ADJUDICATORY ISSUE
INFORMATION

October 18, 2001 SECY-01-0191

FOR: The Commission

FROM: John F. Cordes, Jr. ***/RA/***
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SUBJECT: LITIGATION REPORT - 2001- 04

Kennedy v. Southern California Edison Co., No. 98-56157 (9th Cir., decided Sept. 26, 2001)

This is a private "radiation tort" suit arising out of leukemia allegedly caused by radioactive "fuel fleas" that escaped the San Onofre reactor site. After trial, a federal court jury found against plaintiffs. A 3-judge panel of the court of appeals (Ninth Circuit) set aside the jury verdict on the ground of improper jury instructions. The court ruled that plaintiffs could recover damages if they could show even a small probability -- a 1 in 100,000 chance -- that leukemia had resulted from the fuel fleas.

On our recommendation, the Justice Department approved the filing of a government amicus curiae brief arguing for rehearing and contesting what we considered an extreme view of tort causation. We expressed concern that the panel ruling ultimately could lead to an unwarranted expansion of tort liability, including (in some cases) government liability, under the Price Anderson Act.

After rebriefing and reargument, the same Ninth Circuit panel (Boochever, Hawkins & Thomas, JJ.) abandoned its original position. Taking a fresh view of the trial court record, the court decided that plaintiffs' evidence at most showed an "infintesimal" or "theoretical" possibility of causation. This, held the court, did not justify a judgment for plaintiff and rendered any technical defects in the jury instructions "harmless."

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Novoste Corp. v. NRC, No. 01-1162 (D.C. Cir., dismissed July 20, 2001)

This lawsuit sought judicial review of NRC staff instructions on the licensing of petitioner's brachytherapy system. Petitioner viewed the instructions as tantamount to a binding NRC rule. In addition to filing its lawsuit, petitioner asked the NRC staff to clarify and modify its instructions. After the NRC staff issued a new guidance document, petitioner withdrew its lawsuit.

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Massachusetts General Hospital v. United States, No. 01-434 C (U.S. Court of Federal Claims, filed July 27, 2001)

This is the third in a series of companion lawsuits seeking government reimbursement for damages, attorney's fees, and costs incurred in a private tort suit. The private suit, Heinrich v. Sweet, arises out of alleged medical misuse of an NRC-licensed research reactor at MIT. Massachusetts General claims reimbursement under a 1959 indemnity agreement between MIT and the Atomic Energy Commission.

We are working with the Department of Justice on the defense of this lawsuit, along with the companion suits (MIT v. United States and Sweet v. United States).

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