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February 13, 2004

via optima courier

Clerk, U.S. Court of Federal Claims
717 Madison Place, NW
Washington, DC 20005

Re: *Elizabeth Dutton Sweet and Frederick H. Grein, Jr., in their capacities as Executors under the will of William H. Sweet, et al. v. United States of America*
Nos. 00-274C, 00-292C, 01-434C (Consolidated) (Judge Firestone)

Dear Sir/Madam:

Enclosed for filing please find the original and two copies of the Brief Of Plaintiffs Elizabeth Dutton Sweet And Frederick H. Grein, Jr., As Executors Under The Will Of William H. Sweet, M.D., In Response To Government's Argument Regarding The Availability Of Private Insurance.

Thank you for your assistance.

Sincerely yours,

James B. Re

Enclosures
cc: Service List (*with enclosure, as shown on Certificate of Service*)
Karen W. Salon, Esquire

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.,	)	
Plaintiffs,	)	Nos. 00-274C, 00-292C, 01-434C (Consolidated) (Judge Firestone)
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., IN RESPONSE TO GOVERNMENT'S ARGUMENT REGARDING THE AVAILABILITY OF PRIVATE INSURANCE

I. INTRODUCTION

In its Order of September 11, 2003, the Court authorized the government to brief a possible defense that its counsel had raised orally, namely that the payment by insurance companies of certain of plaintiffs' costs and attorneys' fees reduces the government's obligations to the plaintiffs under Indemnity Agreement E-39. The government has now briefed that defense, arguing that it need not reimburse those of Dr. Sweet's defense costs that have been paid already by his medical malpractice insurer. In this brief, Dr. Sweet will respond to that argument, which appears at pp. 6-10 of the government's principal brief.[1]

[1] The government's principal brief is entitled, "Defendant's Brief in Response to the Court's September 11, 2003 Order Regarding Outstanding Issues of Indemnification Costs."

II. ARGUMENT

A. The Source Of Funds For Dr. Sweet's Defense In *Heinrich* Is Immaterial To The Government's Indemnity Obligation.

The government agreed to "indemnify and hold harmless [Dr. Sweet] from the reasonable costs of investigating, settling and defending claims for public liability." Agreement, Art. III, ¶ 3. The Agreement contains no exception or exclusion where private insurance covers part or all of those costs. Despite that irrefutable reality, the government insists that Dr. Sweet's malpractice insurance coverage relieves it of its obligation to indemnify and hold him harmless.

This Court has rejected similar arguments by the government in takings cases. For instance, in American Pelagic Fishing Co. v. United States, 55 Fed. Cl. 575, 592 (2003), Judge Bruggink awarded the plaintiff $37 million for the temporary regulatory taking of a fishing trawler. The court rejected the government's argument that the proceeds from an insurance policy precluded the plaintiff from recovering just compensation from the government: "The proceeds of an owner's insurance policy covering loss do not constitute just compensation from the government, nor does it mean that the government did not cause a complete diminution in value. The government cannot be the beneficiary of an insurance policy for which it did not pay." American Pelagic, 55 Fed. Cl. at 592.

Similarly, in Shelden v. United States, 34 Fed. Cl. 355 (1995), a case in which the government's filing of a *lis pendens* on property forfeited under RICO was deemed a taking of the mortgagee's interest, the government argued that the just compensation

should be offset by the proceeds of earthquake insurance paid to the mortgagee. Based in part upon the collateral source rule, the court rejected this argument, observing that "defendants are 'not permitted to avoid payment of full compensation for the injury inflicted merely because the victim has had the foresight to provide himself with insurance.'" Shelden, 34 Fed. Cl. at 372 (quoting Helfend v. Southern California Rapid Transit, 465 P.2d 61, 66-77 (Cal. 1970)) (Smith, C.J.).

B. Dr. Sweet's Malpractice Insurance Cannot Shield The Government From Its Contractual Indemnity Obligation.

1. The Government's "Plain Language" Argument Ignores The Plain Language.

The government argues that since Dr. Sweet and MIT were able to get someone else -- in this case, insurance companies, but the government's argument would apply equally if the payor were a rich uncle or a rich alumna -- to fund the defense of the *Heinrich* case, "there are no costs [for the government] to indemnify." Government's brief at 8. It claims that to "indemnify" means only to "reimburse for amounts paid," not to assume the costs in the first instance. *Ibid.* Thus, goes the argument, because someone else reached for his wallet first, so to speak, there is nothing *to* reimburse, and the indemnity obligation evaporates.

If the government's argument had credence, there would be hope for debtors everywhere: ignoring financial obligations would make them disappear, as if by magic. Indeed, the government treats the plaintiffs' insurance as if it were a conjurer's wand that solves both the plaintiffs' and the government's problem without cost, thereby making it inequitable to require the government to honor its promise. This idyllic approach ignores the harsh truth that insurance must be paid for in the real world, and the more it is used, the more it costs to renew. Thus, the

government's argument that the plaintiffs already have received from insurance the same benefit that the indemnity agreement would have conferred is simplistic and incorrect.[2]

In the real world of insurance premiums and indemnity contracts, the government has agreed to "indemnify" and "hold harmless" Dr. Sweet and the other plaintiffs. "'Hold harmless' means to assume all expenses incident to the defense of any claim and to fully compensate an indemnitee for all loss or expense, undiminished by the costs of defending a claim or litigation." New York Central Railroad Co. v. General Motors Corp., 182 F. Supp. 273, 291 (N.D. Ohio 1960). See also Amoco Canada Petroleum Co. v. Wild Well Control, Inc., 889 F.2d 585, 587(5th Cir. 1989) (under Texas law, "'hold harmless' means to assume all expenses incident to the defense of any claim and to fully compensate an indemnitee for all loss or expense")(citing Bank of El Paso v. Powell, 550 S.W.2d 383, 385 (Tex. Civ. App. 1977)); United States Fire Ins. Co. v. Chrysler Motors Corp., 505 P.2d 1137, 1141 (Or. 1973) ("An agreement to 'hold harmless' is generally held to include an obligation to defend, or to reimburse for the costs of defense, when an action within the terms of the agreement is filed against the indemnitee"). The fact that the government has thus far refused to pay is immaterial to its obligation; it still has to pay.

2. *Resort To Legislative History Is Unnecessary And Improper.*

The government next argues that to permit recovery of defense costs for which private insurance is available would run contrary to the legislative history of the Price-

[2] The fact that Dr. Sweet is deceased is immaterial to the legal principles that control the analysis of this case.

Anderson Act. This is both an incorrect statement and an improper attempt to circumvent the plain language of the Agreement.

First, the legislative history reveals no clear-cut intent to offset indemnity claims with whatever private insurance might be available to persons indemnified. To the contrary, the statutory indemnity provision was purposefully broad, encompassing those who, like Dr. Sweet, could be expected to have insurance coverage quite apart from his involvement with the reactor:

> The definition "person indemnified" means more than just the person with whom the indemnity agreement is executed. . . . The phrase "persons indemnified" also covers any other persons who may be liable . . . it is not meant to be limited solely to those who may be found liable due to their contractual relationship with the licensee. In the hearings, the question of protecting the public was raised where some unusual incident, such as negligence in maintaining an airplane motor, should cause an airplane to crash into a reactor and thereby cause damage to the public. Under this bill the public is protected and the airplane company can also take advantage of the indemnification and other proceedings.

S. Rep. No. 296, 85th Cong., 1st Sess. 1957, *reprinted in* 1957 U.S.C.C.A.N. 1818. The hypothetical airline alluded to in the Senate Report could hardly be thought to be without some insurance covering the incident, yet Congress saw fit to extend the government's indemnity obligation to it.

Moreover, there is no occasion even to look to legislative history here.

> Where the plain language of the statute would settle the question before the court, the legislative history is examined with hesitation to determine whether there is a

> clearly expressed legislative intention contrary to the statutory language. Sometimes the literal language of some part of a statute may seemingly contradict the intent of the statute taken as a whole. Absent a clear-cut contrary legislative intent, the statutory language is ordinarily regarded as conclusive.

Madison Galleries, Ltd. v. United States, 870 F.2d 627, 629-30 (Fed. Cir. 1989).

In the present case, the government is attempting to extrapolate limiting terms from the general statements of purpose reflected in the legislative history. "However, creation of an ambiguity in an otherwise clear and unambiguous statute, by reference to legislative history, is improper." United States v. Corning Glass Works, 586 F.2d 822, 825 (Cust. & Pat. App. 1978). This Court has ruled already that where the terms used in the Price-Anderson Act and the Indemnity Agreement are clear, the ordinary meaning of those terms control. Sweet v. United States, 53 Fed. Cl. 208, 220-21 (Fed. Cl. 2002).

The government made the same legislative history argument in its summary judgment brief (at pp. 31-35), and the Court rejected it. See Sweet v. United States, 53 Fed. Cl. at 224 ("While it is no doubt true that Congress' overarching rationale was to provide indemnification for the damages arising from a large-scale reactor failure with the Price-Anderson Act, it did not *limit* the availability of indemnification to such incidents"). Just as there is no basis for limiting indemnity to the feared "runaway reactor" or "meltdown" situations to which the government has alluded, there simply is no justification for limiting indemnity to "uninsurable" risks.

3. Insurance Industry Practice Does Not Support The Government's Position.

The government finally goes back to that imperfect comparison, the insurance industry, asserting that insureds are not permitted more than one defense. This argument, which refers to situations where multiple

insurance companies are obligated to defend the same claim under separate liability policies, is misplaced. As the government has taken pains to point out, Indemnity Agreement E-39 is not a liability policy, but an indemnity agreement – a different creature altogether. *See generally* Lee R. Russ and Thomas F. Segalla, Couch on Insurance 3d, § 103:4 (1997) (discussing distinction between liability insurance and indemnity contracts). Moreover, where there is a duty to defend, "[a]n insurance company cannot 'simply stand on the sidelines' because another insurance company performs its own contractual duties." West American Insurance Co. v. J.R. Construction Co., 777 N.E.2d 610, 620 (Ill. App. 2002), appeal denied, 787 N.E.2d 181 (2003).

If the parties intended to excuse the government from its indemnity obligation in the happy event that insurance turned out to be available, they could have dealt with it in the Agreement. Insurance companies invariably include so-called "other insurance" clauses in their liability policies, in order to limit their liability where other insurance may cover the same loss. *See* Lee R. Russ and Thomas F. Segalla, Couch on Insurance 3d, § 219:1 and 219:5 (1997 and Supp. 2003) (discussing types of "other insurance" clauses). The indemnity agreement at issue has no such provision.

III. CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in their principal brief concerning the scope of the government's contractual indemnity obligation to them, Dr. Sweet's executors respectfully request 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.[3]

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

By their attorneys,

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Dated: February 13, 2004

[3] Of course, if the parties cannot reach agreement concerning the specific amount of the judgment once the Court has determined the applicable boundaries, the parties will have to ask the Court to determine the amount of the judgment after whatever further proceedings the Court requires.

CERTIFICATE OF SERVICE

I, James B. Re, hereby certify that on this date I served the foregoing document by causing a copy to be delivered in the following manners to all counsel of record in this matter:

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