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.,	)	
and	)	
MASSACHUSETTS INSTITUTE OF TECHNOLOGY,	)	Nos. 00-274C, 00-292C, 01-434C (Consolidated) (Judge Firestone)
and	)	
MASSACHUSETTS GENERAL HOSPITAL,	)	
Plaintiffs,	)	
v.	)	
THE UNITED STATES,	)	
Defendant.	)	

DEFENDANT'S BRIEF IN RESPONSE TO THE COURT'S SEPTEMBER 11, 2003 ORDER REGARDING OUTSTANDING ISSUES OF INDEMNIFICATION COSTS

Pursuant to the Court's order dated September 11, 2003, defendant respectfully submits the following brief regarding outstanding issues of indemnification costs.

DEFENDANT'S BRIEF

STATEMENT OF THE QUESTIONS INVOLVED

1. Whether the reimbursement of plaintiffs' costs and attorney fees by insurance companies or other sources affects the Government's obligations to plaintiffs.

2. Whether and in what amount plaintiffs are entitled to indemnification of legal fees from the Government.

3. How the $250,000 deductible should be applied to the Government's obligation to plaintiffs.

STATEMENT OF THE CASE

I. Nature Of The Case

These consolidated cases involve the alleged breach of an "indemnity agreement" executed between the United States Atomic Energy Commission ("AEC") and the Massachusetts Institute of Technology ("MIT") pursuant to the Price-Anderson Act, 42 U.S.C. § 2210, as well as a second indemnity agreement between the AEC and Associated Universities, Inc. ("AUI"). Sweet Compl. ¶ 2.[1] Since the late 1950s, MIT has owned and operated a nuclear research reactor licensed by the AEC and its successor agency, the Nuclear Regulatory Commission ("NRC"). Further, from 1947 to 1998, AUI served as the contract operator of Brookhaven National Laboratory ("Brookhaven"), a nonprofit educational and research institution in Upton, New York. Sweet Compl. ¶¶ 7, 12.

Plaintiffs allege that the United States breached one or both of these agreements by failing to provide indemnification with respect to the claims in Heinrich, et al. v. Sweet et al., No. CIV. A. 97-12134-WGY (D. Mass.) (originally filed September 21, 1995), a civil tort action brought by surviving family members of patients treated at MIT and Brookhaven in the 1950s and 1960s. The Heinrich plaintiffs alleged that various doctors and institutions -- including MIT, Dr. Sweet, Massachusetts General Hospital ("MGH"), and the United States -- used their relatives and other

[1] For consistency, in this brief, we use the same abbreviations contained in Defendant's Motion to Dismiss, In Part, and Defendant's Motion for Summary Judgment, dated January 12, 2001. "Def. App. __" refers to the appendix attached to this brief, whereas "DA__" refers to the appendix attached to our motion for summary judgment.

terminally-ill patients as "guinea pigs" for dangerous, non-therapeutic medical experiments involving "boron neutron capture therapy" ("BNCT"), an experimental treatment for certain forms of brain cancer. See generally Heinrich v. Sweet, 49 F. Supp.2d 27 (D. Mass.1999).

II. Statement of Facts and Course of Prior Proceedings

A full discussion of the underlying facts in these consolidated cases is contained in Defendant's Motion to Dismiss, In Part, and Defendant's Motion for Summary Judgment, dated January 12, 2001. We respectfully refer the Court to that brief and related filings for general background, and summarize below only those facts relevant to the issues raised in the Court's September 11 Order.

A. Proceedings In The Heinrich Case

MIT notified the NRC of the Heinrich suit by letter dated November 8, 1995. DPFUF ¶ 16; MIT Compl. ¶ 43 & Exh. C; DA52. MIT's counsel, Francis C. Lynch, subsequently telephoned Marjorie S. Nordlinger, a staff attorney in the NRC's Office of the General Counsel, to seek "confirmation that the claim is subject to indemnification by NRC." DA53. Following an exchange of correspondence, by letter dated August 29, 1996, Ms. Nordlinger informed Mr. Lynch that "NRC indemnity should not be invoked in this case" insofar as "the Price-Anderson liability system did not cast the government as insurer of personal harms from medical administrations or from medical treatments without informed consent, but as indemnifier for unexpected but possible public dangers associated with the operation of nuclear reactors or materials used to fuel them." DPFUF ¶¶ 17-18; MIT Compl. ¶¶ 44-45 & Exh. D; DA60-61.

Three years later, by letter dated March 26, 1999, Mr. Lynch notified Ms. Nordlinger that MIT had "exhausted its $250,000 insurance coverage" and asserted that "MIT's satisfaction of the

first $250,000 of reasonable costs triggers the government's obligation to indemnify MIT." DPFUF ¶ 32 DA 63; MIT Compl. ¶ 49 & Exhibit F. Mr. Lynch further stated:

> As the NRC noted In the Matter of Regents of the University of California, 45 NRC 358, 364 (1997), "the Price-Anderson Act contemplates that at the point where governmental indemnity arises, here at the $250,000 threshold, the licensee will offer the government the opportunity to take over defense of the claims and manage the lawsuit." In accordance with the NRC's construction of Price-Anderson in the Regents case, MIT hereby "tenders" the case to the NRC.

Id. On May 4, 1999, Ms. Nordlinger responded that MIT's "tender was mistaken and we decline it" for the reasons stated in her earlier correspondence. DPFUF ¶ 33, DA 65.

Shortly before trial in Heinrich, by letter dated August 10, 1999, Dr. Sweet's counsel, James E. Harvey, Jr., requested Ms. Nordlinger's "help in determining whether the Nuclear Regulatory Commission or any other government agency owes defense or indemnity to Dr. Sweet" in regard to the Heinrich claims. DPFUF ¶ 32, DA66-68. Mr. Harvey submitted further information by letters dated September 7, 1999, and September 10, 1999, in which he indicated that Dr. Sweet was entitled to Price-Anderson indemnity, but did not request the NRC to defend Dr. Sweet in the Heinrich suit, which by then was on the eve of trial. DPFUF ¶¶ 37-38, DA71-74. By letter dated September 15, 1999, Ms. Nordlinger provided Mr. Harvey with the results of her research, but otherwise stated that "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." DPFUF ¶ 39, DA75-76.

At the start of trial proceedings, on September 9, 1999, the court dismissed the claims of the New York plaintiffs (i.e., the plaintiffs allegedly subjected to BNCT at Brookhaven), Joseph

Mayne and Walter Carl Van Dyke. Sweet Compl. ¶ 17; Heinrich v. Sweet, 118 F. Supp.2d 73 n.1 (D. Mass. 1999); DA43 (Docket No. 217). In October 1999, the jury returned verdicts for the remaining two Massachusetts plaintiffs (Evelyn Heinrich and Henry M. Sienkewicz, Jr.) against Dr. Sweet and MGH for wrongful death and negligence. MIT was found not liable on all claims. The United States was also dismissed as a defendant. The jury held Dr. Sweet individually liable in the amount of $1,750,000 (wrongful death), and jointly and severally liable with MGH in the amount of $3,000,000 (negligence). Upon post-trial motion, the court reduced these amounts to $40,000 and $750,000, respectively. Execution of the judgments was stayed pending appeal.

By letter dated October 20, 1999, Mr. Harvey notified Ms. Nordlinger of the status of the trial proceedings, and requested advice on "what further steps I should follow to complete Dr. Sweet's claim to the NRC for indemnity." DPFUF ¶ 42; DA77-78. Dr. Sweet, however, did not thereafter submit an indemnity claim to the NRC prior to filing his complaint in this Court. Similarly, MIT did not submit a claim to the NRC following its correspondence with agency counsel, unlike what was done in the Regents case. See In re Regents of the University of California, 45 NRC 358, 361. Likewise, MGH never submitted an indemnity claim to the NRC.

B. Proceedings In This Court

Dr. Sweet filed his complaint in this Court on May 11, 2000; MIT filed its complaint on May 22, 2000; and MGH subsequently filed its complaint on July 27, 2001. In response to the parties' joint preliminary status report, and prior to the commencement of discovery, the Court stayed discovery and directed briefing on several threshold issues. See Orders dated October 25, 2000, and October 26, 2000. Thereafter, we filed a combined motion to dismiss and motion for partial summary judgment, to which plaintiffs filed separate oppositions.

By decision dated August 7, 2002, the Court granted our motion to dismiss plaintiffs' claims for declaratory relief, and denied our motion for summary judgment as to plaintiffs' indemnification claims. Sweet, et al. v. United States, 53 Fed.Cl. 208 (2002). In its decision denying our motion for summary judgment, the Court held that the amounts for which plaintiffs were found liable in the Heinrich litigation constitute "public liability" for which Federal indemnification is required under the Price-Anderson Act. The Court further held that "MIT, Mass General, and Dr. Sweet are entitled to indemnification of the investigation and defense costs generated by the Heinrich litigation." Id. at 227.

Shortly thereafter, on August 27, 2002, the United States Court of Appeals for the First Circuit vacated the Heinrich verdicts against Dr. Sweet and MGH, and directed that judgment be entered in their favor. See Heinrich, et al. v. Sweet et al., 308 F.3d 48 (1st Cir. 2002). A petition for a writ of certiorari was denied on June 9, 2003.

Following issuance of the First Circuit's decision, and while these cases were stayed pending completion of certiorari proceedings in Heinrich, counsel for the parties conferred upon several issues. Thereafter, following a telephonic status conference held on September 11, 2003, the Court ordered the parties to file briefs addressing the above-referenced issues. We address each issue below.

ARGUMENT

I. The MIT Indemnity Agreement Did Not Obligate The Commission To Reimburse Plaintiffs' Defense Costs To The Extent Such Costs Were Assumed By Third Parties, Such As Plaintiffs' Private Insurers

The Court's September 11 Order directs defendant to address whether "reimbursement of plaintiffs' costs and attorneys' fees by insurance companies or other sources affects the

government's obligations to plaintiffs." Order dated September 11, at 1-2. In this regard, the Court ordered each plaintiff to "submit information to the government regarding the amount, if any, plaintiffs were reimbursed by insurance or other sources for plaintiffs legal fees and other costs" no later than September 30, 2003. Id.

In response to the Court's order, MIT has revealed that "all of the monies paid to counsel representing [MIT] on the various suits, including the Heinrich litigation and the present action against the United States were monies that were paid by licensed insurance carriers." Def. App. 1. Similarly, the Sweet plaintiffs have acknowledged that Dr. Sweet's medical malpractice insurer has paid all of the billings of the law firm Sally & Fitch ($456,638.43) relating to the defense of the Heinrich suit and the prosecution of Dr. Sweet's case in this Court. See Def. App. 3; Sweet Br. 8-10.[2] To date, we have not received any insurance information from MGH as required by the Court's Order, and thus cannot fully analyze MGH's claims in this respect.

These admissions significantly affect the Government's obligations to plaintiffs. As recognized in the Court's August 7 decision, the Commission's obligation to indemnify plaintiffs for their defense costs stems from Article III, ¶ 3, of the MIT indemnity agreement, which, in its original form, provided as follows:

> The Commission agrees to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from the reasonable costs of investigating, settling and defending claims for public liability.

See 53 Fed. Cl. at 227; DPFUF ¶ 7; Sweet Exh. C at 4 (collectively, "defense costs"). Because

[2] The Sweet plaintiffs state that the following amounts have not been paid by insurance: the billings of Dr. Sweet's "personal counsel" (O'Malley & Harvey), of which only $77,508 allegedly relate to defense of the Heinrich suit, and $3,340 in billings of the co-executor of Dr. Sweet's estate, Frederick H. Grein, Jr. Def. App. 3-4; Sweet Br. 8-10.

the Commission's obligation under this provision is one of indemnity – i.e., it is required to reimburse costs, not pay them in the first instance – it follows that, to the extent that plaintiffs' defense costs have been assumed by third parties, there are no costs to indemnify.

This conclusion is supported by the plain meaning of the MIT indemnity agreement. In its ordinary sense, to "indemnify" "costs" means to reimburse or compensate for amounts paid, or engage to be paid.[3] Here, however, plaintiffs have not alleged that they have paid, or are even liable to pay, any of the defense costs that they now seek from the United States. Rather, it appears that the plaintiffs' defense in Heinrich was assumed by their private liability insurers pursuant to the insurers' duty to defend.

Our position is further supported by the purpose and legislative history behind the Price-Anderson Act itself. As explained more fully in our prior motion for summary judgment, the central purpose of the Price-Anderson Act was to address the remote threat of uninsurable damage to the public caused by a nuclear accident, i.e., the legislation responded to industry concerns that a nuclear accident, although extremely unlikely to occur, could potentially result in extraordinarily extensive and uninsurable damage, with corresponding liability for the reactor. See Duke Power Co. v. Carolina Environ. Study Group, Inc., 438 U.S. 59, 63-64 (1978). The

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[3] See, e.g., Webster's New International Dictionary 601, 1262 (2d ed. 1943) (defining "indemnify" as to "make restitution or compensation to; reimburse; compensate"; and "cost" as the "amount or equivalent paid, or given, or charged, or engaged to be paid or given for anything bought or taken in barter or for service rendered"); Def. App. 5-7. See also Black's Law Dictionary (7th ed. 1999) (defining "indemnify" as "To reimburse (another) for a loss suffered because of a third party's act or default."); 9 Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 103:4 (3d ed. 1999) ("The major substantive distinction between a liability policy and an indemnity contract is that payment of a claim by the insured is a condition precedent to the insured's right to recover under the indemnity contract, but not under the liability contract.").

many references in the Act's legislative history to potentially vast damage claims bear this out.[4]

Conversely, the legislative history is devoid of any similar reference or concern about the potentially exorbitant costs of defending suits for damage, or the unavailability of attorneys to defend such suits. Thus, to assert, as plaintiffs do, that insurable risks and defense costs that are covered by private insurance should nevertheless be paid for again by the Price-Anderson system of indemnification cuts against the very purpose of the Act, and expands the liability of the United States beyond what Congress authorized.

Finally, our position is fully consistent with industry practice. It is well-established that, because an insured can "have but one defense," once the insured's defense "is assumed in its entirety by one insurer, the insured can have no cause of action against another insurer that failed to do the same thing." 1 Insurance Claims & Disputes 4th § 4:10, p. 324 . See also id. at 322 ("once an insured has been paid for certain defense costs by one insurer, the insured cannot collect those costs again from a second insurer."). Accord Tricil Resources, Inc. v. Mutual Fire, Marine and Inland Ins. Co., 1986 WL 20608 (N.D. Ohio 1986) (citing 7C Appleman on Insurance s 4.10, at 123 (1979)). At most, plaintiffs could attempt to assert claims based upon a subrogation theory for the use and benefit of their insurers. Plaintiffs, however, have neither asserted subrogation claims in their complaints, nor established entitlement to indemnity under

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[4] See S. Rep. 296 85th Cong., 1st Sess. 1957, reprinted in 1957 U.S.C.C.A.N. at 1804 ("the companies which are interested in participating in the reactor program are hesitant about assuming the liabilities which could ensue in the remote event of a reactor meltdown with the resulting release of fission products and radioactive materials into the air. . . . [I]n the unlikely event of a runaway reactor they may be subjected to damage claims which have been estimated in the testimony before the committee at sums ranging from several hundred thousand dollars for large reactors to sums up to a billion dollars, and somewhat beyond in a few estimates."). See generally Hearings Before the Joint Comm. on Atomic Energy on Governmental Indemnity and Reactor Safety, 85th Cong., 1st Sess. 91 (1957).

such a theory in their respective briefs. Rather, plaintiffs have taken the position that the "existence of insurance is utterly irrelevant to the government's liability under the Agreement." Joint Status Report, dated June 27, 2003, at 4.

Accordingly, based upon the information disclosed by plaintiffs in response to the Court's September 11 Order, the Commission did not breach its indemnity obligations to the extent plaintiffs' defense costs were assumed by third parties, such as plaintiffs' private insurers.

II. The MIT Indemnity Agreement Did Not Obligate The Commission To Reimburse Plaintiffs' Attorney Fees

The Court's September 11 Order further directs the parties to address "[w]hether and in what amount plaintiffs are entitled to indemnification of legal fees from the government." As the parties discussed during the telephonic status conference held on September 10, 2003, the principal issue in this regard is whether the Price-Anderson Act and the MIT indemnity agreement obligated the Commission to indemnify plaintiffs' attorney fees expended in the defense of the Heinrich suit.

On this issue, plaintiffs argue that Article III, ¶ 3 of the MIT indemnity agreement entitled them to indemnity for the attorney fees expended in defending the Heinrich case (regardless of whether they paid the fees, or are liable to pay them). Plaintiffs also argue that this provision obligated the Commission to indemnify them for the costs and attorney fees expended in prosecuting their respective cases in this Court. Lastly, the Sweet plaintiffs go even further, arguing that they were entitled to reimbursement for the attorney fees allegedly expended by Dr. Sweet's "personal counsel" to "secure insurance coverage" regarding the Heinrich case, and the fees of the co-executor of Dr. Sweet's estate for unspecified services. As explained below,

however, plaintiffs' various arguments are without support or merit.

A. The Price-Anderson Act And The MIT Indemnity Agreement Do Not Obligate The Commission To Reimburse Attorney Fees Expended In Defending, Settling, Or Investigating Claims For Public Liability

The MIT indemnity agreement, including Article III, ¶ 3, derives from the grant of authority contained in Section 170(k) the Price-Anderson Act, as amended. See Pub. L. 85-743, 72 Stat. 837 (August 23,1958).[5] Thus, whether Article III, ¶ 3 entitled plaintiffs to indemnification for attorney fees depends upon whether Congress, in enacting Section 170(k), intended to waive sovereign immunity so as to authorize the payment of such fees as part of the Federal indemnity. See, e.g., Cuyahoga Metropolitan Housing Authority v. United States, 57 Fed. Cl. 751, 761 (2003) (court must consider underlying legislation in construing disputed contract term because, "unlike normal contractual undertakings, the contracts here had their source in legislation passed by the Congress . . . .").

It is axiomatic, but bears repeating, that the United States, as sovereign, "'is immune from suit save as it consents to be sued.' " United States v. Testan, 424 U.S. 392, 399 (1976) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). The rule of sovereign immunity applies "not only to the general subject of the suit but to specific items of award," such as attorney fees. Nibali v. United States, 634 F.2d 494, 497 (Ct. Cl.1980). Furthermore, the limitations and

[5] As explained more fully in our prior motion for summary judgment, Section 170(k) of the Act authorized the Commission to "agree to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from public liability in excess of $250,000 arising from nuclear incidents." 72 Stat. at 837. The Act further provided that the "aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed $500,000,000, including the reasonable cost of investigating and settling claims and defending suits for damage . . . ." Id.

conditions upon which the Government consents to be sued must be strictly observed. Soriano v. United States, 352 U.S. 270, 276 (1957). For these reasons, in order for attorney fees to be awarded against the Government, there must be an express statutory authorization providing for the payment of such fees. See Slugocki v. United States, 816 F.2d 1572, 1579 (Fed. Cir 1987).

To overcome the doctrine of sovereign immunity to permit an award of attorney fees against the Government, the plaintiff must point to "specific statutory language that expressly authorizes such an award." Fidelity Construction Co. v. United States, 700 F.2d 1379, 1385 (Fed. Cir. 1983) (emphasis in original) (citing Nibali, 634 F.2d at 497). The waiver of sovereign immunity must be "unequivocally expressed" -- i.e., attorney fees cannot be awarded against the United States "by mere implication or by 'negative inference.'" Fidelity Construction, 700 F.2d at 1385 (quoting Nibali, 634 F.2d at 497). Similarly, and apart from notions of sovereign immunity, it has long been recognized that, pursuant to the "American Rule," attorney fees "generally are not a recoverable cost of litigation 'absent explicit congressional authorization.'" Key Tronic Corp. v. United States, 511 U.S. 809, 814-15 (1994) (quoting Runyon v. McCrary, 427 U.S. 160, 185 (1976)).

Under these principles, Section 170(k) of the Price-Anderson Act does not explicitly authorize Federal indemnification for attorney fees for at least two reasons. First, neither the MIT indemnity agreement nor the Price-Anderson Act itself contain any reference to "attorney fees," much less an "unequivocally expressed" indication that such fees are to be included within the scope of indemnification authorized by the Act. Rather, the agreement refers generally to the "reasonable costs of investigating, settling and defending claims for public liability."

Second, other portions of the Atomic Energy Act of 1954, of which the Price-Anderson

Act is an amended part, contain explicit authority for the award of attorney fees in other contexts. For example, in originally promulgating the Act, Congress became concerned that "private participation in atomic power development" would be inhibited by the "dangers of restrictive patent practices . . . ." See S. Rep. 83-1699, 83rd Cong., 2nd Sess. 1954, reprinted in 1954 U.S.C.C.A.N. 3456, 3464 (June 30, 1954). To address this concern, Congress enacted a compulsory patent licensing system pursuant to which holders of patents on "inventions of primary importance to the peacetime uses of atomic energy" would be required to license such patents to others in return for fair royalties. Id. See Pub. L. 703, §§ 153-54, 68 Stat. 945-46 (August 30, 1954) (codified as amended at 42 U.S.C. §§ 2183-84).

Under this program, an affected patent owner was entitled to receive a "reasonable royalty fee from the licensee . . . ." Pub. L. 703, § 153(g), 68 Stat. 946 (42 U.S.C. § 2183(g)). Significantly, Section 154 of the Act expressly provided that, in the event "any such patent licensee shall fail to pay such royalty fee," the patent owner was authorized to "bring an action in any court of competent jurisdiction for such royalty fee, together with such costs, interest, and reasonable attorney's fees as may be fixed by the court." Pub. L. 703, § 154, 68 Stat. 946 (42 U.S.C. § 2184) (emphasis added). Likewise, although the Act withdrew the patent holder's right to enjoin use its invention or discovery, it required that the measure of damages in any action successfully brought against the licensee "shall be the royalty fee, together with such costs, interest, and reasonable attorney's fees as may be fixed by the court." Id. (Emphasis added.)

These provisions convincingly demonstrate that Congress knew how to provide for "attorney's fees" under the Atomic Energy Act, but did not intend to authorize such fees with respect to Price-Anderson indemnification. Just as Congress enacted the compulsory patent

licensing system to foster "private participation in atomic power development," three years later, Congress amended the Act to add the nuclear incident indemnity provisions as a continued effort to "encourage the development of the atomic energy industry. . . ." Pub. L. 85-256, § 1, 71 Stat. 576 (42 U.S.C. § 2012(i)). Yet, in fashioning the scope of the indemnity, Congress only chose to include within the Government's aggregate indemnity for each nuclear incident the "reasonable cost of investigating and settling claims and defending suits for damage . . . ." Pub. L. 85-256, § 170(c), 71 Stat. at 577 (42 U.S.C. § 2210(c)). The fact that Congress included two express provisions for "attorney's fees" awards in Section 154's compulsory licensing provisions, without also including a similar coverage in Section 170's indemnity provisions, is compelling evidence that Congress drew a distinction a between "attorney fees" and "costs," and did not intend to authorize the former as part of the Commission's indemnity obligations.

This distinction compels the conclusion that the term "costs" in both the Act and in Article III, ¶ 3 was intended to refer only to expenditures traditionally understood and properly awardable under relevant authority as "costs" – e.g., court fees, printing expenses, compensation of court-appointed experts, interpreters, and the like. See Marek v. Chesny, 473 U.S. 1, 9 (1985). These items are not insignificant, however. The "costs" claimed in this case by MIT alone amount to almost $100,000. Def. App. 2.

B. Plaintiffs Have Failed To Demonstrate An Express And Unequivocal Entitlement To Attorney Fees

For their part, plaintiffs advance several different arguments in support of their claim to attorney fees, although the precise basis for their claims is less than clear. As explained below, none of these arguments demonstrate the type of express and unequivocal language needed to

authorize an award of attorney fees against the United States.

1. The Court's August 7, 2002 Decision Did Not Decide Plaintiffs' Entitlement to Attorneys Fees

As an initial matter, plaintiffs argue that the Court's August 7 decision supports their entitlement to attorney fees. See Sweet Br. 11, MIT Br. 8, MGH Br. 8. Specifically, plaintiffs point to the Court's holding that they are entitled to indemnification for their "legal defense costs," a statement that appears twice in the Court's decision. See 53 Fed. Cl. at 221, 228. This aspect of the Court's decision, however, simply rejected our threshold argument that the 1975 amendments to the Act (known as the "Hathaway" amendments) excluded the cost of investigating, settling, and defending post-1975 claims for public liability from the Federal layer of indemnity. See 53 Fed. Cl. at 225. We did not argue, and the Court did not address, whether Article III, ¶ 3, if still valid, specifically required indemnification for "attorney fees". Thus, plaintiffs' reliance upon the Court's August 7 decision in this regard is misplaced.

2. The Price-Anderson Act Does Not Evince An Intent To Provide Federal Indemnity For Attorney Fees

Plaintiffs further argue that, despite the absence of any express reference to "attorney fees" in the Price-Anderson Act or MIT indemnity agreement, Congress has otherwise expressed a clear intent to authorize indemnity for such fees. Specifically, relying primarily upon Key Tronic Corp. v. United States, 511 U.S. 809 (1994), and its progeny, plaintiffs maintain that "federal courts have found that a statute need not specify attorney fees if the statute otherwise evinces an intent to provide for such fees." MIT Br. 5; Sweet Br. 12. Toward this end, plaintiffs argue that the plain meaning of certain Price-Anderson provisions demonstrate a clear intent to include attorney fees as part of the Commission's indemnity obligations.

For example, citing the Merriam-Webster online dictionary, MIT argues that common meanings of "cost " and "defend" include "the amount or equivalent paid or charged for something," and "to act as attorney for," respectively. MIT Br. 3-4. In contrast, the Sweet plaintiffs and MGH do not cite dictionary definitions but, rather, emphasize that the MIT indemnity agreement (Article IV, ¶ 1) gives the Commission the right to approve settlements of "actions asserted against" indemnified persons for public liability. Sweet Br. 13. They thus contend, without further argument or support, that "[c]learly, 'actions asserted against' can mean only legal actions, and indemnity for legal actions must include legal fees." Id.

None of these arguments are availing. As explained below, plaintiffs' reliance upon Key Tronic cuts against, rather than supports, their various positions.

In Key Tronic, a private corporation that incurred cleanup (or "response") costs under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9607(a) ("CERCLA"), brought suit against the United States Air Force to recover a share of its "necessary costs of response," a statutory term defined to include "enforcement activities related thereto." 42 U.S.C. §§ 9601(25); 9607(a)(4)(B). Key Tronic's claim for contribution included attorney fees for legal services provided in connection with (1) the identification of other potentially responsible parties ("PRPs"), (2) the preparation and negotiation of a settlement agreement with the EPA, and (3) the prosecution of the litigation. The issue before the Court was whether the statutory phrase "necessary costs of response," including "enforcement activities," covered Key Tronic's attorney fees.

Although the Court initially noted that the "absence of specific reference to attorney's fees is not dispositive if the statute otherwise evinces an intent to provide for such fees," 511 U.S. at

815, the Court nevertheless held that Key Tronic's litigation-related attorney fees were not recoverable as "necessary costs of response." Central to the Court's holding was the fact that Congress had included two express provisions for attorney fee awards in other CERCLA provisions, but did not include a similar reference in the cost recovery provisions upon which Key Tronic relied. The Court held that "[t]hese omissions strongly suggest a deliberate decision not to authorize such awards." 511 U.S. at 818-19. The Court was also guided by its "adherence to a general practice of not awarding fees to a prevailing party absent explicit statutory authority . . . ." Id. at 819 (citing Alyeska Pipeline, 421 U.S. at 262). In view of this long-standing practice, the Court held that the term "enforcement activity" was "not sufficiently explicit" to "provide for the award of private litigants' attorney's fees associated with bringing a cost recovery action."

The Supreme Court's analysis in Key Tronic similarly demonstrates that Congress did not intend to include attorney fees as part of the Commission's indemnity obligations under the Atomic Energy Act. As in CERCLA, Congress included two express provisions for "attorney's fees" awards in the Atomic Energy Act's compulsory patent licensing provisions, without also including a similar coverage in the Act's Price-Anderson indemnity provisions. Plainly, Congress could have authorized Federal indemnity for the "reasonable costs, including attorney's fees, of investigating, settling, and defending" suits for damage, but did not do so. As in Key Tronic, this omission provides compelling evidence that Congress did not intend to authorize such awards as part of the Price-Anderson system of indemnification.

Moreover, similar to CERCLA's "necessary costs of response" (including "enforcement activities"), Price-Anderson's references to "costs of defending" public liability claims, and "actions asserted against" persons indemnified, are not sufficiently explicit to authorize Federal

indemnification for attorney fees. While such "claims" and "actions" could include legal actions for public liability brought against responsible persons, it is not clear that the attorney fees associated with such actions amount to "costs", particularly where the Act, in the context of other legal actions, expressly distinguishes between "costs" and "attorney's fees". Further, although MIT notes that the term "defend" is commonly defined to include the work of an attorney, the same observation could be made with respect to the term "enforce" as used in the CERCLA context. Indeed, in his dissenting opinion in Key Tronic, Justice Scalia observed that the "costs of 'enforcement activities' naturally (and indeed primarily) include attorney's fees." 511 U.S. at 822-23 (noting that the term "enforce" "clearly includes the assertion of a valid private claim against another private litigant."). This argument, however, did not persuade the Court's majority to find required degree of explicitness. Because "defending" and "enforcing" claims are but two sides to the same coin, the same conclusion is required here.

3. Section 170(h) Of The Price-Anderson Act Does Not Entitle Plaintiffs To Indemnification for Attorney Fees

MIT next argues that the NRC's decision in In the Matter of Regents of the University of California, 45 NRC 358 (1997), supports it claim for attorney fees. MIT Br. 6, 11. Specifically, MIT points to dicta contained in that decision indicating that expenses associated with a Commission-approved settlement "'could include reasonable attorney's fees incurred by the person indemnified in examining any claims.'" Regents, 45 NRC at 362 n.2 (quoting H.R.Rep. No. 296, 85th Cong., 1st Sess. 23 (1957)). The Sweet plaintiffs and MGH do not advance this argument.

MIT's argument is misplaced. The Regents decision did not address the Commission's

indemnity obligations (which are set out in Sections 170(c), 170(d), and 170(k) of the Act) but, rather, dealt with Commission's discretionary statutory authority to settle claims pursuant to Section 170(h) of the Price-Anderson Act. As noted in Regents, Section 170(h) gave the Commission the right, when it determined it to be appropriate, to take charge of and/or settle public liability claims "on a fair and reasonable basis . . . ." 45 NRC at 362. Moreover, in its original form, Section 170(h) vested the Commission with discretionary authority to include in such settlements "reasonable expenses in connection with the claim incurred by the person indemnified" which, as noted in Regents, could, but need not, include reasonable attorney fees. Regents, 45 NRC at 362 n.2

Here, in contrast, MIT's claim for attorney fees does not arise under Section 170(h) but, rather, is based upon Article III, ¶ 3, of the MIT indemnity agreement, which derives from Section 170(k) and refers solely to the "reasonable costs" of investing, settling, and defending public liability claims. Indeed, because Section 170(h)'s statutory grant of authority to pay "reasonable expenses" was a discretionary right, a comparable provision is not contained in the MIT indemnity agreement in any form. Thus, MIT's reliance upon the Regents decision and/or Section 170(h) does not support its claim for attorney fees.

4. Plaintiffs Are Not Entitled to Damages for the Costs and Attorney Fees Expended in Prosecuting Their Cases in this Court

Plaintiffs also argue that they are entitled to damages for the costs and attorney fees expended in prosecuting their cases in this Court. Plaintiffs base this claim upon two grounds: (1) the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(b); and (2) as consequential damages for the Commission's alleged breach of a duty to defend the Heinrich suit on plaintiffs'

behalf. See MIT Br. 12-13; Sweet Br. 16-24.

Plaintiffs' first contention can be quickly dismissed. As the Sweet plaintiffs acknowledge, consideration of an EAJA fee award is premature at this juncture, as no final judgment as been entered. See Sweet Br. 17 n.11. Thus, plaintiffs' reliance upon the EAJA misplaced, and in no way supports their present claims for attorney fees.

Similarly deficient is plaintiffs' claim that they are entitled to attorney fees as consequential damages for the Commission's alleged breach of a duty to defend. As plaintiffs correctly recognize, private liability insurance policies often include "duty to defend" clauses that obligate the insurer to defend claims brought against the insured. See 1 Insurance Claims & Disputes 4th § 4:1, p. 232 ("Most liability policies provide that the insurance company has both the right and the obligation to defend the insured."); Keeton and Widiss, Insurance Law §9.1(b) (1988) (same). In such a case, courts have held that an insurer's breach of its duty to defend may subject the insurer to consequential damages, including costs and attorney fees incurred by the insured in defending himself. See Sweet Br. 15, 20-23. See also 1 Insurance Claims & Disputes 4th § 4:33, pp. 425-26.

Here, however, plaintiffs have failed to identify any Price-Anderson provision that imposes a duty upon the Government to defend claims for public liability, and in fact there is none. At best, plaintiffs point to Article IV, ¶ 1, of the MIT indemnity agreement, which provides that, "[w]hen 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," among other things, "to collaborate with the licencee and other persons indemnified in the settlement and defense of any claim," and "to appear through the Attorney

General of the United States on behalf of the licencee or other persons indemnified, take charge of such action and settle or defend and such action. . . ." See Sweet Br. 18-19.

Fairly read, however, this provision does not impose upon the United States a duty to defend the Heinrich suit on plaintiffs' behalf. Where, as here, a policy "gives an insurer the right, but not the obligation, to defend, it has no duty to defend." 1 Insurance Claims & Disputes 4th § 4:1, p. 232. Accord Couch on Insurance § 200:5 (3d ed. 1999) ("Since the contract terms govern the duty, an insurance policy may relieve the insurer of any duty to defend, or give the insurer the right, but not the duty, to defend.") (citations omitted). By its plain terms, Article IV, ¶ 1, merely affords the Government the right to defend claims for public liability; it imposes no corresponding duty to defend such claims. Even plaintiffs seem to acknowledge this fact. See Sweet Br. 18 (noting that Article IV gives the Government the "option" of "taking charge of the public liability action, and defending it."). Indeed, it would be unprecedented to suggest that a Federal agency, by and through the Department of Justice, has a duty to defend private parties in what it regards as a medical malpractice suit.

Accordingly, because the Commission did not have a duty to defend the Heinrich suit, the United States cannot be held liable for any damages flowing from an alleged failure to assume plaintiffs' defense.[6]

[6] In any event, consequential damages are not allowed where, as appears to be the case here, an insured's defense is assumed by another insurer. See 1 Insurance Claims & Disputes 4th § 4:35, p. 431 ("if an insured has been paid some of its defense costs by one insurer, it cannot collect those costs, again, from a second insurer.").

5. The Costs of Investigating, Settling, and Defending Claims for Public Liability Do Not Include Costs Incurred To Secure Private Liability Insurance

Finally, the Sweet plaintiffs argue that the Commission was obligated to indemnify them for the attorney fees and costs they incurred to "secure insurance coverage for the defense of the Heinrich litigation . . . ." Sweet Br. 14. These efforts, plaintiffs explain, "required litigation" in one instance against one of Dr. Sweet's medical malpractice insurers. Id. MIT and MGH do not advance this argument.

We disagree. The purpose of the indemnity covered by Article III, ¶ 3 is to reimburse costs that are defensive in nature – i.e., the Commission is required to indemnify against the reasonable costs of investigating, settling, and defending claims for public liability that are asserted against a licensee or other persons indemnified. In contrast, plaintiffs were not required to secure private liability insurance in order to defend the Heinrich suit; rather, they did so to minimize their financial exposure from the litigation by shifting that risk from themselves to other available sources. In this light, plaintiffs' voluntary decision to pursue private insurance coverage, including their initiation of affirmative litigation, cannot reasonably be regarded as the type of defensive costs covered by Article III, ¶ 3. Cf. McBryde v. United States, 299 F.3d 1357, 1366-68 (Fed. Cir. 2002) (costs incurred in judge's pursuit of affirmative mandamus action not covered by statute providing reimbursement for "costs of defense" of suits brought against judicial officers in their official capacity).

Indeed, as explained above, because the "raison d'etre" of the Price-Anderson Act was to address the remote threat of uninsurable damage to the public, there is absolutely no reason to believe that Congress intended to provide Federal indemnification for expenditures made to

secure available sources of private liability insurance. The very fact that private insurance was available to plaintiffs only underscores the conclusion that the Heinrich case did not present the type of claims covered by the Price-Anderson system of indemnification.

IV. Plaintiffs Are Subject To Multiple $250,000 Deductibles For Each Nuclear Incident Alleged In The Heinrich Complaint

Finally, the Court's September 11 Order directs the parties to address "[h]ow the $250,000.00 deductible should be applied to the government's obligation to the plaintiffs." In this regard, the "$250,000 deductible" stems from a provision in the MIT indemnity agreement (Article III, ¶ 4(a)) that expressly imposes indemnity obligations upon the Commission only where specified covered amounts "in the aggregate exceed $250,000." Sweet Compl. Exh. C at 4.

On this issue, plaintiffs argue that only one $250,000 deductible applies to their claims because all of the BNCT trials conducted at MIT between 1960 and 1961 constituted a "single nuclear incident." As explained below, however, pursuant to the rationale applied in the Court's August 7 decision, the Heinrich suit alleged multiple nuclear incidents. Accordingly, the Government's obligation to indemnify plaintiffs for their defense costs did not arise unless and until those costs exceeded $250,000 for each nuclear incident.[7]

A. Pursuant To The Court's August 7 Decision, The Heinrich Complaint Alleged Multiple "Nuclear Incidents" And, Thus, Plaintiffs Are Subject To Multiple $250,000 Deductibles

Although the August 7 decision did not address the proper application of the $250,000 deductible, the Court's construction of the term "nuclear incident" – and particularly its

[7] In addressing this issue, we adhere to the Court's August 7 decision as law of the case. We respectfully maintain and reserve for appeal all of our prior arguments that the allegations in Heinrich did not constitute "nuclear incidents".

interpretation of the phrase "any occurrence or series of occurrences" – necessarily compels the conclusion that the Heinrich suit alleged multiple nuclear incidents.[8] Specifically, the Court held that, based upon various dictionary definitions of the term, an "occurrence" "simply means an 'event,' and that the term consequently encompasses the radiation exposures caused by the BNCT trials conducted at the MIT reactor." 53 Fed. Cl. at 221. The Court thus held that the "harm caused by those experiments indeed resulted in 'nuclear incidents,'" which thus gave rise to "a right to indemnification under the plain terms of the Price-Anderson Act and the MIT E-39 Indemnity Agreement." 53 Fed. Cl. at 223-24 (emphasis added)..

It follows from the Court's analysis that each plaintiff in Heinrich alleged a distinct "nuclear incident" – i.e., each plaintiff alleged that their family members were exposed to radiation during the BNCT trials, and that the exposures caused them harm. For example, the Heinrich complaint alleged that Eileen Sienkewicz received "neutron irradiation from the MIT reactor" on November 15, 1960, and died on October 31, 1961, the alleged cause of death being "'extensive radiation necrosis of brain' which was caused by the BNCT." Sweet Compl., Exhibit D at 10-12. Similarly, according to the complaint, George Heinrich was exposed to radiation during the BNCT process on January 2, 1961, and died on May 27, 1961, as a result of "'extensive radiation necrosis of brain' which was caused by the BNCT." Sweet Compl. ¶ 15 & Exhibit D at 8-9. Pursuant to the Court's August 7 decision, these allegations comprise multiple nuclear incidents, hence the Court's use of the plural form of "nuclear incident" in stating its

[8] In its original form, the MIT indemnity agreement defined "nuclear incident" as "any occurrence or series of occurrences at the location or in the course of transportation causing bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, explosive, or other hazardous properties of the radioactive material." Sweet Compl. ¶ 9.e & Exhibit C at 1.

holding. See 53 Fed. Cl. at 223-24 (the "harm caused by [the BNCT] experiments indeed resulted in 'nuclear incidents.'"). (Emphasis added.)

Focusing upon the "harm caused" in determining the number of incidents involved in Heinrich is consistent with the plain terms of the MIT indemnity agreement, which defined a "nuclear incident" as an occurrence or series of occurrences "causing" bodily injury, sickness, disease, or death arising out of or resulting from the hazardous properties of radioactive material. Sweet Compl. Exhibit C at 1 (emphasis added.). Under this language, multiple incidents arose because the injuries in Heinrich were allegedly caused by distinct exposures of radiation to individual patients that took place on different dates, that were administered under different conditions, and which arose in the context of separate doctor-patient relationships.

Moreover, determining the number of incidents involved in Heinrich based upon the "harm caused" is also supported by the weight of insurance law. In similar contexts, the "vast majority of courts have held, in the absence of policy language to the contrary, that the number of occurrences is determined by referring to the causes or causes of damage, rather than to the number of individual claims or injuries." 2 Insurance Claims & Disputes 3rd § 11:24, p. 308. See also Appalachian Insurance Co. v. Liberty Mutual Insurance Co., 676 F.2d 56, 61 (3rd Cir. 1982) ("The general rule is that an occurrence is determined by the cause or causes of the resulting injury."). As explained in Appalachian, "the majority of jurisdictions [employ] the 'cause theory'. Using this analysis, the court asks if '(t)here was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage.'" 676 F.2d at 61 (quoting Bartholomew v. Insurance Co. of N. America, 502 F. Supp. 246, 251 (D.R.I.1980), aff'd. sub nom. Bartholomew v. Appalachian Ins. Co., 655 F.2d 27 (1st Cir. 1981)). Accord 2 Insurance

Claims & Disputes 3rd § 11:24, p. 310 ("The critical question, therefore, is whether the damages all resulted from one continuing source/cause."). Here, as shown above, the harms caused by the BNCT trials did not result from a single, continuing cause but, rather, resulted from separate and discrete exposures of radiation.

Accordingly, because the Heinrich suit alleged multiple nuclear incidents, and thus multiple claims for "public liability," the Government's obligation to indemnify plaintiffs' defense costs did not arise unless and until such costs exceeded $250,000 for each nuclear incident.

B. Plaintiffs Have Not Demonstrated That The Heinrich Suit Involved A Single Nuclear Incident

For their part, plaintiffs advance a litany of arguments to the effect that, at most, only one $250,000 deductible applies to their claims because the BNCT trials conducted at MIT between 1960 and 1961 constituted a single nuclear incident. As explained below, none of plaintiffs' various arguments have merit.

1. The $250,000 Deductible Is Not A Jurisdictional Threshold

As an initial matter, MGH and the Sweet plaintiffs argue that the $250,000 deductible does not apply at all. Rather, they maintain the figure is akin to an amount-in-controversy threshold in Federal diversity jurisdiction suits that, once met, "triggers" their entitlement to seek full indemnity for all of their defense costs, including amounts below $250,000. MIT does not advance this argument.

This "jurisdictional trigger" argument, however, simply cannot be squared with the plain

terms of the MIT indemnity agreement. In its entirety, Article III, ¶ 4(a), provides:

> The obligations of the Commission under this Article shall apply only with respect to such public liability, such damage to property of persons legally liable for the nuclear incident (other than such property described in the proviso to paragraph 2 of this Article) and such reasonable costs described in paragraph 3 of this Article as in the aggregate exceed $250,000.

Sweet Compl. Exh. C at 4 (emphasis added.) Clearly, the $250,000 figure is not a jurisdictional condition upon plaintiffs' right to bring suit but, rather, is a monetary threshold that circumscribes the "obligations of the Commission . . ." It is nonsensical to argue, as plaintiffs do, that the Commission can be liable for indemnity below $250,000 where the agreement clearly states that the Commission's "obligations" "apply only with respect to" certain claimed amounts that, in the aggregate, "exceed $250,000."

2. The First Series Of Sixteen BNCT Experiments Conducted At MIT Between 1960 and 1961 Did Not Constitute A Single Nuclear Incident

The Sweet plaintiffs and MGH next contend that only a single $250,000 deductible applies in this case because the definition of "nuclear incident" includes not simply an "occurrence," but also a "series of occurrences." Because the exposures of first 16 patients in the 1960-61 BNCT trials could be viewed as a "series of occurrences," plaintiffs maintain that "the entire BNCT trial was a single nuclear incident that would be subject to a single deductible." Sweet Br. 30; MGH Br. 12. MIT does not advance this argument.

Plaintiffs' "single incident" argument fails for at least three reasons. First, it ignores an essential part of the definition of "nuclear incident". A "nuclear incident" is not defined simply as an "occurrence or series of occurrences" at the reactor location but, rather, means an

"occurrence or series of occurrences" "causing" "bodily injury, sickness, disease, or death arising out of or resulting from the hazardous properties of radioactive material." (Emphasis added.) Thus, it is not enough merely to point to a "series of occurrences" to demonstrate that a single nuclear incident has occurred. Rather, in order to show that there was but one event covered by indemnity, to which one deductible would apply, plaintiffs must show that the series of occurrences was the single, continuing cause that resulted in all of the injuries at issue.

In the Heinrich case, the harms allegedly caused by the BNCT trials did not result from a series of events that, once set in motion, caused multiple injuries. Rather, they stemmed from separate and discrete exposures of radiation. As detailed above, the injuries were allegedly caused by distinct exposures of radiation to individual patients that took place on different dates, that were administered under different conditions, and which arose in the context of separate doctor-patient relationships. The fact that the exposures were planned as a series of medical trials does not change the analysis. Indeed, it makes no sense to argue, for example, that the exposure of patient #1 caused the injuries to patient #3 or patient #12, and so on. Rather, each exposure was an independent act over which Dr. Sweet, MGH, and MIT exercised control and could have stopped at any time.

Second, plaintiffs further ignore the fact the allegations in the Heinrich complaint were not limited to the 1960-61 BNCT trials conducted at MIT, but instead alleged harms arising out of numerous other BNCT trials occurring at both MIT and Brookhaven National Laboratory in New York. See Sweet Compl. Exh. D at 30-37. Because the "occurrence or series of occurrences" causing injury (and, thus, a "nuclear incident") must take place at "at the location," the simple fact that many of these trials occurred at Brookhaven shows that, if the Heinrich

complaint alleged public liability at all, it alleged multiple nuclear incidents.

Third, plaintiffs' interpretation presents a classic "slippery slope" that will subject the Commission's indemnity obligations to manipulation and arbitrary application. By defining the beginning and ending point of a "nuclear incident" merely as a series of events, divorced from the effects caused by such events, there is no principled way to determine, for example, whether the series of events in this case should cover the "first series" of16 BNCT patients at MIT, or the next two BNCT patients (labeled by the doctors as the "second series"), see Sweet Br. 7, or, for that matter, any set or subset of BNCT trials conducted at MIT at any later time. Accepting plaintiffs' position would mean that Price-Anderson licensees could set the boundaries of a nuclear incident, and thus the Commission's liability, merely by the labels placed on a set of clinical trials. Thus, plaintiffs' proposed stopping point is effectively no stopping point at all.[9]

3. The $250,000 Figure Does Not Operate As An "Aggregated Self-Insured Retention"

The Sweet plaintiffs next argue that the $250,000 figure operates, if at all, as an "aggregated self-insured retention" limit ("SIR limit"), rather than a deductible against the Government's indemnity obligation. In this regard, plaintiffs correctly explain that the difference between a deductible and a SIR limit is the provision's effect upon the policy's limit of liability – i.e., a deductible is "deducted from the policy limit, while an SIR is not." Sweet Br. 29. Further, citing General Star Indemnity Co. v. Hard Rock Café, 55 Cal. Rptr.2d 322 (Cal. Ct. App. 1996), plaintiffs explain that, where a policy, in addition to the SIR limit, also contains an "aggregation

[9] Indeed, BNCT trials, including studies of glioblastoma multiforme in human patients, continue at MIT to this day. See http://web.mit.edu/nrl/www/bnct/bnct_home.html; http://www.bnct.org.

limit" amount, payments made by the insured "may be aggregated until the aggregation limit is exhausted," after which "the insurance will cover any additional claims from dollar one." Sweet Br. 30 (quoting General Star, 55 Cal. Rptr.2d at 326).

The relevance of plaintiffs' arguments in this regard is not entirely clear. Irrespective of whether the $250,000 amount is regarded as a deductible or a SIR limit, plaintiffs were still responsible for it, and they do not contend otherwise. As demonstrated by plaintiffs' own example involving a $1,000 SIR limit, see Sweet Br. 29, an insured must pay either the deductible amount or SIR limit, whichever the case may be.

Moreover, plaintiffs have not identified any sort of "aggregation limit" provision in the MIT indemnity agreement, nor do they clearly explain how such a provision, even if one existed, could affect the Government's indemnity obligations in this case.[10] At best, plaintiffs cite Article III, ¶ 6, which provides that the Commission's obligations "shall not in the aggregate exceed $500,000,000 with respect to any nuclear incident," and Article III, ¶ 4(a), which provides that the Commission's obligations only apply to the extent the "public liability," the damage to property of persons "legally liable for the nuclear incident," and the reasonable costs of investigating, settling, and defending the claims for public liability "in the aggregate exceed

[10] According to General Star, an "aggregation limit" feature is "not essential to a self-insured retention," but can be purchased for added protection by an insured for "an additional premium amount." Id. To illustrate, where a standard policy contains a limit of liability of $10,000 per occurrence and a SIR limit of $1,000, for an additional premium, an insured may purchase an "aggregation limit" feature in a stated amount, e.g., $20,000. In such a case, payments made by the insured under its SIR limit may be aggregated until the $20,000 aggregation limit is exhausted, at which time "the insurance will cover any additional claims from dollar one." Id. Thus, in the case of a policy having an aggregation limit of $20,000, if the insured were to pay $10,000 for one claim, and subsequently pay $10,000 for a second claim, the insured would be entitled to aggregate those payments so that, in the event of a third occurrence, the insurer would be fully liable for the third claim, as well as any additional claims during the policy period.

$250,000." Sweet Br. 29-30. These provisions plainly do not support plaintiffs' argument. Even assuming the $250,000 amount constitutes a SIR limit, neither ¶ 4(a) nor ¶ 6 include any type of "aggregation limit" provision discussed in General Star. By their plain terms, these provisions serve to limit, not expand, the Commission's indemnity obligations. Accordingly, the Sweet plaintiffs' "aggregated self-insured retention" argument is misplaced.

4. Industry Practice Does Not Support Plaintiffs' Position

The Sweet plaintiffs next argue that insurance industry practice further supports the conclusion that the entire BNCT trial was a single nuclear incident. Specifically, citing so-called "single claim" clauses that are "typically" included in professional liability insurance policies, plaintiffs argue that 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 determining both the policy limits and the "number of deductibles" to be applied in a particular case. Sweet Br. 30-32 (citing Continental Casualty Co. v. Brooks, 698 So.2d 763 (Ala. 1997); Gregory v. Home Ins. Co., 876 F.2d 602 (7th Cir.1989); Guttman Oil Co. v. Pennsylvania Ins. Guaranty Assoc., 632 A.2d 1345 (Pa. Super. Ct. 1993)).

This argument, however, confuses the exception with the rule. As shown above, the vast majority of jurisdictions employ the "cause theory" in determining whether a series of acts or events may be treated a single claim for insurance purposes. As the very cases cited by plaintiffs demonstrate, a limited exception to this general rule arises where the policy at issue expressly states that multiple claims arising out of a series of acts "shall be treated as a single claim." For example, in Gregory, the court declined to apply a cause-based analysis because the policy in that case expressly provided that '"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.'" 876 F.2d at 604 & n.3 (emphasis added). Likewise, in Continental Casualty, the court relied upon precedent construing policy provisions stating that "'Two or more claims arising out of a single act, error or omission or a series of related acts, errors or omissions, shall be treated as a single claim.'" 698 So.2d at 765 n.3 (emphasis added). Similarly, Guttman addressed policy language providing that "all claims for loss, damage or expense arising out of any one occurrence shall be adjusted as one claim . . . ." 632 A.2d at 1348. Such policy language was critical to the results in these cases.[11]

In this light, the few cases cited by plaintiffs clearly do not represent the weight of industry practice. Nor have plaintiffs identified any "single claim" or other similar clause in the MIT indemnity agreement pursuant to which the first 16 BNCT trials at MIT could be viewed "as a single nuclear incident that would be subject to a single deductible." The Sweet plaintiffs' resort to industry practice is thus misplaced.

5. MGH's Deductible Cannot Be Reduced To $83,300

Finally, MGH argues that its $250,000 deductible should be reduced to $83,330 because Article III, ¶ 4(a) of the MIT indemnity agreement obligates the Government to pay "such reasonable costs described in paragraph 3 of this Article as in the aggregate exceed $250,000." MGH Br. 12 (emphasis in original). Although not entirely clear, MGH apparently contends that the phrase "in the aggregate" means that number of persons claiming indemnity (in this case,

[11] See Universal Underwriters Ins. Co. v. Ford 734 So.2d 173, 177-78 (Sup. Ct. Miss. 1999) ("cases in which courts have considered the question of whether stated policy limits and deductibles . . . apply to a series of acts caused by an employee, are those cases in which the policy language clearly and unambiguously states that multiple acts may constitute one occurrence of loss.").

three) should be aggregated and then divided into the $250,000 figure. Thus, MGH contends that the $250,000 amount "should be allocated to each of the parties equally, with MGH's share of the $250,000 reduction $83,330." Id. The Sweet plaintiffs and MIT do not make this specific argument.

MGH's interpretation of Article III, ¶ 4(a) does not aid its case for two reasons. First, it proffers an interpretation that undermines MGH's entire claim. As detailed above, in its entirety, Article III, ¶ 4(a), provides:

> The obligations of the Commission under this Article shall apply only with respect to such public liability, such damage to property of persons legally liable for the nuclear incident (other than such property described in the proviso to paragraph 2 of this Article) and such reasonable costs described in paragraph 3 of this Article as in the aggregate exceed $250,000.

Sweet Compl. Exh. C at 4. Thus, by its plain terms, ¶ 4(a) refers to three categories of potential indemnity: (1) "public liability"; (2) the "damage to property of persons legally liable for the nuclear incident"; and (3) "such reasonable costs described in paragraph 3 of this Article" (i.e., the reasonable costs investigating, settling, and defending public liability claims). See Sweet Compl. Exh. C at 4. The Commission's obligations regarding each of these categories are spelled out in paragraphs 1, 2, and 3 of Article III, respectively.

If, as MGH contends, the phrase "in the aggregate" refers to the "reasonable costs described in paragraph 3" rather than all three categories of potential indemnity, then MGH's entire claim must fail. This is because, so construed, the Commission's indemnity obligations would only arise if the "public liability" of the licensee and other persons indemnified exceeded $250,000. Because plaintiffs, separately or together, are not subject to any amount of public

liability, it follows that the Commission could not breach any of its indemnity obligations. Indeed, this conclusion is consistent with, if not compelled by, the Price-Anderson Act itself, which only authorizes the Commission to "agree to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from public liability in excess of $250,000 arising from nuclear incidents." Pub. L. 85-743, 72 Stat. 837 (August 23,1958) (adding § 170(k), 42 U.S.C. § 2210(k)) (emphasis added). The Act contains no similar provision authorizing the Commission to agree to provide indemnification for defense costs where no public liability exists.

Second, MGH's position is flawed because it ignores limitations imposed upon it as a putative third-party beneficiary under the MIT indemnity agreement. As a general rule, to maintain a breach-of-contract action in this Court, there must be privity of contract between the plaintiff and the United States. Erickson Air Crane Co. v. United States, 731 F.2d 810, 813 (Fed. Cir.1984). Here, MIT is the only signatory to Indemnity Agreement E-39 and, thus, is the only party in privity with the United States that may bring a direct suit for breach. See Anderson v. United States, 344 F.3d 1343, 1351 (Fed. Cir. 2003). The only possible basis upon which MGH (or the Sweet plaintiffs) could bring suit in this Court is as intended third-party beneficiaries of the MIT indemnity agreement. See Glass v. United States, 258 F.3d 1349 (Fed. Cir.2001). A third-party beneficiary, however, merely "stands in the shoes of a party within privity." First Hartford Corp. v. United States, 194 F.3d 1279, 1289 (Fed. Cir. 1999). Its rights are derived from and limited by the terms of the contract itself. See Ashton v. Pierce, Secretary, United States Dept. of Housing and Urban Dev., 715 F.2d 56, 66 (D.C. Cir. 1983) (citing 2 Williston, A Treatise on the Law of Contracts, § 364A (3d ed. 1959)).

Here, MGH effectively argues that the Commission was obligated to indemnify MGH for defense costs in excess of $83,330, and that it is entitled to all costs above that amount as damages for breach. No such provision appears in the MIT indemnity agreement, however, and MIT has not and could not contend that the Commission was similarly obligated. Instead, as more fully detailed in our previous motion for summary judgment, on March 26, 1999, MIT notified NRC counsel that it had "exhausted its $250,000 insurance coverage" and asserted that "MIT's satisfaction of the first $250,000 of reasonable costs triggers the government's obligation to indemnify MIT." DPFUF ¶ 32 DA 63; MIT Compl. ¶ 49 & Exhibit F. Because MGH's position gives it greater rights than the party in privity, its interpretation must fail.

Moreover, MGH's position is both arbitrary and unworkable. If another plaintiff were subsequently to bring suit in this Court asserting indemnity claims arising out of the MIT BNCT trials, the new plaintiff, under MGH's view, would not be liable for any portion of the $250,000 deductible since, by happenstance, the full deductible would already have been "allocated" between MGH, MIT, and the Sweet plaintiffs. Because MGH's interpretation presages such random and capricious results, it should be rejected. See Arizona v. United States, 216 Ct. Cl. 221, 575 F.2d 855, 863 (1978) (court will avoid interpretation that renders a portion of the contract "useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result.").

V. Plaintiffs Are Not Entitled To Judgment

Finally, in the concluding paragraphs of their respective briefs, plaintiffs request that judgment be entered in their favor. For example, in addition to addressing the issues raised in the Court's September 11 Order, MGH requests the Court to enter judgment in its favor in the

amount of $566,525.86, plus interest and costs. MGH Br. 14. Although they do not specify amounts, MIT and the Sweet plaintiffs also request that judgment be entered in their favor for the "full value of the government's obligations" under the MIT indemnity agreement. MIT Br. 16, Sweet Br. 34.

Plaintiffs are not entitled to judgment for several salient reasons. As a threshold matter, they have not clearly established damages for breach. Pursuant to Article III, ¶ 3, the Commission was obligated to indemnify the "reasonable costs" of defending "claims for public liability". Aside from having never filed motions for summary judgment pursuant to Rule 56 on this issue, plaintiffs do not allege that they have paid, or are even liable to pay, the defense costs that they now seek as damages. They have not alleged, much less substantiated, any of the elements of a subrogation claim for their insurers' benefit, but instead have asserted that insurance-related issues are "utterly irrelevant". Nor have plaintiffs articulated any basis for liability regarding their defense of the claims of the "Brookhaven plaintiffs" in the Heinrich case (which were not addressed in the Court's August 7 decision). At best, plaintiffs' various assertions are vague and unsubstantiated.

Moreover, the Heinrich suit presented numerous claims, only some of which have been held by the Court to constitute "public liability" claims (i.e., the claims involving BNCT at the MIT reactor). Plaintiffs, however, have neither alleged nor shown that their claimed damages are limited to the costs of defending the "public liability" claims. Instead, plaintiffs apparently seek the costs of defending all claims in Heinrich. Plaintiffs also have made no effort to demonstrate that their claimed defense costs are "reasonable". See Hensley v. Eckerhart, 461 U.S. 424, 434 (1983) (the "party seeking an award of fees should submit evidence supporting the hours worked

and rates claimed"; "excessive, redundant, or otherwise unnecessary" fees must be excluded). Indeed, except for an affidavit submitted by MGH, the amounts of plaintiffs' claimed defense costs are wholly unsupported by any evidence at all.[12]

CONCLUSION

For the foregoing reasons, plaintiffs are not entitled to judgment in their favor. In the event the Court does not dismiss plaintiffs' claims in their entirety, and should plaintiffs desire to obtain judgment without trial, they must, as required by Rule 56, file proper motions for summary judgment setting forth the legal basis for their claims and specifying the material facts as to which they believe there is no genuine issue, together with supporting evidence. If plaintiffs intend to pursue new theories of liability, such as subrogation claims upon their insurers' behalf, they should be required to seek leave of Court to amend their complaints clearly alleging the new claims. In any event, we reserve the right to demonstrate pursuant to Rule 56(f) that discovery is required in order to respond to any such motion.

Respectfully submitted,

PETER D. KIESLER
Assistant Attorney General

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[12] The multiple and redundant sets of defense counsel in Heinrich alone raise serious questions regarding the reasonableness of plaintiffs' costs. For example, it is far from clear how the billings of O'Malley & Harvey and Mr. Grein relate to Dr. Sweet's defense in the Heinrich suit. According to plaintiffs, Dr. Sweet was represented in the Heinrich suit by the law firm of Martin, Magnuson, McCarthy & Kenney (which also represented MGH) up through trial, at which time Dr. Sweet retained the firm of Sally & Fitch "when it became apparent that his interests might diverge from those of MGH." Sweet Br. 8. O'Malley & Harvey is identified only as Dr. Sweet's "personal counsel." Mr. Grein is identified as being affiliated with the law firm of Hutchins, Wheeler & Ditmar. Id.; Def. App. 4.

DAVID M. COHEN
Director

OF COUNSEL:

John F. Cordes, Jr.
Marjorie S. Nordlinger
E. Leo Slaggie
Office of the General Counsel
Nuclear Regulatory Commission
Washington, D.C. 20555

Edward C. Jiran
Office of the General Counsel
Department of Energy
Washington, D.C. 20585

January 8, 2004

BRIAN M. SIMKIN
Assistant Director
Commercial Litigation Branch
Civil Division
Department of Justice
Attn: Classification Unit
8th Floor
1100 L Street, N.W.
Washington, D.C. 20530
Tele: (202) 307-6289

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this ___th day of January, 2004, I caused to be sent by overnight mail a copy of "DEFENDANT'S BRIEF IN RESPONSE TO THE COURT'S SEPTEMBER 11, 2003 ORDER REGARDING OUTSTANDING ISSUES OF INDEMNIFICATION COSTS" addressed as follows:

James B. Re, Esq.
Sally & Fitch
225 Franklin Street
Boston, Massachusetts 02110

Owen Gallagher, Esq.
Gallagher & Gallagher, P.C.
120 2nd Avenue
Boston, Massachusetts 02129

Joseph L. Doherty, Jr., Esq.
Joseph L. Doherty, Jr. and Associates
225 Franklin Street, 26th Floor
Boston, Massachusetts 02110

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