsible for Shawna's regression. (Osborns' App. at 132.)

The district court concluded that Mrs. Osborn's March 1984 conversation with Dr. Bartholomew provided no more information than the May 1983 conversation with Dr. Oksol. The evidence is to the contrary. Dr. Bartholomew not only told Mrs. Osborn that future DPT shots were inadvisable, he also told her that Shawna's seizures following the fourth DPT shot "may have been precipitated by the injection itself."<sup>[9]</sup> This statement unequivocally told Mrs. Osborn far more than the statement of Dr. Oksol. The import of the two conversations is the central issue before us. The district court erred in failing to recognize the significance of Dr. Bartholomew's statement.

We conclude (1) that the evidence was insufficient to establish that the conversation with Dr. Oksol imparted to Mrs. Osborn knowledge of the cause of Shawna's condition and (2) that the district court erred in concluding that Dr. Bartholomew imparted no additional information.

The district court erred in dismissing this case for lack of jurisdiction. The Osborns' action is not time-barred because they sustained their burden of demonstrating that they had no knowledge of the cause of Shawna's condition until the conversation with Dr. Bartholomew in March 1984.

[1] Dr. Bartholomew saw Shawna on March 8, 1984 at the emergency room and also on March 9 at the pediatric clinic. He stated in his deposition that his recollection of his conversations with Mrs. Osborn was drawn from both of those visits. (Osborns' App. at 177-78.) Dr. Bartholomew testified as follows:

Q. ... [W]hat did Mrs. Osborn tell you about the shot record as far as what Dr. Oksol had written, do you recall?

A. She just pointed out to me that he had made a notation on the record that she was not to get DPT or part of DPT and since I had asked her about immunizations during this seizure she asked if there was a relationship and what that relationship was.

Q. What did you tell her?

....

A. Let's see. I would have told her that for many children the vaccine may cause a febrile reaction within twenty-four hours of having it, that in a child that has a seizure disorder a fever as Mrs. Osborn well knew may precipitate a seizure. Okay. We, also, talked about the fact that it had been shown or at least reported that the DPT vaccine had been associated rarely with an encephalitic process, which presumably [sic] could exacerbate an underlying neurologic condition. Now it was during the course of this discussion that she started — I believe it was she that mentioned first the relationship of one of her DPT shots to a day she had a lot of seizures.

....

Q. What did she tell you about that that [sic] day?

A. I don't believe she told me anything more than that, that there was a temporal relationship between one of her DPT injections and a—some of her seizures.

....

Q. ... What did you say to her about your opinion of the temporal relationship of the seizures following the fourth DPT shot?

A. I believe I said words to the effect that the seizures that she had on that day following her fourth DPT shot may have been precipitated by the injection itself, by the immunization itself.

Q. Did you tell her at that time your opinion as to whether or not future DPT shots were inadvisable or advisable?

A. In my opinion they were not advisable.

Dep. of Dr. Dennis Bartholomew, Osborns' App. at 178-83.

[2] Mrs. Osborn, under questioning by the government's counsel, testified in a deposition regarding her meeting with Dr. Bartholomew:

Q. Did Mr. Malstrom or Dr. Trudeau [sic] ever tell you that the fourth DPT vaccination that was administered to Shawna was the cause of her seizure disorder?

A. No.

Q. Did there come a point in time when any physician told you that?

A. That it directly caused the problem?

Q. That it caused her seizure disorder.

A. No, I was told that it can cause problems.

Q. Who told you that?

A. Dr. Bartholomew.

Q. When?

A. In March of 1984.

....

Q. Specifically, what did Dr. Bartholomew tell you?

A. He said she had a fever, and she was having seizures, and she was getting older at this point.

I'm asking him about starting school and vaccinations. That's when he tells me that she should not have any more DPT, and I asked him why. He said pertussis can cause bacterial encephalitis. He told me it was whooping cough. He told me pertussis was the drug they used for whooping cough, and then I said what about the things that have happened, the shots in the past. He said he didn't know.

Q. I'm not sure I understand what Dr. Bartholomew was telling you when he says pertussis can cause —

A. Encephalitis.

....

A. He's telling me that children with a low threshold for seizures, which Shawna exhibited at the time prior to her fourth vaccination, should not be given pertussis because they have a low threshold, [sic] and it made them more susceptible to problems from pertussis such as encephalitis.

....

Q. Did he specifically tell you that it was improper for the Air Force to have administered DPT vaccine to Shawna, the fourth DPT vaccination, given her history of prior febrile seizures?

A. Yes.

Q. Do you recall being told that by anyone else prior to March of 1984?

A. No.

Dep. of Pamela Ann Osborn, Osborns' App. at 138-40.

[3] 28 U.S.C. § 2401(b) provides:

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

[4] The district court has authority to consider matters outside the pleadings when subject matter jurisdiction is challenged under Rule 12(b)(1). *Land*

v. Dollar, 330 U.S. 731, 735 & n. 4, 67 S.Ct. 1009, 1011 & n. 4, 91 L.Ed. 1209 (1947); Satz v. ITT Fin. Corp., 619 F.2d 738, 742 (8th Cir.1980).

[5] The Osborns cite Snyder v. United States, 717 F.2d 1193, 1195 (8th Cir.1983), for the proposition that summary judgment standards must be applied to a 12(b)(1) motion when matters outside the pleadings are considered. We are convinced that Snyder did not squarely address the issue of what standards properly apply. See also Heille v. City of St. Paul, 671 F.2d 1134, 1136 (8th Cir.1982); Satz, 619 F.2d 738, 742 (8th Cir.1980). Cf. Haley v. Childers, 314 F.2d 610, 613 & n. 2 (8th Cir.1963). For a helpful discussion of the proper treatment of motions brought under Rule 12(b)(1), see Western Neb. Resources Council v. Wyoming Fuel Co., 641 F.Supp. 128, 139-40 (D.Neb.1986).

[6] A court deciding a motion under Rule 12(b)(1) must distinguish between a "facial attack" and a "factual attack." Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir.), cert. denied, 449 U.S. 953, 101 S.Ct. 358, 66 L.Ed.2d 217 (1980); Mortensen, 549 F.2d at 891. In the first instance, the court restricts itself to the face of the pleadings, Menchaca, 613 F.2d at 511; Mortensen, 549 F.2d at 891, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6). Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir.1982). The general rule is that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to

relief." Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957)). In a factual attack, the court considers matters outside the pleadings, Menchaca, 613 F.2d at 511, and the non-moving party does not have the benefit of 12(b)(6) safeguards. Mortensen, 549 F.2d at 891.

[7] Mrs. Osborn testified in a deposition:

Q. What else happened as a result or during the visit with Dr. Pettit? What else did you learn from him?

A. He told us the same thing that Dr. Schuman had said. He thought that he would like her on Dilantin for a minimum of one year, and most probably she'll be seizure free, and then we'll begin to wean her off of it. And if she goes two years after that seizure free, we'll have no problems.

....

Q. What happened during the Willford Hall hospitalization?

....

A. It was suggested to me about the first week we were there by Dr. Malstrom that maybe an ear infection had done her some harm. Then they got to the point where he didn't suggest that anymore.

He said it's a seizure disorder, probably she'll outgrow it.

Dep. of Pamela Ann Osborn, Osborns' App. at 128,  
136-37.

[8] Mrs. Osborn further testified:

Q. Did you ask Dr. Pettit any of these questions  
[regarding developmental delays and possible brain  
damage]?

A. Yes, I asked him these questions, and I was put off  
by the answer, don't worry, things are just fine.

Dep. of Pamela Ann Osborn, Osborns' App. at 129.

[9] *See supra* footnote 1.

APPENDIX F

450 F.3d 797 (2006)

Lance LEMAY, on Behalf of Himself and All Others  
Similarly Situated, and on Behalf of the General  
Public, Appellant,  
v.  
UNITED STATES POSTAL SERVICE, Appellee.

No. 05-3515.

United States Court of Appeals, Eighth Circuit.

Submitted: March 17, 2006.

Filed: June 16, 2006.

798\*798 Sanford Svetcov, argued, San Francisco, CA  
(Michael B. Angelovich and Texarkana, TX, Timothy  
G. Blood, and Maria V. Morris, San Francisco, CA, on  
the brief), for appellant.

Eric P. Koetting, Legal Policy and Ratemaking, U.S.  
Postal Service, Washington, DC (Brien M. Reimer of  
the same agency, on the brief), for appellee.

Before WOLLMAN and RILEY, Circuit Judges, and  
ROSENBAUM,<sup>[1]</sup> District Judge.

ROSENBAUM, District Judge.

Lance LeMay has filed a putative class action. The  
district court<sup>[2]</sup> dismissed for lack of subject matter  
jurisdiction. LeMay appeals; we affirm.

## I. Background

LeMay, purportedly acting on his own behalf and on behalf of others similarly situated, claims the United States Postal Service ("Postal Service") entered into and breached a federal common law contract.

According to Mr. LeMay, the Postal Service contracts with its patrons to provide preferred handling and expedited treatment of Priority Mail, but fails to do so. Mr. LeMay considers the Postal Service's heightened Priority Mail charges to be contractual consideration. He claims the Postal Service is in breach whenever it fails to provide the enhanced services. LeMay's proposed class definition is exquisite: he seeks to represent persons living in designated cities who used and paid for Priority Mail service, for items weighing up to 13 ounces, directed to four particular Postal Service Priority Mail Zones, on or after January 5, 2000. His proposed measure of class damages is the difference between the Priority Mail charges paid and the cost of First-Class Mail. The Postal Service moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, and Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

In analyzing the case, the district court initially found it had subject matter jurisdiction, pursuant to 39 U.S.C. § 409(a) of the Postal Reorganization Act ("PRA"), which gives federal district courts jurisdiction "over all actions brought by or against the Postal Service." Having made this determination, however, the district court ultimately concluded it lacked jurisdiction. It based this holding on 39 U.S.C. § 3662, a later PRA section, finding Congress gave

exclusive jurisdiction over complaints concerning postal rates and services to the Postal Rate Commission ("PRC"). The court held that, in enacting the PRA, Congress did not intend to create a private right of action for such complaints. The court then concluded the proposed class members' claims were "more properly characterized as a complaint about the postal services they receive or the rates they are charged." As such, the complaint was dismissed for lack of subject matter jurisdiction. *LeMay v. United States 799\*799 Postal Service*, No. 05-CV-4001, slip op. at 5-6 (W.D.Ark. Aug. 4, 2004).

LeMay appeals, claiming the district court erred in misconstruing his contract claim as a challenge to the Postal Service's rates and services. In the alternative, LeMay argues Congress did not enact section 3662 as an exclusive remedy.

## II. Discussion

A district court's dismissal of a complaint for lack of subject matter jurisdiction is subject to de novo review. *Green Acres Enterprises, Inc. v. United States*, 418 F.3d 852, 856 (8th Cir.2005). Subject matter jurisdiction refers to the court's power to decide a certain class of cases. *Cont'l Cablevision of St. Paul, Inc. v. United States Postal Service*, 945 F.2d 1434, 1437 (8th Cir.1991). We may affirm the district court's dismissal on any basis supported by the record. *In re K-tel Int'l Sec. Litig.*, 300 F.3d 881, 889 (8th Cir.2002) (internal quotations and citation omitted).

Congress enacted the PRA in 1970. In doing so, it created the modern Postal Service, and defined its

susceptibility to private suit. It gave the Postal Service the power to "sue and be sued in its official name." 39 U.S.C. § 401. Congress also conferred upon federal district courts the power to hear cases by or against the Postal Service, saying "[e]xcept as provided in section 3628 of this title, the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service." 39 U.S.C. § 409(a).

While the PRA gave district courts broad jurisdiction over Postal Service matters, Congress did not give them "exclusive jurisdiction" over its disputes. The jurisdiction seemingly conferred by sections 401 and 409 may be preempted when another, "precisely drawn, detailed statute" places jurisdiction elsewhere. *See Goodin v. United States Postal Inspection Service*, 444 F.3d 998, 1001 (8th Cir.2006) (quoting *Brown v. Gen. Serv. Admin.*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976)).

In this case, Congress removed the district courts' jurisdiction over claims regarding postal rates and services. It did so by enacting 39 U.S.C. § 3662, which provides that:

Interested parties who believe the Postal Service is charging rates which do not conform to the policies set out in this title or who believe that they are not receiving postal service in accordance with the policies of this title may lodge a complaint with the Postal Rate Commission in such form and in such manner as it may prescribe.

LeMay makes much of section 3662's use of "may" in addressing recourse to the Postal Rate Commission.

He argues that by using the word "may," Congress intended application to the PRC to be permissive, opting against using the mandatory "shall." His argument is interesting, but ultimately unpersuasive. It fails because we are not analyzing statutes in general; our focus is on the PRA in specific.

Certainly, as a general rule of statutory construction, "may" is permissive, whereas "shall" is mandatory. Anderson v. Yungkau, 329 U.S. 482, 485, 67 S.Ct. 428, 91 L.Ed. 436 (1947); Braswell v. City of El Dorado, Ark., 187 F.3d 954, 958-59 (8th Cir.1999). But this general rule does not close the inquiry. Courts will infer foreclosure of judicial review "where congressional intent to preclude judicial review is 'fairly discernible' in the detail of the particular legislative 800\*800 scheme." Ismailov v. Reno, 263 F.3d 851, 854-55 (8th Cir.2001) (quoting Block v. Cmtv. Nutrition Inst., 467 U.S. 340, 349, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984)). Evidence of such congressional intent should be "drawn from the statutory scheme as a whole." *Id.* After undertaking a review of the PRA's legislative history, we hold the remedy provided by section 3662 is exclusive.

The PRA's legislative history shows that, in crafting the Act, Congress intended to minimize external intrusions on the Postal Service's managerial independence. Buchanan v. United States Postal Service, 508 F.2d 259, 262 (5th Cir.1975). Congress intended to afford postal management the "unfettered authority and freedom that has been denied for years to maintain and operate an efficient service." Sen. Rep. No. 912, 91st Cong., 2d Sess. 2 (1970).

Congress gave meaning to this intention by placing within the Postal Service the means to redress a disaffected party's concerns about postal rates and services. Unhappy postal patrons were given recourse to the PRC. This is a specific grant of authority over a defined category of postal rate/postal service concerns. This specific designation is contrasted with the District Courts' otherwise general jurisdiction. Considering the differing treatment of the varying types of postal disputes, in light of Congress's stated purpose in enacting the PRA, it is "fairly discernable" that Congress intended to remove consideration of postal service complaints from the courts altogether. *See Ismailov*, 263 F.3d at 854-55.

We are not the first Court to consider this question. While new to the Eighth Circuit, this question has arisen in the Tenth Circuit. In an unpublished opinion, that Court reached the same conclusion, holding "[t]he language of section 3662 makes clear that a postal customer's remedy for unsatisfactory service lies with the Postal Rate Commission." *Bovard v. United States Post Office*, 47 F.3d 1178, 1995 WL 74678 (10th Cir.) (affirming the district court's dismissal for lack of subject matter jurisdiction).<sup>41</sup>

We, finally, consider whether the district court correctly construed LeMay's complaint as a claim of inadequate postal service. When deciding whether a matter is properly before it, a court must "look beyond the facial allegations of the complaint to determine the true nature of th[e] suit." *Sellers v. Brown*, 633 F.2d 106, 108 (8th Cir.1980). LeMay's complaint is lavishly wrapped in contract clothing,

but a court will not be dazzled by pretty wrappings. LeMay's alleges the Postal Service had a "contractual obligation to provide" priority services, (Compl. ¶ 15), and "[i]n direct contradiction to [its] promises, representations and terms and conditions, the Postal Service does not provide preferential handling or handling that results in any meaningful expedition of Priority Mail over that accorded the much less expensive First Class Mail." (Compl. ¶ 10.) These claims do not conclude our inquiry.

801\*801 The words echo contract, but the issues are classic questions of postal rates and services. Were we to decide otherwise, every missed mail delivery could engender a contract dispute. LeMay cannot avoid the PRC's exclusive jurisdiction over commonplace service complaints through artful pleading.

### III. Conclusion

We find the district court, while having initial jurisdiction over this case, as filed, properly construed the claims, as pled. After correctly perceiving the matter was a common dispute over rates and services, the district court rightly determined Congress had placed authority over such matters in the Postal Rate Commission, at which point the district court was divested of its jurisdiction.

Perceiving no error, we affirm the judgment of the district court.

[1] The Honorable James M. Rosenbaum, Chief Judge, United States District Court for the District of Minnesota, sitting by designation.

[2] The Honorable Harry F. Barnes, United States District Judge for the Western District of Arkansas.

[3] The section 3628 exception is inapplicable here. The section relates to appellate review of decisions made by the PRC or its Governors—issues not before the Court.

[4] Other courts are in accord. See Shelby Resources v. United States Postal Service, 619 F.Supp. 1546, 1549 (S.D.N.Y.1985) (sections 3662 and 3628 "provide the sole remedy for a user of postal services who is not receiving adequate service."); Azzolina v. United States Postal Service, 602 F.Supp. 859, 864 (D.N.J. 1985) ("plaintiff does not have a private right of action to bring service-related complaints in federal district court"); Tedesco v. United States Postal Service, 553 F.Supp. 1387, 1389 (W.D.Pa.1983) ("a close reading of the [PRA] strongly suggests that Congress intended that complaints regarding postal service be resolved outside of court"); Martin v. Sloan, 432 F.Supp. 616, 618 (W.D.N.C.1977) (postal patrons are remitted to the complaint procedure established in section 3662).

## APPENDIX G

### 1. 5 U.S.C. § 702 provides:

#### Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

2. 26 U.S.C. § 6331(a) provides:

**Levy and distraint**

**(a) Authority of Secretary**

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

\* \* \*

Note: To fully understand the authority codified at 26 U.S.C. § 6331(a) the underlying statutory law must be consulted.

Section 6331(a) is derived from section 6331(a) in the 1954 Internal Revenue Code.

Section 6331(a) in the 1954 Internal Revenue Code is derived from section 3310(a) and (b) in the 1939 Internal Revenue Code.

Section 3310(a) and (b) in the 1939 Internal Revenue Code provides:

Part II—Assessment, Collection, and Refund

SEC. 3310. RETURNS AND PAYMENT OF TAX.

(a) MONTHLY RETURNS.—All returns required to be made monthly by any person liable to tax shall be made on or before the 10th day of each month, and the tax assessed or due thereon shall be returned by the Commissioner to the collector on or before the last day of each month.

(b) OTHER RETURNS.—All returns for which no provision is otherwise made shall be made on or before the 10th day of the month succeeding the time when the tax is due and liable to be assessed, and the tax thereon shall be returned as herein provided for monthly returns, and shall be due and payable on or before the last day of the month in which the assessment is so made.

Section 3310(a) and (b) in the 1939 Internal Revenue Code is derived from section 3185 of the Revised Statutes.

Section 3185 of the Revised Statutes provides:

**Monthly returns and special returns, when to be made, and when tax payable.**

SEC. 3185. All returns required to be made monthly by any person liable to tax shall be made on or before the tenth day of each month, and the tax assessed or due thereon shall be return by the Commissioner of Internal Revenue to the collector on or before the last day of each month. All returns for which no provision is otherwise made shall be made on or before the tenth day of the month succeeding the time when the tax is due and liable to be assessed, and the tax thereon shall be returned as herein provided for monthly returns, and shall be due and payable on or before the last day of the month in which the assessment is made. When the said tax is not paid on or before the last day of the month as aforesaid, the collector shall add a penalty of five per centum, together with interest at the rate of one per centum per month, upon such tax from the time the same because due: but no interest for a fraction of a month shall be demanded: *Provided*, That notice of the time when such tax become due and payable is given in such manner as may be prescribed by the Commissioner of Internal Revenue. It shall be the duty of the Collector, in case of non-payment of said tax on or before the last day of the month, as aforesaid, to demand payment thereof, with five per centum per month, as aforesaid, in the manner prescribed by law; and if said tax, penalty, and interest, are not paid within ten days after such demand, it shall be lawful for the collector or his

deputy to make distraint therefor, as provided by law.

**3. 26 U.S.C. § 6702 provides in relevant part:**

**Frivolous tax submissions**

**(a) Civil penalty for frivolous tax returns**

A person shall pay a penalty of \$5,000 if—

(1) such person files what purports to be a return of a tax imposed by this title but which—

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or

(B) contains information that on its face indicates that the self-assessment is substantially incorrect, and

(2) the conduct referred to in paragraph (1)—

(A) is based on a position which the Secretary has identified as frivolous under subsection (c), or

(B) reflects a desire to delay or impede the administration of Federal tax laws.

**(b) Civil penalty for specified frivolous submissions**

**(1) Imposition of penalty**

Except as provided in paragraph (3), any person who submits a specified frivolous submission shall pay a penalty of \$5,000.

**(2) Specified frivolous submission**

For purposes of this section—

**(A) Specified frivolous submission**

The term “specified frivolous submission” means a specified submission if any portion of such submission—

- (i) is based on a position which the Secretary has identified as frivolous under subsection (c), or
- (ii) reflects a desire to delay or impede the administration of Federal tax laws.

**(B) Specified submission**

The term “specified submission” means—

- (i) a request for a hearing under—
  - (I) section 6320 (relating to notice and opportunity for hearing upon filing of notice of lien), or
  - (II) section 6330 (relating to notice and opportunity for hearing before levy), and
- (ii) an application under—
  - (I) section 6159 (relating to agreements for payment of tax liability in installments),
  - (II) section 7122 (relating to compromises), or
  - (III) section 7811 (relating to taxpayer assistance orders).

\* \* \*

**(c) Listing of frivolous positions**

The Secretary shall prescribe (and periodically revise) a list of positions which the Secretary has identified as being frivolous for purposes of this subsection. The Secretary shall not include in such list any position that the Secretary determines meets the requirement of section 6662(d)(2)(B)(ii)(II).

\* \* \*

4. 26 U.S.C. § 6703 provides in relevant part:

Rules applicable to penalties under sections 6700, 6701, and 6702

(a) Burden of proof

In any proceeding involving the issue of whether or not any person is liable for a penalty under section 6700, 6701, or 6702, the burden of proof with respect to such issue shall be on the Secretary.

\* \* \*

5. 26 U.S.C. § 7422 provides in relevant part:

Civil actions for refund

(a) No suit prior to filing claim for refund

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

\* \* \*

6. 26 U.S.C. § 7433 provides:

## **Civil damages for certain unauthorized collection actions**

### **(a) In general**

If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

### **(b) Damages**

In any action brought under subsection (a) or petition filed under subsection (e), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the lesser of \$1,000,000 (\$100,000, in the case of negligence) or the sum of—

- (1) actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional or negligent actions of the officer or employee, and
- (2) the costs of the action.

### **(c) Payment authority**

Claims pursuant to this section shall be payable out of funds appropriated under section 1304 of title 31, United States Code.

### **(d) Limitations**

- (1) Requirement that administrative remedies be exhausted

A judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.

**(2) Mitigation of damages**

The amount of damages awarded under subsection (b)(1) shall be reduced by the amount of such damages which could have reasonably been mitigated by the plaintiff.

**(3) Period for bringing action**

Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount in controversy and may be brought only within 2 years after the date the right of action accrues.

**(e) Actions for violations of certain bankruptcy procedures**

**(1) In general**

If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service willfully violates any provision of section 362 (relating to automatic stay) or 524 (relating to effect of discharge) of title 11, United States Code (or any successor provision), or any regulation promulgated under such provision, such taxpayer may petition the bankruptcy court to recover damages against the United States.

**(2) Remedy to be exclusive**

**(A) In general**

Except as provided in subparagraph (B), notwithstanding section 105 of such title 11,

such petition shall be the exclusive remedy for recovering damages resulting from such actions.

**(B) Certain other actions permitted**

Subparagraph (A) shall not apply to an action under section 362(h) of such title 11 for a violation of a stay provided by section 362 of such title; except that—

(i) administrative and litigation costs in connection with such an action may only be awarded under section 7430; and

(ii) administrative costs may be awarded only if incurred on or after the date that the bankruptcy petition is filed.

7. 28 U.S.C. § 2072 provides:

**Rules of procedure and evidence; power to prescribe**

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

8. 26 C.F.R. § 301.6203–1 provides:

**Method of assessment.**

The district director and the director of the regional service center shall appoint one or more assessment officers. The district director shall also appoint assessment officers in a Service Center servicing his district. The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record. The date of the assessment is the date the summary record is signed by an assessment officer. If the taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed.

9. 26 C.F.R. § 301.7433-1 provides:

**Civil cause of action for certain unauthorized collection actions.**

(a) In general. If, in connection with the collection of a federal tax with respect to a taxpayer, an officer or an employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of the Internal Revenue Code or any regulation promulgated under

the Internal Revenue Code, such taxpayer may bring a civil action for damages against the United States in federal district court. The taxpayer has a duty to mitigate damages. The total amount of damages recoverable is the lesser of \$1,000,000 (\$100,000 in the case of negligence), or the sum of: (1) The actual, direct economic damages sustained as a proximate result of the reckless or intentional actions of the officer or employee; and (2) Costs of the action. An action for damages filed in federal district court may not be maintained unless the taxpayer has filed an administrative claim pursuant to paragraph (e) of this section, and has waited for the period required under paragraph (d) of this section. (b) Actual, direct economic damages— (1) Definition. Actual, direct economic damages are actual pecuniary damages sustained by the taxpayer as the proximate result of the reckless or intentional, or negligent, actions of an officer or an employee of the Internal Revenue Service. Injuries such as inconvenience, emotional distress and loss of reputation are compensable only to the extent that they result in actual pecuniary damages. (2) Litigation costs and administrative costs not recoverable. Litigation costs and administrative costs are not recoverable as actual, direct economic damages. Litigation costs may be recoverable under section 7430 (see paragraph (h) of this section) or, solely to the extent described in paragraph (c) of this section, as costs of the action. (i) Litigation costs. For purposes of this paragraph, litigation costs are any costs incurred pursuing litigation for relief from the action taken by the officer or employee of the Internal Revenue Service, including costs incurred pursuing a civil action in federal district court under paragraph (a) of this section. The term litigation costs includes the

following: (A) Court costs; (B) Expenses of expert witnesses in connection with a court proceeding; (C) Cost of any study, analysis, engineering report, test, or project prepared for a court proceeding; and (D) Fees paid or incurred for the services of attorneys, or other individuals authorized to practice before the court, in connection with a court proceeding. For purposes of this section, administrative costs are any costs incurred pursuing administrative relief from the action taken by an officer or employee of the Internal Revenue Service, including costs incurred pursuing an administrative claim for damages under paragraph (e) of this section. The term administrative costs includes: (A) Any administrative fees or similar charges imposed by the Internal Revenue Service; and (B) Expenses, costs, and fees described in paragraph (b)(2)(i) of this section incurred pursuing administrative relief. (c) Costs of the action. Costs of the action recoverable as damages under this section are limited to the following costs: (1) Fees of the clerk and Marshall; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of paper necessarily obtained for use in the case; (5) Docket fees; and (6) Compensation of court appointed experts and interpreters. (d) No civil action in federal district court prior to filing an administrative claim—(1) Except as provided in paragraph (d)(2) of this section, no action under paragraph (a) of this section shall be maintained in any federal district court before the earlier of the following dates: (i) The date the decision is rendered on a claim filed in accordance with paragraph (e) of this section; or (ii) The date six months after the date an administrative

claim is filed in accordance with paragraph (e) of this section. (2) If an administrative claim is filed in accordance with paragraph (e) of this section during the last six months of the period of limitations described in paragraph (g) of this section, the taxpayer may file an action in federal district court any time after the administrative claim is filed and before the expiration of the period of limitations. (e) Procedures for an administrative claim—(1) Manner. An administrative claim for the lesser of \$1,000,000 (\$100,000 in the case of negligence) or actual, direct economic damages as defined in paragraph (b) of this section shall be sent in writing to the Area Director, Attn: Compliance Technical Support Manager of the area in which the taxpayer currently resides. (2) Form. The administrative claim shall include: (i) The name, current address, current home and work telephone numbers and any convenient times to be contacted, and taxpayer identification number of the taxpayer making the claim; (ii) The grounds, in reasonable detail, for the claim (include copies of any available substantiating documentation or correspondence with the Internal Revenue Service); (iii) A description of the injuries incurred by the taxpayer filing the claim (include copies of any available substantiating documentation or evidence); (iv) The dollar amount of the claim, including any damages that have not yet been incurred but which are reasonably foreseeable (include copies of any available substantiating documentation or evidence); and (v) The signature of the taxpayer or duly authorized representative. For purposes of this paragraph, a duly authorized representative is any attorney, certified public accountant, enrolled actuary, or any other person permitted to represent the taxpayer before the Internal Revenue Service

who is not disbarred or suspended from practice before the Internal Revenue Service and who has a written power of attorney executed by the taxpayer.

(f) No action in federal district court for any sum in excess of the dollar amount sought in the administrative claim. No action for actual, direct economic damages under paragraph (a) of this section shall be instituted in federal district court for any sum in excess of the amount (already incurred and estimated) of the administrative claim filed under paragraph (e) of this section, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time the administrative claim was filed, or upon allegation and proof of intervening facts relating to the amount of the claim.

(g) Period of limitations—(1) Time for filing. A civil action under paragraph (a) of this section must be brought in federal district court within 2 years after the date the cause of action accrues.

(2) Right of action accrues. A cause of action under paragraph (a) of this section accrues when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action.

(h) Recovery of costs under section 7430. Reasonable litigation costs, including attorney's fees, not recoverable under this section may be recoverable under section 7430. If following the Internal Revenue Service's denial of an administrative claim on the grounds that the Internal Revenue Service did not violate section 7433(a), a taxpayer brings a civil action for damages in a district court of the United States, and establishes entitlement to damages under this section, substantially prevails with respect to the amount of damages in controversy and meets the requirements of section 7430(c)(4)(A)(iii) (relating to

notice and net worth requirements), the taxpayer will be considered a "prevailing party" for purposes of section 7430. Such taxpayer, therefore, will generally be entitled to attorney's fees and other reasonable litigation costs not recoverable under this section. For purposes of this paragraph, if the Internal Revenue Service does not respond on the merits to an administrative claim for damages within six months after the claim is filed, the Internal Revenue Service's failure to respond shall be considered a denial of the claim on the grounds that the Internal Revenue Service did not violate section 7433(a). Administrative costs, including attorney's fees incurred pursuing an administrative claim under paragraph (e) of this section, are not recoverable under section 7430. (i) Effective dates. The portions of this section relating to reckless or intentional acts are applicable to actions taken by Internal Revenue Service officials after July 30, 1996. The portions of this section relating to negligent acts are applicable to actions taken by the Internal Revenue Service officials after July 22, 1998.

**10. Federal Rule of Civil Procedure 12 states in relevant part:**

\* \* \*

**12(b) How to Present Defenses.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

**(1) Lack subject-matter jurisdiction**

\* \* \*

- (6) failure to state a claim upon which relief can be granted; and

\* \* \*

**12(d) Result of Presenting Matters Outside the Pleadings.** If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

**11. Federal Rule of Civil Procedure 41(b) provides:**

**Involuntary Dismissal; Effect.**

If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

12. Federal Rule of Civil Procedure 56 provides:

**Summary Judgment.**

(a) **MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT.** A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) **TIME TO FILE A MOTION.** Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) **PROCEDURES.**

(1) **Supporting Factual Positions.** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) **WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT.** If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) **FAILING TO PROPERLY SUPPORT OR ADDRESS A FACT.** If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) FAILING TO GRANT ALL THE REQUESTED RELIEF. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) AFFIDAVIT OR DECLARATION SUBMITTED IN BAD FAITH. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

13. Operating Rule 22.01 of the Missouri Supreme Court provides:

Supreme Court of Missouri  
en banc

September 25, 2000

In re:

Adoption of a new Court Operating Rule 22.01,  
entitled "Court en banc Review of Division Opinions."

**ORDER**

1. It is ordered that Court Operating Rule 22.01 be and the same is hereby adopted to read as follows:

**22.01 Court en banc Review of Division Opinions**

Each district of the court of appeals shall establish a procedure by local court rule requiring en banc review of a division opinion within the district that chooses not to follow a previous decision of an appellate court of this state. The procedure shall require that such case be reheard by the court en banc. The procedure also may include as an alternative to rehearing the case en banc that an order shall be entered indicating that the district has reviewed the opinion en banc.

2. The state courts administrator shall provide copies of this order to each chief judge and clerk of each district of the court of appeals and such other persons as the administrator deems appropriate.

14. Federal Rule of Appellate Procedure 47 provides:

Rule 47. Local Rules by Courts of Appeals

(a) LOCAL RULES.

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. §2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(b) PROCEDURE WHEN THERE IS NO CONTROLLING LAW. A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules

unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

15. Local 8<sup>th</sup> Circuit Rule 47B provides:

**AFFIRMANCE OR ENFORCEMENT WITHOUT OPINION**

A judgment or order appealed may be affirmed or enforced without opinion if the court determines an opinion would have no precedential value and any of the following circumstances disposes of the matter submitted to the court for decision: (1) a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) the evidence in support of a jury verdict is not insufficient; (3) the order of an administrative agency is supported by substantial evidence on the record as a whole; or (4) no error of law appears. The court in its discretion, with or without further explanation, may enter either of the following orders: "AFFIRMED. See 8th Cir. R. 47B"; or "ENFORCED. See 8th Cir. R. 47B."