Nos. 00-274C, 00-292C, 01-434C
(Consolidated) (Judge Firestone)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

ELIZABETH DUTTON SWEET and FREDERICK H. GREIN, JR.,
in their capacities as Executors under the will of William H. Sweet, M.D.,
MASSACHUSETTS INSTITUTE OF TECHNOLOGY, and
MASSACHUSETTS GENERAL HOSPITAL,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

BRIEF OF PLAINTIFFS ELIZABETH DUTTON SWEET AND FREDERICK H. GREIN, JR., AS EXECUTORS UNDER THE WILL OF WILLIAM H. SWEET, M.D., CONCERNING THE SCOPE OF THE GOVERNMENT'S CONTRACTUAL INDEMNITY OBLIGATION TO THEM

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UNITED STATES COURT OF FEDERAL CLAIMS

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QUESTIONS INVOLVED

In accordance with the Court's Order of September 11, 2003, plaintiffs Elizabeth Dutton Sweet and Frederick H. Grein, Jr., as Executors under the Will of William H. Sweet, M.D.,[1] will address in this brief the outstanding issues of (1) their entitlement to full indemnification of legal fees and other expenses from the government, and (2) how the $250,000 figure[2] mentioned in the indemnity agreement that is at the heart of this matter affects the government's obligation to them and the other plaintiffs in this

[1] For the sake of simplicity, Dr. Sweet's executors and estate are referred to throughout this brief as "Dr. Sweet."

[2] The parties and the Court have often used the familiar shorthand expression "deductible" to describe the $250,000 figure mentioned in the indemnity agreement. As is discussed below, however, it really is better described as a "trigger" or a "threshold" for the government's liability.

consolidated action, Massachusetts Institute of Technology ("MIT") and Massachusetts General Hospital ("MGH").

STATEMENT OF THE CASE

A. Introduction

1. The Heinrich Litigation And Efforts To Enforce The United States' Indemnity Obligation.

Dr. Sweet, MGH, MIT, and others, including the United States, were sued in 1995 by family members of four terminally-ill brain cancer patients who participated in clinical trials of boron neutron capture therapy ("BNCT") some forty years earlier. That case was called *Heinrich v. Sweet*, United States District Court for the District of Massachusetts, Civil Action No. 97-CV-12134-WGY (the "*Heinrich* case" or the "*Heinrich* litigation"). Two of the patients were treated in the 1950's at a nuclear reactor at Brookhaven National Laboratory on Long Island, and two were treated in 1960 and 1961 at MIT's nuclear reactor in Cambridge, Massachusetts.

Soon after the *Heinrich* plaintiffs brought suit, but long before the plaintiffs filed this lawsuit against the government, the indemnity claims presented in this action were presented to the government by means of a letter to the Nuclear Regulatory Commission ("NRC") dated November 8, 1995 from Francis C. Lynch, former counsel to MIT. Since that time, numerous letters have been exchanged between counsel for MIT and Dr. Sweet on the one hand, and the NRC through its Office of the General Counsel on the other.[3] In

[3] Many of those letters are contained in the Appendix to the United States' January 12, 2001 Motion to Dismiss, in Part, and Motion for Partial Summary Judgment.

those letters, MIT and Dr. Sweet spelled out very clearly their position that they are entitled to be indemnified for any liability or expenses arising from claims originating with Dr. Sweet's treatment of patients at MIT's Atomic Energy Commission ("AEC") - licensed nuclear reactor. Just as clearly, the NRC rejected those claims. For example, Marjorie Nordlinger of the NRC's Office of the General Counsel summarized the NRC's position in her letter to Mr. Lynch dated May 4, 1999, well before the *Heinrich* case began trial in the United States District Court for the District of Massachusetts:

> [O]ur 1996 correspondence ended with my August 29, 1996 letter affirming our opinion that Congress did not intend the mandatory Price-Anderson liability provisions for nuclear incidents to include in their scope activities involving prescription of radiation doses within a doctor-patient relationship. To our knowledge, nothing has changed. . . . In that light, we believe your tender was mistaken and we decline it.

Similarly, in a letter dated September 15, 1999, when the *Heinrich* trial was just beginning, the NRC reiterated its position in response to repeated requests for defense and indemnity of Dr. Sweet by his personal counsel, James E. Harvey, Jr.:

> The [Price-Anderson] Act and legislative history, including that which you cite, are very clear that if there is indemnification at all, it covers any person liable for the nuclear incident. Not every nuclear incident is indemnified. Whether there is indemnification at all depends on whether it is required under the Price Anderson Act or if not required whether the Commission or Dept. of Energy has exercised its statutory discretion to indemnify. As I have previously explained, it is our view that the acts involved in Heinrich v. Sweet are not covered by either the terms of the Act or by any discretionary action of the Commission.

After a lengthy trial in the fall of 1999, the *Heinrich* jury returned verdicts of negligence and wrongful death against Dr. Sweet and MGH, but in favor of MIT, and the

trial judge found in favor of the United States on the *Heinrich* plaintiffs' claims. The judge reduced the amount of the verdict significantly in response to post-trial motions, and the Court of Appeals for the First Circuit vacated the judgment altogether, finding that the verdict was unsupported by the evidence. On June 9, 2003, the United States Supreme Court denied the *Heinrich* plaintiffs' petition for a writ of certiorari.

Meanwhile, Dr. Sweet, MIT, and MGH had brought this action seeking indemnity from the United States for the *Heinrich* judgment as well as for reimbursement of their legal fees and other expenses, based upon Indemnity Agreement E-39 (the "Agreement") between the AEC and MIT. In view of the favorable disposition that Dr. Sweet and MGH were able to effect on appeal of the *Heinrich* case, the scope of the government's liability has been reduced greatly to reimbursement of Dr. Sweet, MGH, and MIT for their expenditures (whether direct or through insurers). Ironically (in light of the government's reluctance to reimburse), the largest part of those expenditures was made in the service of protecting the government from a liability of more than $8,000,000 to meet the *Heinrich* plaintiffs' judgments.

In its opinion dated August 7, 2002, this Court denied the United States' motion for summary judgment and "rule[d] that under the Price-Anderson Act, plaintiffs [Dr. Sweet, MGH, and MIT] are entitled to indemnification from the United States for both their 'public liabilities' stemming from the *Heinrich* litigation, which underpins this matter, and for their legal defense costs accrued in connection with that litigation." Sweet v. United States, 53 Fed. Cl. 208, 211 (2002). In its September 11, 2003 Order, this Court directed the parties to brief the indemnification issues that stand in the way of a

final disposition of this matter.

2. The *Joseph* Case.

A related case, styled *Joseph ex rel. Joseph v. Sweet*, Civil Action No. 00-CV-11026-WGY, is pending in the United States District Court for the District of Massachusetts on behalf of another patient who underwent BNCT at MIT in the 1960's.

Shortly before Dr. Sweet commenced this action against the United States, the *Heinrich* plaintiffs had attempted to file a Fifth Amended Complaint, adding the estate of Nassef Joseph as a plaintiff in the *Heinrich* case. See *Sweet v. United States,* Complaint, ¶¶ 15(e), 18. On March 22, 2000, the district court denied plaintiffs' motion to amend. The order was expressly without prejudice, however, to the right of Mr. Joseph's representatives to file a separate, related case. They did, on May 23, 2000, by filing a Complaint asserting claims against Dr. Sweet and MGH by Edward A. Joseph, on behalf of the estate of his father, Nassef Joseph, and by Marc O. Oddo, on behalf of the estate of his father, Nicholas Oddo.[4] (The *Joseph* and *Oddo* plaintiffs were represented by the same counsel representing the *Heinrich* plaintiffs.) Dr. Sweet and MGH moved to dismiss the claims of both new plaintiffs, moved to sever the claims, and moved to refer the claims to a medical malpractice tribunal pursuant to Mass. Gen. Laws c. 231, § 60B. The district court severed the claims and referred both cases to a medical malpractice tribunal. See Joseph ex rel. Joseph v. Sweet, 125 F. Supp. 2d 573 (D. Mass. 2000). The

[4] The plaintiffs had attempted to file a Fourth Amended Complaint in Heinrich, adding claims against Dr. Sweet on behalf of Nicholas Oddo, who was alleged to have been treated at Massachusetts General Hospital in 1953. The Oddo claims were dismissed voluntarily, without prejudice, then re-filed along with the Joseph claims. Mr. Oddo did not receive BNCT at MIT, and Dr. Sweet does not claim a right of indemnity under Indemnity Agreement E-39 with regard to the Oddo claim.

district court has not ruled on the motions to dismiss.

In April 2001, the district court entered an order granting the parties' joint motion to stay all proceedings in both *Joseph* and *Oddo* until the conclusion of all appeals in *Heinrich*. The *Joseph* and *Oddo* plaintiffs' counsel have not taken any steps to revive the matter since the Supreme Court denied their petition for a writ of *certiorari* in *Heinrich* on June 9, 2003.

B. Relevant Factual Background.

1. The MIT BNCT Series.

The background of BNCT, including the MIT series, is described in the Brief for Defendants-Appellants Elizabeth Dutton Sweet and Frederick H. Grein, Jr., Representatives of the Estate of William H. Sweet, M.D., filed in the United States Court of Appeals for the First Circuit in the *Heinrich* case, at pages 9 through 18.[5] The BNCT trials are described in greater detail in two articles, both co-authored by Dr. Sweet.[6] The so-called "Asbury article," which was presented in 1964 and published in 1972, describes the Brookhaven and MIT series as follows:

> In 1954 Farr, Sweet and co-workers reported the results of treatment in a series of patients with glioblastoma

[5] Copies of all the First Circuit briefs were provided to this Court on March 26, 2002, pursuant to an Order dated March 5, 2002.

[6] Copies of the articles are reproduced in the Appendix to this brief. They are: A.K. Asbury, et al., Neuropathologic Study of Fourteen Cases of Malignant Brain Tumor Treated by Boron-10 Slow Neutron Capture Radiation, Journal of Neuropathology & Experimental Neurology, 31:278-303, 281 (1972)(Appendix A); and W.H. Sweet, et al., The Use of Thermal and Epithermal Neutrons in the Treatment of Neoplasms (Appendix B). Both articles were included in the Joint Record Appendix submitted to the Court of Appeals for the First Circuit. The latter article is not dated, but probably was written in 1961, since it refers to the fact that one patient from the MIT trial was still living at the time of writing.

> multiforme at the nuclear reactor at the Brookhaven National Laboratory. After intravenous administration of a boron-10 compound, irradiation of the tumor was carried out through intact scalp. Ten patients received a total of 21 treatments. . . .
>
> *Review of Clinical Aspects of the Present [MIT] Series*
>
> A total of 18 patients received 19 irradiations. Table I summarizes the clinical and radiational details. The preradiation diagnosis in all patients with a supratentorial tumor was glioblastoma multiforme, although one of these was subsequently shown to be an amelanotic melanoma. . . . In all cases a craniotomy was performed sometime prior to the irradiation to establish the diagnosis and to resect as much gross tumor mass as possible. An interval of at least 3 weeks was then allowed for the blood-brain barrier in the surrounding normal tissue to reconstitute. Each patient was then taken to the operating room beneath the MIT reactor and the craniotomy wound reopened with reflection of scalp, bone, and dura. The surrounding scalp was protected with boron-free plastic and small bags containing lithium fluoride; an air-filled balloon was placed in the operative cavity to keep normal brain from collapsing into the wound. Continuous suction kept the cavity dry. Fine gold wires (5-6 cm in length) and small gold foils were then placed on the surface of the dura and brain and within its substance, and the position of each was recorded. After these preliminary preparations a lithium fluoride collimator was attached over the operative area. Following radiation the gold wires and foils were removed and the neutron flux in the area was determined from the neutron activation of the gold.
>
> Sixteen patients were given an intravenous injection of paracarboxybenzene boronic acid containing boron-10 and two patients received sodium perhydrodecaborate via intracarotid injection.

A.K. Asbury, et al., *Neuropathologic Study of Fourteen Cases of Malignant Brain Tumor Treated by Boron-10 Slow Neutron Capture Radiation*, Journal of Neuropathology & Experimental Neurology, 31:278-303, 281 (1972) (App. A-4). All eighteen patients in the MIT series, as described in the Asbury article, underwent the same procedure.

In the Asbury article, Dr. Sweet and his co-authors described the BNCT treatments of the eighteen MIT patients as a single series. In the earlier report, Dr. Sweet had referred to the first sixteen patients as one series, and the last two patients as the beginning of a second series: "The first series of patients was treated using paracarboxybenzeneboronic acid, given intravenously just prior to radiation. . . . A second series of cases irradiated following the intracarotid injection of sodium perhydrodecaborate was then started." W.H. Sweet, et al., *The Use of Thermal and Epithermal Neutrons in the Treatment of Neoplasms*, at 16 (App. B-18). Even if that reference were deemed significant for present purposes, however, George Heinrich, Eileen Sienkewicz, and Nassef Joseph were among the first sixteen patients. *See* App. B-20-21.

2. The Costs Of Investigating And Defending The *Heinrich* Claims Of Public Liability Incurred By Or For Dr. Sweet.

In addition to counsel in this case for MGH (Mr. Doherty and his firm), who represented both MGH and Dr. Sweet through trial in the *Heinrich* litigation, three law firms have provided legal services to Dr. Sweet and his estate in "investigating, settling and defending claims for public liability," for which Dr. Sweet claims a right of reimbursement by the government.

Dr. Sweet retained Sally & Fitch following trial, when it became apparent that his interests might diverge from those of MGH.[7] Sally & Fitch has represented Dr. Sweet, and then his estate, with respect to post-trial motions in *Heinrich*, in the appeal of the

[7] The fees and expenses of Mr. Doherty and his firm in representing Dr. Sweet's interests before Sally & Fitch became involved are addressed in MGH's counterpart to this brief.

Heinrich verdict to the United States Court of Appeals for the First Circuit, in opposing the *Heinrich* plaintiffs' petition for a *writ of certiorari* to the United States Supreme Court, in all aspects of the *Joseph* matter, and in the instant litigation to establish the government's obligations under the Agreement.

The firm of O'Malley and Harvey, LLP, has served as personal counsel to Dr. Sweet and his estate in defending his interests against the MIT BNCT claims since the *Heinrich* case was filed in 1995. O'Malley and Harvey played a large role in defending Dr. Sweet in the *Heinrich* litigation, both at trial and in the post-trial and appellate phases. O'Malley and Harvey also represented Dr. Sweet in attempting to persuade the government to meet its indemnity obligation, and in the instant case, brought when persuasion failed. O'Malley and Harvey's successful efforts on Dr. Sweet's behalf extended to reaching medical malpractice insurance coverage from the distant past with which to defend his interests against the *Heinrich* claims.

Dr. Sweet's interests also have been represented in connection with the *Heinrich* claims by Frederick H. Grein, Jr., a lawyer who is co-executor of Dr. Sweet's estate. Mr. Grein's fees for his services in connection with the *Heinrich* case total $3,340.00.

In summary, the legal fees and expenses that Dr. Sweet has incurred for "investigating, settling and defending claims for public liability," for which he claims a right of reimbursement by the government, fit into three categories: (1) those incurred for work directly in the *Heinrich* litigation, including appeal; (2) those incurred for work in attempting to persuade the government to defend and indemnify him in connection with the *Heinrich* claims, and in maintaining this case when persuasion failed; and (3) those

incurred for work related to procuring insurance coverage to defend and indemnify him in connection with the *Heinrich* claims.[8]

The fees and expenses of Sally & Fitch and O'Malley and Harvey are summarized in the following table:

	Sally & Fitch		O'Malley and Harvey		Total
	Fees	**Expenses**	**Fees**	**Expenses[9]**	
Heinrich Litigation	$319,321	$17,398	$75,836	$1,672	$414,227
Indemnity Action	$113,930	$4,738	$55,537	$1,672	$175,877
Claims against Private Insurers	$0.00	$0.00	$66,494	$1,671	$68,165
Total	$433,251	$22,136	$197,867	$5,015	$658,269

Together with Frederick Grein's fees of $3,340, the total amount that has been expended on behalf of Dr. Sweet and his estate in investigating and defending his

[8] Since the *Joseph* case was stayed in the very early stages, the fees and expenses incurred by Dr. Sweet in defending that case to date have not been substantial. Those figures therefore have not been included in this brief.

[9] A detailed breakdown of O'Malley and Harvey's expenses by category is not available; therefore, the total figure has been divided equally for purposes of estimating total expenditures by category. Also, the O'Malley and Harvey figures have been rounded to the nearest dollar.

interests against the *Heinrich* claims (with the exception of amounts paid on his behalf to Mr. Doherty's former and present firms) is $661,609. All of Sally & Fitch's fees and expenses have been paid by Amerisure, Dr. Sweet's malpractice insurer. All of O'Malley and Harvey's and Mr. Grein's fees have been paid directly by Dr. Sweet or his estate.

ARGUMENT

A. Dr. Sweet Is Entitled To Recover All Of The Costs, Including Attorneys' Fees, Expended By Him And On His Behalf In Investigating And Defending His Interests Against The *Heinrich* Claims.

1. Recoverable Costs Include Attorneys' Fees.

The government has taken the position that its undertaking (in Art. III, ¶ 3 of the Agreement) to indemnify against "costs of investigating, settling and defending claims for public liability" does not include attorneys' fees because the Agreement does not explicitly identify them as being among the recoverable costs. That position ignores the quite obvious fact that the only sensible reading of the Agreement is that legal fees are covered. Moreover, this Court has settled the point already by "rul[ing] that under the Price-Anderson Act, plaintiffs are entitled to indemnification from the United States for both their 'public liabilities' stemming from the Heinrich litigation, which underpins this matter, and for their legal defense costs accrued in connection with that litigation." Sweet v. United States, 53 Fed. Cl. at 211.

This is a case of first impression in the context of Price-Anderson, but there is ample authority to be found elsewhere, such as where the government pursues private parties to recover "response costs" under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"):

> Responsible parties are liable for "any . . . necessary costs of response incurred that are consistent with the national contingency plan." [42 U.S.C.] § 9607(a)(4)(B). The Act also states that "[t]he terms 'respond' or 'response' mean[] remove, removal, remedy, and remedial action," and these terms include "enforcement activities related thereto." [42 U.S.C.] § 9601(25). Thus, the government's recoverable response costs properly include not only the obvious costs of remediation, but also include, *inter alia,* attorneys' fees[.]

B.F. Goodrich v. Betkoski, 99 F.3d 505, 527-28 (2d Cir. 1996). In United States v. Chapman, 146 F.3d 1166 (9th Cir. 1998), the court followed B.F. Goodrich, and reasoned as follows:

> "The absence of a specific reference to attorney's fees is not dispositive if the statute otherwise evinces an intent to provide for such fees." [Key Tronic Corp. v. United States, 511 U.S. 809, 815, 114 S. Ct. 1960, 128 L. Ed. 2d 797 (1994)]. Congress does not have to "incant the magic phrase 'attorney's fees'" where it has "explicitly authorized the recovery of costs of 'enforcement activities'" and enforcement activities naturally include attorney fees. Key Tronic, 511 U.S. at 823, 114 S. Ct. 1960 (Scalia, J. dissenting). Section 107(a)(4)(A) evinces an intent to provide for attorney fees because it allows the government to recover "all costs of removal or remedial action" including "enforcement activities."

Chapman, 146 F.3d at 1175 . Thus, the courts have taken the simple language "remedial action" as it is used in CERCLA and construed it in the broadest possible way to serve the underlying purposes of that statute, which is – to oversimplify an extremely complex statutory scheme – to effect cleanup of polluted sites, to make the polluters pay, and to encourage them to do so voluntarily.

A simple reading of Indemnity Agreement E-39, particularly with an eye toward the purposes animating Price-Anderson, leads inexorably to the conclusion that the

government intended to include attorneys' fees in its indemnity obligation under the contract, which, after all, the government wrote.

Further, since the Agreement is very like an insurance agreement, it should be read like one. Insurance agreements are construed to afford the greatest possible protection to the insured. MacKinnon v. Truck Ins. Exchange, 73 P.3d 1205, 1213 (Cal. 2003); Westport Ins. Corp. v. Bayer, 284 F.3d 489, 498 (3d Cir. 2002)(applying Pennsylvania law); Kroening v. Blue Cross & Blue Shield United of Wisconsin, 619 N.W.2d 307 (Wis.App. 2000); Farm Bureau Mut. Ins. Co. v. Kurtenbach By and Through Kurtenbach, 961 P.2d 53, 57 (Kan. 1998). Generally, where an insurer has a duty to defend and refuses to do so, even in good faith, it must reimburse the insured for the costs of defense. See Twin City Fire Ins. Co. v. Home Indemnity Co., 650 F. Supp. 785, 792 (E.D. Pa. 1986).

Moreover, the government's position that its obligation under Art. III, ¶ 3 to indemnify "costs" does not include attorneys' fees is inconsistent with another provision of the Agreement, which provides that:

> When the Commission determines that the United States will probably be required to make indemnity payments under the provisions of this agreement, the Commission shall have the right to collaborate with the licensee and other persons indemnified in the settlement and defense of any claim and shall have the right (a) to require the prior approval of the Commission for the settlement or payment of any claim or action asserted against the licensee or other person indemnified for public liability . . . **which claim or action the licensee or the Commission may be required to indemnify under this agreement**; and (b) to appear through the Attorney General of the United States on behalf of the licensee or other person indemnified, take charge of such action and settle or defend any such action.

Agreement, Art. IV, ¶ 1 (emphasis added). Thus, this portion of the Agreement envisions the United States being "required to indemnify" not only for "claims," but also for "action[s] asserted against the licensee or other person[s] indemnified for public liability[.]" Clearly, "actions asserted against" can mean only legal actions, and indemnity for legal actions must include legal fees. Contractual provisions must be read in the context of the entire agreement, and the agreement must be construed "so as not to render portions of it meaningless." Dalton v. Cessna Aircraft Co., 98 F.3d 1298, 1305 (Fed. Cir. 1996). Also, the correct interpretation is the one "that accords a reasonable meaning to each of the provisions." Id.

Apart from the issue of inconsistency, if the government were correct that legal fees are not included in its indemnity obligation under Art. III, ¶ 3, then the Agreement provides the government with an extraordinary opportunity to take advantage of its indemnitee. While Art. IV, ¶ 1 gives the government the right to have its lawyer appear for and defend the indemnitee in the public liability action, which plainly would be at the government's expense, the government argues that Art. III, ¶ 3 gives it the right to avoid that expense by relying on the indemnitee to protect both his own and the government's interests. Thus, the indemnitee's reward for providing himself and the government with a strong defense is that he must pay for that defense himself. Surely such a one-sided bargain was not the parties' intent.

2. The Cost Of Investigating And Defending Claims For Public Liability Also Includes Marshalling The Necessary Resources To Defend The Claims.

A portion of the fees paid by Dr. Sweet and his estate to the law firm of O'Malley and Harvey went to secure insurance coverage for the defense of the *Heinrich* litigation;

in one instance, that effort required litigation. Given the government's recalcitrance, Dr. Sweet's defense in the *Heinrich* litigation was funded primarily by his insurer. Of course, had the government honored its obligation to indemnify Dr. Sweet from the beginning, he would not have had to spend money to obtain the means to defend himself against the *Heinrich* claims for public liability.

The $68,000 Dr. Sweet paid to O'Malley and Harvey secured for Dr. Sweet *more than nine times that amount* – $615,000 – for payment of legal fees and expenses to defend the *Heinrich* claims.[10] It also absolved him, and the government as indemnitor, of multi-million dollar liability to the *Heinrich* plaintiffs. Certainly, paying a penny to obtain a pound was an eminently "reasonable" expenditure of funds to "investigate" and "defend" claims for public liability.

But for the government's obdurate refusal to honor its commitment to indemnify Dr. Sweet, however, none of these efforts would have been necessary. It is thus the government's obligation to make Dr. Sweet whole for having to carry the defense, including enlisting O'Malley and Harvey to secure insurance coverage. The operative principle is demonstrated in Amato v. Mercury Casualty Co., 53 Cal. App. 4th 825 (1997), a case in which the insured could not afford to defend the underlying action, so a default judgment entered. The court first noted that "[w]here an insured mounts a defense at the insured's own expense following the insurer's refusal to defend, the usual contract damages are the costs of the defense." 53 Cal. App. 4th at 831. It went one step further,

[10] Dr. Sweet's insurer has paid Sally & Fitch approximately $337,000 for defense of the Heinrich litigation. Based on the information available to undersigned counsel, it appears that Mr. Doherty's former firm was paid approximately $278,000 on behalf of Dr. Sweet. The total is $615,000.

however, and ordered the insurer to pay the judgment, even though it was ultimately determined that there was no coverage under the policy, because the default was entered as a proximate result of its refusal to defend. Id.

Here, Dr. Sweet was able to defend the underlying action, owing in large part to the efforts of O'Malley and Harvey; therefore, O'Malley and Harvey's charges were among Dr. Sweet's "reasonable costs of defending claims for public liability." Since the government's refusal to indemnify and defend Dr. Sweet necessitated those efforts, the government should bear the cost. Otherwise, Dr. Sweet essentially will be punished for pulling together the resources with which to mount a defense to the underlying action.

Clearly, the $68,000 that Dr. Sweet paid to O'Malley and Harvey was money well spent from the government's perspective: had Dr. Sweet not had help in paying the bills to defend the *Heinrich* litigation, the government might now be reaching into its pocket to satisfy the original $8,000,000+ judgment rather than quibbling over the comparatively modest sum still at issue.

B. Dr. Sweet Is Entitled To Recover The Cost Of Enforcing The Government's Indemnity Obligation.

1. Statutory Waiver Of Immunity

The government has waived its sovereign immunity as to awards of attorneys' fees in the same circumstances in which fees would be awarded between private parties under common law and statutory exceptions to the American Rule. The Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, was enacted to "ensure[] that the United States will be subject to the common law and statutory exceptions to the American rule regarding attorney fees. This change will allow a court in its discretion to award fees

against the United States to the same extent as it may presently award such fees against other parties." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 5-6, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4953, 4984. The Act thus provides:

> (b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable
>
> under the common law or under the terms of any statute which specifically provides for such an award.

28 U.S.C. § 2412 (2003). Indeed, when the position of the United States in such litigation is found to be without "substantial justification" or when there are no mitigating "special circumstances," courts are required to award "fees and other expenses" to the prevailing party against the United States. 28 U.S.C. § 2412(d)(1)(A).[11]

The notion of fairness that gave rise to the EAJA plainly applies here. As this Court has described it, the government's purpose in enacting the statute was "to reduce the deterrent effect of the expense involved in seeking review of, or defending against, unreasonable government action." Lemelson v. United States, 8 Cl. Ct. 789, 792 (Fed.

[11] The applicability of subsection (d)(1) of the EAJA to Dr. Sweet and the other plaintiffs in this action is not ripe for adjudication; since judgment has not entered, a petition for attorneys' fees and costs pursuant to that subsection would be premature at this point. See Doe v. United States, 54 Fed. Cl. 337, 340 (2002) (citing 28 U.S.C. § 2412(d)(1)(B)).

Cl. 1985). That noble purpose would be thwarted by permitting the government to avoid the cost of Dr. Sweet's pursuit of governmental fairness.

2. The Dearth Of Federal Law Addressing The Scope Of The Government's Indemnity Obligations Under The Price-Anderson Act.

"In the context of contracts between the federal government and its citizens, the courts have opted for a uniform federal common law of contracts as the federal rule of decision, to avoid the uncertainty of conflicting state laws." Price v. United States, 46 Fed. Cl. 640, 646 (Fed. Cl. 2000) (applying federal law where plaintiff alleged that the government breached a contract for sale of land). The present case appears to be the first stemming from a Price-Anderson Act indemnity agreement, however.[12]

Indemnity Agreement E-39 is very much in the nature of an insurance agreement, as contrasted with a commercial contract that simply requires one party to indemnify another against claims relating to the subject matter of the contract. Perhaps the most

[12] Federal cases dealing with indemnity obligations shed no light upon the present inquiry, since most have focused on indemnity obligations between private parties incidental to some other agreement or implied by law. For instance, Peter Fabrics, Inc. v. Italia Di Navigazione Societa Per Azioni, 765 F.2d 306 (2d Cir. 1985), had at its core an admiralty claim for the loss of ocean cargo that was discharged from a ship at the dock facility of the Massachusetts Port Authority ("Massport"). 765 F.2d at 308. The cargo owner brought suit against Massport, and Massport sought indemnification from the shipping line under its stevedoring and terminal services agreement with the line. The court ruled that while Massport could recover the attorneys' fees and expenses it incurred in defending the underlying claim, it could "not recover fees and expenses incurred to establish [its] right against the indemnitor." Id. at 315 (internal citations omitted). Although the court did not state explicitly what body of law it looked to as governing the contract claim, it appears that the court was applying maritime law. See also Cooper v. Loper, 923 F.2d 1045, 1051, n.7 (3d Cir. 1991) (holding, in shipowner's implied indemnity action against dock owner to recover settlement paid seaman who was injured by negligence of dock owner's employees, that shipowner could not recover costs of obtaining indemnification).

important feature that distinguishes this case from those arising under commercial contracts is that here, the government had the option of taking charge of the public liability action, and defending it. The Agreement provides:

> When the Commission determines that the United States will probably be required to make indemnity payments under the provisions of this agreement, the Commission shall have the right to collaborate with the licensee and other persons indemnified in the settlement and defense of any claim and shall have the right . . . to appear through the Attorney General of the United States on behalf of the licensee or other person indemnified, take charge of such action and settle or defend any such action.

Agreement, Art. IV, ¶ 1. The government has been on notice of the *Heinrich* litigation since 1995, and has itself been a defendant in that action, but has consistently refused to honor its indemnity obligation. Now, eight years later, the "persons indemnified" have expended hundreds of thousands of dollars defending public liability claims that the government should have taken responsibility for from the beginning, and hundreds of thousands more enforcing the government's obligation.

Given that the government agreed to act like an insurer, the federal cases dealing with commercial indemnity agreements among private parties outside the insurance context are an imperfect fit. Because federal cases involving insurance coverage typically are predicated on diversity jurisdiction, however, there are few, if any, potential instances of federal common law controlling an insurance agreement. It makes sense, therefore, to seek guidance from the treatment such agreements have received under state law.

"To the extent existing federal law is not determinative of the issue and permits an area of choice between the merits of competing principles, the best in modern decision and discussion, including the general principles of contract . . . should be taken into

account." Prudential Ins. Co. v. United States, 801 F.2d 1295 (Fed. Cir. 1986). In Allenfield Assoc. v. United States, 40 Fed. Cl. 471, 481 (Fed. Cl. 1998), this Court applied Pennsylvania common law to the issue of whether a sublease of property located in Pennsylvania should be deemed to expire along with the primary lease, noting that Pennsylvania law on the subject "fully conforms to the general principles of landlord-tenant law that represent 'the best in modern decision and discussion.'" Id. at 481, quoting Prudential, 801 F.2d at 1298.

3. The "Best In Modern Decision And Discussion" Favors Full Indemnity.

A number of states, including Massachusetts, hold that fees for prosecuting indemnity or insurance coverage actions are recoverable against the indemnitor.[13]

In Rubenstein v. Royal Ins. Co., 708 N.E.2d 639, 643 (Mass. 1999), for example, the Massachusetts Supreme Judicial Court held that where an insurer denied coverage under a comprehensive liability policy, the insured was entitled to recover the attorneys' fees expended in the litigation to establish coverage. See also Hill v. Samuel Cabot, Inc., 742 N.E.2d 1123, 2001 WL 184565 *2 (Mass. App. 2001) (unpublished) (upholding lower court's award of fees and costs for pursuing cross-claim against indemnitors as part of "defense costs"). The Supreme Judicial Court had previously determined, in Preferred Mutual Insurance Company v. Gamache, 686 N.E.2d 989, 993 (Mass. 1997), that an

[13] The Price-Anderson Act can be read to mandate that Massachusetts law governs this issue. In a public liability action "the substantive rules for decision . . . shall be derived from the law of the State in which the nuclear incident occurs." 42 U.S.C. § 2014(hh). Indemnity Agreement E-39 provides that a "public liability" is "any legal liability arising out of or resulting from a nuclear incident." Agreement, Art. I, ¶ 5 (emphasis added). This action certainly has arisen out of a nuclear incident, since it is a necessary corollary to the Heinrich litigation, which was a "public liability action."

insured was entitled to attorneys' fees expended in establishing the insurer's duty to defend under a homeowners' policy. The Court concluded in Gamache, and reiterated in Rubenstein, that:

> [S]uch an exception to the so-called 'American Rule' [is] warranted in cases involving disputes between insurers and insureds because to preclude such recovery would 'permit the insurer to do by indirection that which it could not do directly. **That is, the insured has a contract right to have actions against him defended by the insurer, at its expense. If the insurer can force him into a declaratory judgment proceeding and, even though it loses in such action, compel him to bear the expense of such litigation, the insured is actually no better off financially than if he had never had the contract right mentioned above.'**

Rubenstein, 708 N.E.2d at 641 (quoting 7C J.A. Appelman, Insurance Law and Practice § 4691 at 283 (rev. ed. 1979)) (emphasis added). See also An-Son Corp. v. Holland-America, 767 F.2d 700 (10th Cir. 1985) (citing the same section from Appelman with approval).

The Rubenstein court also held that it makes no difference which party initiates the declaratory judgment action: "An insured is entitled to attorney's fees, regardless of which party instituted the declaratory judgment action, whenever the insured establishes that the insurer violated its duty to defend." Id. at 642. The court expressly declined to adopt a rule that would allow recovery of fees only where the insurer denied coverage in "bad faith" or engaged in "vexatious litigation," id. at 642-43, emphasizing that to hold otherwise would deprive the insured of at least some part of the benefit of its bargain:

> The intent of an insured in acquiring liability insurance is to transfer to the insurer the responsibility for defending the insured against any claim which may fall within the coverage of the policy. The position advanced by the

> defendant would enable an insurer who wrongfully refused to defend to deprive its insured of the principal benefit of its contractual bargain, and for which the insured paid premiums. **Even if the insured were eventually compensated for its defense of the third party action, it would remain permanently uncompensated for the costs associated with the declaratory judgment action it was forced to initiate because of the insurer's violation of its duty to defend.**

Id. at 642 (emphasis added).

Massachusetts is far from alone in its view that indemnity must be complete to be meaningful. See, e.g., Olympic Steamship Co., Inc. v. Centennial Ins. Co., 811 P.2d 673, 681 (Wash. 1991) ("We also extend the right of an insured to recoup attorney fees that it incurs because an insurer refuses to defend or pay the justified action or claim of the insured, regardless of whether a lawsuit is filed against the insured."); Bankers and Shippers Ins. Co. v. Electro Enterprises, Inc., 415 A.2d 278, 282 (Md. 1980) ("[A]n insurer is liable for the damages, including attorney's fees incurred by an insured as a result of the insurer's breach of its contractual obligation to defend the insured against a claim potentially within the policy's coverage, and this is so whether the attorneys' fees are incurred in defending against the underlying damage claim or in a declaratory judgment action to determine coverage and a duty to defend"); Motorists Mutual Ins. Co. v. Trainor, 294 N.E.2d 874, 878 (Ohio 1973) ("The fact that the insurer brings a declaratory judgment action after it has failed in its duty to defend should not require the insured to incur expenses which he cannot recover.").[14]

[14] Some states have statutes allowing recovery of fees in insurance coverage cases. See, e.g., Bassette v. Standard Fire Ins. Co., 803 So.2d 744 (Fla. Dist. Ct. App. 2d 2001). Some jurisdictions award fees only where the indemnitee is the defendant in the declaratory judgment action. See, e.g., Brown v. United States Fidelity & Guaranty Co., 361 N.Y.S.2d 232, 234 (App. Div. 1974). And some award fees if the insurer acts in bad

Other courts have awarded attorneys' fees with the view that they are consequential damages for an insurer's breach of contract in refusing to defend or concede coverage under the policy. See, e.g., Canyon Country Store v. Bracey, 781 P.2d 414, 420 (Utah 1989) (awarding amount of contingency payment to attorneys on theory that fees were consequential damages flowing from breach of insurance contract); Seaway Port Auth. v. Midland Ins. Co., 430 N.W.2d 242, 252 (Minn. Ct. App. 1988) ("the costs of the declaratory judgment action are considered to be 'consequential damages' flowing from the breach of the insurance contract").

The only approach that accomplishes the purpose of the indemnity agreement – which is to make the indemnitee whole – is that taken by the Massachusetts and other like-minded courts. When the government refuses to defend its indemnitees in a public liability action, and refuses to honor its indemnity obligation until ordered by a court to do so, it should do so at its own risk. It is inherently unfair and nonsensical to permit the government to do what it did here, and the progress of the *Heinrich* litigation illustrates that perfectly.

Since 1995, the government knew that the *Heinrich* case had been filed, had been called upon to provide defense and indemnification, was itself a defendant, and refused to honor its obligations, *even after the judge presiding over Heinrich ruled that the case would be tried as a public liability action under Price-Anderson.* Heinrich ex rel.

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faith or engages in vexatious litigation. See Twin City Fire Ins. Co. v. Home Indemnity Co., 650 F. Supp. 785, 792 (E.D. Pa. 1986); American States Ins. Co. v. Walker, 486 P.2d 1042, 1044 (Utah 1971); Dairyland Ins. Co. v. Hawkins, 292 F. Supp. 947, 952 (D. Iowa 1968). See generally Jane Massey Draper, Insured's Right to Recover Attorney's Fees Incurred in Declaratory Judgment Action to Determine Existence of Coverage Under Liability Policy, 87 A.L.R. 3d 429, 437-41 (1978) (collecting cases).

Heinrich v. Sweet, 62 F. Supp. 2d 282, 297-98 (D. Mass. 1999). The trial resulted in a verdict against MGH and Dr. Sweet totaling approximately $8 million. With no help from the government, Dr. Sweet and MGH persuaded the trial judge to reduce the verdict amount to about $800,000, the Court of Appeals for the First Circuit to vacate the award altogether, and the Supreme Court to refuse further review. Now, after looking on while the government's indemnitees protected its interests, the government maintains that it should pay virtually nothing because attorneys' fees – both in the underlying public liability action and in the present indemnity action – are not recoverable. In pressing that extreme position, the government would have this Court reward it for ignoring its obligations for the past eight years. That is just bad policy.

C. The Role Of The $250,000 Figure Mentioned In The Agreement.

1. $250,000 Is Merely A Trigger To The Government's Liability.

Now that it is on the verge of being required finally to meet its obligations, the government attempts to reduce those obligations to the vanishing point by arguing that the $250,000 figure mentioned in Article III, ¶ 4(a) of the Agreement is the equivalent of an insurance deductible, and that more than one such "deductible" should be applied here. That argument, too, collides with the plain language of the Agreement.

In Article III, ¶ 1, "The [United States Atomic Energy] Commission undertakes and agrees to indemnify and hold harmless the licensees and other persons indemnified . . . from public liability." That obligation includes a promise "to indemnify and hold harmless the licensee and other persons indemnified . . . from the reasonable costs of investigating, settling and defending claims for public liability." Agreement, Art. III, ¶ 3.

There is a trigger for the government's obligations under Article III, however:

> The obligations of the Commission under this Article [III] shall apply only with respect to such public liability, such damage to property of persons legally liable for the nuclear incident . . . and such reasonable costs described in paragraph 3 of this Article as *in the aggregate* exceed $250,000.

Agreement, Art. III, ¶ 4(a) (emphasis added).

Thus, when the $250,000 figure is placed in full context, rather than read merely in association with the phrase "such reasonable costs," it does not appear intended to reduce the government's obligation, as a deductible does, but rather seems to serve as a trigger to the government's obligation.[15]

To use a different image, the $250,000 figure serves as a threshold, much as the $75,000 figure mentioned in the statute (28 U.S.C. § 1332) conferring the federal district court's diversity subject matter jurisdiction is often called a "threshold." Applying that analogy to the government's indemnity obligation here, the purpose of the $250,000 figure is to keep the government clear of relatively small matters involving its licensed reactors. The government will exercise "subject matter jurisdiction," so to speak, only over significant matters, i.e., those in which the public liability itself and the cost of defending claims for that public liability combine to exceed $250,000.

2. At Most, A Single $250,000 Threshold Applies To The MIT BNCT Trials.

[15] Indeed, the government interprets Art. III, ¶ 4(a) just that way: "Under these provisions, the Government's obligation to indemnify would have been triggered, if at all, when the defense costs for 'claims for public liability,' coupled with the amount of any public liability, exceeded $250,000." Defendant's Reply to Plaintiffs' Oppositions to Defendant's Motion to Dismiss, in Part, and Defendant's Motion for Partial Summary Judgment, at 17-18.

a. Introduction

Even if one takes the view that the role of the $250,000 threshold is to serve as an offset to the government's financial obligation, rather than as a condition precedent to it, it is quite clear that the government would get only a single quarter million dollar windfall here.

The analysis "begins with the plain language of the contract. If the contract language is unambiguous, the court's inquiry is at an end, and the plain language of the contract is controlling." Input/Output Technology, Inc. v. United States, 44 Fed. Cl. 65, 70 (1999) (Firestone, J.), citing Textron Defense Systems v. United States, 143 F.3d 1465, 1469 (Fed. Cir. 1998) ("We . . . first consider the language of the contract. Because the language is sufficiently clear, our inquiry ends there as well."). "The ordinary meaning of the language in contractual documents governs, and not a party's subjective but unexpressed intent. . . . Moreover, the mere fact that the parties disagree upon the meaning of a contract does not render the language ambiguous." PCL Const. Services, Inc. v. United States, 47 Fed. Cl. 745, 785 (2000) (Horn, J.). "If a contract term is unambiguous, the court cannot assign it another meaning, no matter how reasonable it may appear." Cray Research, Inc. v. United States, 41 Fed. Cl. 427, 435 (1998) (Weinstein, J.).

The contract terms that matter for purposes of determining how many $250,000 offsets apply here (again, assuming for this discussion that an offset is intended by the contract) are "claims for public liability" and "nuclear incident." Happily, those terms are defined in the Agreement. "'Public liability' means any legal liability arising out of or resulting from a nuclear incident . . . ." Agreement, Art. I, ¶ 5. A "nuclear incident" is

"any *occurrence or series of occurrences* at the location . . . ." Agreement, Art. I, ¶ 2(a) (emphasis added).

b. The MIT BNCT Series Was A "Series Of Occurrences."

The Court has ruled already that "the term 'occurrence' simply means an 'event,' and that the term consequently encompasses the radiation exposures caused by the BNCT trials conducted at the MIT reactor." Sweet v. United States, 53 Fed. Cl. 208, 221 (2002). That being established, the *series* of those events of radiation exposure constitute a "series of occurrences."

Even if that were not already the law of the case, and the Court were to look at the issue anew, the Court inevitably would reach the same result. The clearest and most efficacious source of guidance for the plain meaning of the terms used in Price-Anderson and the Agreement has been the dictionary, and that is true again here: the prevalent definition for "series" is "a number of things or events of the same class coming one after another in spatial or temporal succession." Webster's Ninth New Collegiate Dictionary, 1074 (1983). A single clinical trial in which a single therapy is administered to a finite number of patients over a short time period plainly fits the description of a "series of occurrences."

The ninth definition in Webster's provides an analogy that is particularly poignant for those of us in Boston: "A number of games (as of baseball) played usually on consecutive days between two teams." That is not to suggest that there was anything remotely game-like in administering potentially life-saving therapy to terminally ill patients. As in a number of consecutive games between two teams, however, certain

aspects of the BNCT treatments necessarily varied from patient to patient. In baseball, a new pitcher is on the mound for each game, the lineup and batting order may change, and the location shifts from one team's ball park to another. In the BNCT trials, Dr. Sweet's team treated eighteen individuals with two different boron compounds, increased the reactor power from 1 megawatt to 1.8 megawatts after the first thirteen irradiations, and varied the exposure times. But the procedure was basically the same, and the MIT series was no less a "series" for the variations.

c. Multiple Applications Of The $250,000 Threshold Would Be Nonsensical And One-Sided.

The provisions addressing the $250,000 threshold speak in terms of an "aggregate" amount of public liability and cost, as does the provision capping the United States' liability at $500,000,000: "The obligations of the Commission under this and all other agreements and contracts to which the Commission is a party shall not in the aggregate exceed $500,000,000 with respect to any nuclear incident." Agreement, Art. III, ¶ 6.

Clearly, if the government were faced with claims on behalf of all eighteen MIT BNCT patients, it would maintain that the MIT BNCT trial constituted a single "nuclear incident," representing at most a single $500,000,000 government indemnity liability. Similarly, if the MIT reactor had had an undetected leak throughout the period of the BNCT clinical trial, affecting thousands of people in Cambridge, the claims resulting from the eighteen irradiations might well exceed $500,000,000 in the aggregate. In such an event, the United States surely (and correctly) would view the entire BNCT trial as a single nuclear incident. There is no reason to view the actual situation presented here any

differently than the hypothetical one.

d. *Analogous Insurance Industry Practices.*

1. ***The $250,000 Figure Operates, If At All, As An Aggregated Self-Insured Retention.***

While the plain meaning of the terms used in the Agreement should settle the matter, reviewing insurance industry parlance and practice may provide some guidance. Such an exercise reveals that the Agreement's treatment of the $250,000 figure far more closely resembles a self-insured retention ("SIR") provision commonly found in endorsements to Commercial General Liability ("CGL") policies than it does a "deductible."

An SIR is similar to a deductible only in that it requires the insured to contribute a certain amount to covered claims. An important difference between the two, however, is that a deductible is *deducted* from the policy limit, while an SIR is not. For instance, where an insurance policy contains a limit on liability of $10,000 per occurrence and a deductible of $1,000 per occurrence, the insurer will never pay more than $9,000 per occurrence. If the policy contains an SIR instead, the insurer will pay the entire $10,000 once the insured has paid the $1,000 retained limit. See *Self Insured Retentions: An Examination of the Uses and Problems*, Malecki on Insurance, Oct. 1993, at 3. See also Tokio Marine and Fire Ins. Co. v. Insurance Co. of North America, Inc., 693 N.Y.S.2d 520 (App. Div. 1 Dept. 1999) ("the $250,000 was a true deductible, properly subtracted from the policy limits, and not a self-insured retention . . . . .Accordingly, when the insured contributed $250,000 . . ., [the insurer] discharged its obligation under the subject policy by contributing an additional $750,000; it was not required to contribute $1

million, as it would have been had the $250,000 contributed by the insured represented a self-insured retention").

Here, the Agreement uses the term "aggregate" in connection both with the limits of the government's indemnity obligation ("shall not in the aggregate exceed $500,000,000 with respect to any nuclear incident," Agreement, Art. III, ¶ 6), and in connection with the threshold to that obligation (it applies only with respect to such public liability and reasonable costs "as in the aggregate exceed $250,000," Art. III, ¶ 4(a)). These provisions do not in any way suggest that the government's obligation might be reduced to $499,750,000, as it would be in the case of a deductible.

Indemnity Agreement E-39 says absolutely nothing about "per occurrence" or "per claim" limits, or about "per occurrence" or "per claim" thresholds. The Agreement is phrased in terms of aggregates *only*. Nothing in the language of the Agreement – whether viewed with or without reference to insurance industry usage – suggests any circumstances under which the indemnitees would be subject to repeated application of the retained amount on a "per claim" basis, as the government would have it.

In General Star Indem. Co. v. Hard Rock Café, 55 Cal. Rptr. 2d 322 (Cal. Ct. App. 1996), the California Court of Appeals elucidated the purpose of the aggregation feature in a standard-form CGL policy:

> An aggregation feature is for the benefit of the insured. Without an aggregation feature, the SIR amount applies anew to each claim. The insured must exhaust that amount separately, over and over again as many times as there are claims. Before the insurer has any obligation on any single claim, the SIR must be exhausted for that claim. If, by contrast, there is an aggregation provision, payments made by the insured may be aggregated until the aggregation limit is exhausted. Thereafter, the insurance will cover any additional claims from dollar one.

General Star, 55 Cal. Rptr. 2d at 326.

2. *Multiple Injuries Arising Out Of A Single Occurrence Or Series Of Occurrences Are Treated As A Single Claim To Which A Single Deductible Applies.*

Insurance industry practices also reinforce the view that even if the $250,000 figure were viewed as a deductible, the entire BNCT trial was a single nuclear incident that would be subject to a single deductible. Most directors' and officers' liability policies, for instance, provide that multiple claims arising out of a single act or series of acts constitute one "claim" for purposes of applying a deductible, as well as a "per claim" limit to the insurer's liability:

> The deductible, as well as the limits of liability usually apply as to each claim. Most policies are careful to provide that suits against multiple insureds arising out of a single act or series of acts constitutes but one claim. In the absence of such language an insured could seek to circumvent the per claim limitation utilized in most policies.

Dan L. Goldwasser & Alan A. Harley, *Scope of Directors' and Officers' Insurance Coverage*, Practising Law Institute: Commercial Law and Practice Course Handbook Series, PLI Order No. A4-4383 at 1. The article notes that deductibles and policy limitations generally are construed consistently with each other, precisely because insurers want to eliminate any doubt that the policy limitation encompasses *all* claims against *all* insureds arising out of the same set of facts.

Typically, insurance companies facing multiple claims arising from the same act or series of acts assess one deductible:

> Significantly, the deductible is applicable 'in respect of

> each and every loss hereunder.' Therefore, the amount of the deductible will depend on the number of losses which have occurred. The policy will typically provide: 'losses arising out of the same act or interrelated acts of one or more of the insured shall be considered a single loss and only one retention shall be applied to each loss.' **This means if multiple lawsuits are filed with respect to the same underlying act or acts, only one loss has occurred and only one deductible will be applied.** On the other hand, where a lawsuit against directors and officers involves more than one cause of action, based upon distinct underlying sets of factual circumstances, more than one deductible will apply.

Howard M. Garfield, *Directors' and Officers' Liability Insurance 1988: Other Insurance and Operations of Limits and Deductibles*, Practising Law Institute: Commercial Law and Practice Court Handbook Series, PLI Order No. A4-4223 at 3 (emphasis added).

Similar language appears in legal malpractice insurance policies:

> The inclusion of more than one Insured in any claim or the making of claims by more than one person or organization shall not operate to increase the limits of liability and deductible. Two or more claims arising out of a single act, error, omission or personal injury or a series of related acts, errors, omissions or personal injuries shall be treated as a single claim. All such claims whenever made shall be considered first made on the date on which the earliest claim arising out of each act, error, omission or personal injury was first made and all such claims are subject to the same limit of liability and deductible.

Jobe v. International Ins. Co., 933 F. Supp. 844, 853 (D. Ariz. 1995). See also Westport Ins. Corp. v. Bayer, 284 F.3d 489, 499 (3rd Cir. 2002); Gregory v. Home Ins. Co., 876 F.2d 602, 604 (7th Cir. 1988).

Courts commonly view constellations of claims arising out of the same act or a related series of acts as constituting a single "claim" for purposes of applying policy

limitations. See, e.g., Continental Cas. Co. v. Brooks, 698 So. 2d 763 (Ala. 1997) (finding that claim based on various acts of attorney leading to same result presented one claim for policy limitations purposes); Gregory, 876 F.2d 602 (same). They also commonly require that the number of deductibles be consistent with the number of claims. For example, in Guttman Oil Co. v. Pennsylvania Ins. Guar. Assoc., 632 A.2d 1345 (Pa. Super. Ct. 1993), the trial court had declared that each claim of four insureds should be treated as a separate claim under the flood insurance policy at issue, thereby quadrupling the insurer's liability exposure, but then had, in effect, increased that exposure again by applying only a single deductible. Id. at 1346-47. The appellate court reversed the discordant result: "It seems untenable to argue, on the one hand, that each insured may recover separately under the policy and then, on the other hand, that all four claims are subject to a single $25,000.00 deductible." Id. at 1349.

Similarly, it would be untenable in the present case to construe the Agreement in a way that would permit the government the dual and inconsistent benefits of multiple applications of a $250,000 "deductible," coupled with a single $500,000,000 limitation of liability.

CONCLUSION

For all of the foregoing reasons, Dr. Sweet respectfully requests that the Court enter a judgment reflecting the full value of the government's obligations under Indemnity Agreement E-39, comprising all costs, including attorneys' fees, incurred by or on behalf of Dr. Sweet in investigating and defending claims for public liability stemming from the MIT series of BNCT trials, all damages flowing from the government's breach of its obligation to indemnify Dr. Sweet against claims for public liability, and all costs, including attorneys' fees, incurred by or on behalf of Dr. Sweet in enforcing the Agreement.

Elizabeth Dutton Sweet and Frederick H. Grein, Jr., as Executors under the Will of William H. Sweet, M.D.

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CERTIFICATE OF SERVICE

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APPENDIX

A. A.K. Asbury, et al., *Neuropathologic Study of Fourteen Cases of Malignant Brain Tumor Treated by Boron-10 Slow Neutron Capture Radiation*, Journal of Neuropathology & Experimental Neurology, 31:278-303, 281 (1972)

B. W.H. Sweet, et al., *The Use of Thermal and Epithermal Neutrons in the Treatment of Neoplasms*

Appendix A

A.K. Asbury, et al., *Neuropathologic Study of Fourteen Cases of Malignant Brain Tumor Treated by Boron-10 Slow Neutron Capture Radiation*, Journal of Neuropathology & Experimental Neurology, 31:278-303, 281 (1972)

Appendix B

W.H. Sweet, et al., *The Use of Thermal and Epithermal Neutrons in the Treatment of Neoplasms*