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

SECOND AMENDED COMPLAINT OF ELIZABETH DUTTON SWEET AND FREDERICK H. GREIN, JR, IN THEIR CAPACITIES AS EXECUTORS UNDER THE WILL OF WILLIAM H. SWEET

As and for their Second Amended Complaint, plaintiffs Elizabeth Dutton Sweet and Frederick H. Grein, Jr., in their capacities as executors under the will of William H. Sweet, M.D., say as follows.[1]

PARTIES AND JURISDICTION

1. The plaintiffs' decedent, Dr. Sweet, was an eminent neurosurgeon. At all times material hereto, Dr. Sweet was licensed to practice medicine in the Commonwealth of Massachusetts. For most of his career, and at all times material hereto, Dr. Sweet was on the faculty of the Harvard Medical School and the medical staff of Massachusetts General Hospital ("MGH"); from 1961 to 1977, he was chief of the neurosurgical service at MGH. He was a

[1] Dr. Sweet brought this action in May 2000, filing his Complaint on or about May 9, 2000, and his First Amended Complaint (which merely corrected a typographical error -- $500,000 instead of $500,000,000 -- in ¶ 8 of the Complaint) on or about May 12, 2000. Dr. Sweet died on January 22, 2001, and in May 2001, his duly appointed executors, Elizabeth Dutton Sweet and Frederick H. Grein, Jr., were substituted for Dr. Sweet as plaintiffs. Despite that substitution, for simplicity's sake, plaintiffs Elizabeth Dutton Sweet and Frederick H. Grein, Jr, in their capacities as executors under the will of William H. Sweet, M.D., generally are referred to throughout this Second Amended Complaint as "Dr. Sweet."

resident of Brookline, Massachusetts; Elizabeth Dutton Sweet is a resident of Brookline, Massachusetts.

2. This action is founded on an indemnity agreement (the "MIT Indemnity Agreement") entered into between the Massachusetts Institute of Technology ("MIT"), and the Atomic Energy Commission (the "AEC"), an agency of defendant United States of America duly authorized by act of Congress to bind the United States, and on a second indemnity agreement believed to exist between Associated Universities, Inc. ("AUI") and the AEC (the "Brookhaven Indemnity Agreement"). Under the MIT Indemnity Agreement and, on information and belief, the Brookhaven Indemnity Agreement, Dr. Sweet is entitled to indemnity by the United States from certain liabilities, as discussed more fully below. Dr. Sweet further seeks a declaration that the United States is obligated to indemnify him against future claims falling under the Brookhaven and MIT Indemnity Agreements.

3. The Nuclear Regulatory Commission has succeeded to the responsibilities of the AEC under 42 U.S.C. §2210 and under indemnity agreements of the type at issue in this case.

4. This Court has jurisdiction under 28 U.S.C. §1491, in that this action is founded upon an express contract with the United States. This Court has jurisdiction to award declaratory relief under 28 U.S.C. §2201.

FACTS

A. The MIT Indemnity Agreement.

5. In 1958, MIT, a nonprofit educational institution, completed the construction of a research nuclear reactor, known as "MITR-1." The reactor is powered by uranium enriched in the isotope 235. It was constructed with facilities -- including an operating room -- designed to facilitate its use in medical research and treatment.

6. Under the Atomic Energy Act of 1954, as periodically amended and now codified, in part, at 42 U.S.C. §2210, the AEC was authorized to enter into indemnity agreements with persons licensed to operate nuclear reactors. Such agreements were to bind the AEC, and through it, the

United States, to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from "public liability" resulting from "nuclear incidents."

7. On or about June 9, 1958, the AEC issued to MIT license no. R-37 to possess and operate MITR-1. The license has been in place, subject to periodic amendments, continuously from 1958 to the present. Copies of the license, and amendments through 1962, are on file with the Court as Exhibit A to Dr. Sweet's original Complaint.

8. On or about May 25, 1959, the AEC issued to MIT an interim indemnity agreement, a true and correct copy of which is on file with the Court as Exhibit B to Dr. Sweet's original Complaint. MIT accepted and signed the interim indemnity agreement on or about August 1, 1959. By it, the AEC agreed to indemnify MIT and other persons indemnified, as their interests may appear, from public liability in excess of $250,000 arising from nuclear incidents, to a limit of $500,000,000, including the reasonable costs of investigating and settling claims and defending suits for damage. The Interim Indemnity Agreement recited that it would be superseded in due course by the execution and issuance of a formal indemnity agreement.

9. Subsequently, the AEC issued and MIT accepted Indemnity Agreement No. E-39 (the MIT Indemnity Agreement), a true and correct copy of which is on file with the Court as Exhibit C to Dr. Sweet's original Complaint. By the terms of the MIT Indemnity Agreement:

a. The Agreement was effective from 12:01 A.M., June 9, 1958 forward, and superseded the interim indemnity agreement. (Art. 1, §5 and Attachment, Item 4.)

b. "The Commission undertakes and agrees to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from public liability." (Art. II, §1.)

c. "'Persons indemnified' means the licensee [MIT] and any other person who may be liable for public liability." (Art. I, §4.)

d. "'Public liability' means legal liability arising out of or resulting from a nuclear incident," with certain exceptions not here relevant. (Art. I, §5.)

e. "'Nuclear incident' means any occurrence or series of occurrences at the location or in the course of transportation causing bodily injury, sickness, disease, death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of the radioactive material," as well as other occurrences not here relevant. (Art. I, §2(a).)

f. The "location" means the MIT reactor building and the area immediately around it. (Attachment, Item 3.)

10. "Persons indemnified," "public liability," and "nuclear incident" are statutory terms taken from the Atomic Energy Act, and more particularly 42 U.S.C. §§2014 and 2210(c). These terms are used in the MIT Indemnity Agreement consistently with their statutory meanings, and with the purpose and intent of the Atomic Energy Act.

11. On information and belief, MIT has maintained private liability insurance relative to its operation of MITR-1 in an amount of at least $250,000, continuously since operations began in 1958 to the present.

B. The Brookhaven Indemnity Agreement.

12. AUI, a nonprofit educational and research institution, operated Brookhaven National Laboratory ("BNL") in Upton, New York from 1947 until 1998. Among the facilities at BNL are the AEC-licensed Brookhaven Graphite Research Reactor, which went into operation in 1950, and two other AEC-licensed reactors. On information and belief, each of these reactors was, like MITR-1, the subject of an indemnity agreement (collectively, the "Brookhaven Indemnity Agreement") between the AEC and AUI, whose terms were substantially similar to those of the MIT Indemnity Agreement.

C. The Heinrich Civil Action.

13. On or about September 21, 1995, Dr. Sweet was named as a defendant in a complaint filed in the United States District Court for the Eastern District of New York. Subsequently, the action was transferred to the District of Massachusetts. The action (herein, the

"Heinrich Civil Action") was pending in the United States District Court for the District of Massachusetts as *Evelyn Heinrich, et al. v. William H. Sweet, M.D., et al.*, Civil Action No. 97-CV-12134-WGY. The complaint was amended several times after the action was filed. A true and correct copy of the Heinrich plaintiffs' Second Amended Complaint is on file with the Court as Exhibit D to Dr. Sweet's original Complaint.

14. The plaintiffs in the Heinrich Civil Action filed a motion for leave to file a Fifth Amended Complaint, a true and correct copy of which is on file with the Court as Exhibit E to Dr. Sweet's original Complaint.

15. The Complaint, as amended, in the Heinrich Civil Action purports to state claims against which, under the MIT Indemnity Agreement and the Brookhaven Indemnity Agreement, the United States is obligated to indemnify Dr. Sweet. More particularly, the Complaint alleges:

a. That on June 14, 1951 Joseph Mayne, a patient of Dr. Sweet's, underwent boron neutron capture therapy ("BNCT") at Brookhaven. BNCT was a treatment for brain cancer that involved intravenous injection of a boron compound, followed by exposure to neutron radiation at a reactor. (Second Amended Complaint, ¶¶3, 14.)

b. That on March 6, 1957 a patient named Walter Carmen Van Dyke underwent BNCT in "an operating nuclear reactor" at Brookhaven. (Id., ¶16.)

c. That on January 18, 1961 Dr. Sweet administered BNCT to a patient named George Heinrich at the MITR-1 reactor. (Id., ¶9.)

d. That on November 13, 1960 a patient of Dr. Sweet's named Eileen Sienkewicz received BNCT at MITR-1. (Id., ¶11.)

e. That on April 16, 1961 a patient of Dr. Sweet's named Nassef Joseph received BNCT at MITR-1. (Fifth Amended Complaint, ¶20F.)

16. a. The Complaint further alleges that the administration of BNCT to the plaintiffs' decedents caused those decedents radiation-related injury and death, and that Dr. Sweet and others are liable to their estates and their survivors under a variety of legal theories.

b. Dr. Sweet's indemnity claim was reported and presented to the NRC with MIT's and MGH's in a letter dated November 8, 1995 from Francis C. Lynch, counsel to MIT. Since that time, numerous letters have been exchanged between counsel for MIT, Dr. Sweet, and MGH on the one hand, and the NRC through its Office of the General Counsel on the other. In those letters, MIT's, Dr. Sweet's, and MGH's position that they are entitled to be indemnified for any liability that they might be found to have to patients whom Dr. Sweet treated at MIT's AEC-licensed nuclear reactor, or their families, as well as their defense costs in claims presented by such persons, is spelled out very clearly.

Just as clearly, the NRC has rejected those claims. For example, the NRC's Office of the General Counsel summarized the NRC's position in a letter to Mr. Lynch dated May 4, 1999, well before the case of *Evelyn Heinrich, et al. v. William H. Sweet, M.D., et al.* began trial in the United States District Court for the District of Massachusetts: "[It is] 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. . . . In that light, we believe your tender was mistaken and we decline it."

Similarly, on September 15, 1999, when the trial of *Evelyn Heinrich, et al. v. William H. Sweet, M.D., et al.* 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., and his law firm, O'Malley and Harvey LLP:

> 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.

c. In addition to his efforts to obtain defense and indemnity from the government, Dr. Sweet paid his personal counsel, Mr. Harvey, and his law firm, O'Malley and Harvey LLP, to try to obtain coverage for him under medical malpractice insurance policies dating

back 35 years or more to the time of the events alleged in the Heinrich Civil Action. On July 17, 1996, Mr. Harvey wrote to Amerisure Insurance Company, successor to Michigan Mutual Liability Company, presenting the case for coverage under Michigan Mutual policies, nos. 36-10713, 36-13630, and 36-16288, respectively covering the periods September 1, 1959 to August 31, 1960, September 1, 1960 to August 31, 1961, and September 1, 1961 to August 31, 1962. (True and accurate copies of the policies are appended to this Second Amended Complaint.) On July 29, 1996, Amerisure responded by "confirm[ing] that we had coverage for Dr. Sweet during at least part of the period in question." Accordingly, Amerisure has provided Dr. Sweet with counsel in the Heinrich Civil Action as well as in this indemnity action against the government. In addition, Dr. Sweet has expended his own funds in the Heinrich Civil Action and in this action, as well as in obtaining defense and indemnity under the medical malpractice policies.

d. Condition 6 of the medical malpractice policies created a subrogation right in Amerisure. Given that fact, Amerisure is subrogated to Dr. Sweet's indemnity rights against the government to the extent that Amerisure paid "the reasonable costs of investigating ... and defending claims for public liability" against Dr. Sweet.

e. The "reasonable costs of investigating ... and defending claims for public liability" against Dr. Sweet include (1) Dr. Sweet's personal expenditures to obtain Amerisure's defense and indemnity undertaking; (2) Dr. Sweet's personal expenditures for services and disbursements in the Heinrich Civil Action; (3) Dr. Sweet's personal expenditures for services and disbursements in this action; (4) Amerisure's expenditures for services and disbursements in the Heinrich Civil Action; and (5) Amerisure's expenditures for services and disbursements in this action. Dr. Sweet's position is that however he met the costs of defending claims for public liability, whether from earnings or savings or by purchasing insurance, he has a contractual right to indemnity by the government for all such costs. In any event, Dr. Sweet is entitled to recover for himself all of "the reasonable costs of investigating ... and defending claims for public liability" that he paid himself, and to recover for the use and benefit of Amerisure all of "the reasonable costs of investigating ... and defending claims for public liability" that Amerisure paid.

f. Neither Dr. Sweet nor Amerisure would have been put to the expenses described in ¶ 16. e. if the government had met its obligations under the MIT Indemnity Agreement.

17. The Mayne and Van Dyke claims were dismissed just prior to trial. The Heinrich and Sienkewicz claims were tried in September-October, 1999, and resulted in jury verdicts against Dr. Sweet and against Massachusetts General Hospital for negligence, wrongful death, and punitive damages for wrongful death, as follows:

Plaintiff	**Count**	**Sweet**	**MGH**
Heinrich	Negligence	$250,000	$250,000
	Wrongful Death	$250,000	(Same)
	Death Punitives	$750,000	$1,250,000
Sienkewicz	Negligence	$500,000	Same
	Wrongful Death	$2,000,000	Same
	Death Punitives	$1,000,000	$2,000,000
TOTALS		$4,750,000	$6,250,000

When Dr. Sweet filed this action, judgment had not yet entered in the Heinrich Civil Action. Post-trial motions, including motions for judgment as a matter of law and for new trial, were pending. Since that time, post-trial proceedings in the United States District Court for the District of Massachusetts, the United States Court of Appeals for the First Circuit, and the Supreme Court of the United States have resulted in the jury verdicts against Dr. Sweet and against Massachusetts General Hospital being vacated in their entirety.

18. On March 22, 2000, the district court denied plaintiffs' motion to add Nassef Joseph as a plaintiff. The order was expressly without prejudice, however, to the right of Mr. Joseph's representatives to file a separate, related case, which they have done.

19. Plaintiffs also alleged that Dr. Sweet participated in a variety of other research projects and therapies involving radiation. In addition to Joseph, for example, the Fifth Amended Complaint asserted 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, but (as with the Joseph claims) without prejudice to their being re-filed in a separate action, which they have been. On information and belief, should patients other than Mayne, Van Dyke, Sienkewicz, and Heinrich assert claims, such claims are or may be subject to indemnity agreements to which the United States is a party, under which it is or may be obligated to indemnify Dr. Sweet.

20. The United States participated in the Heinrich/Sienkewicz proceedings, in that there were claims asserted against it under the Federal Tort Claims Act. In February, 2000 the court ruled that the FTCA claims would not lie, because the actions complained of were those of independent government contractors.

21. The district court's FTCA ruling did not foreclose a claim for contractual indemnity. In fact, the court also ruled, prior to trial, that the Price-Anderson Act (the Atomic Energy Damages Act, Pub. L. 85-256, Sept. 2, 1957) governed the dispute among the non-governmental parties, and made a preliminary ruling, "intended in no way to bind any subsequent tribunal," that the Brookhaven and MIT Indemnity Agreements cover the BNCT treatments that are the subject of the complaint. Heinrich v. Sweet, 62 F. Supp. 2d 282, 298-99 (D. Mass. 1999).

22. In defending the Mayne, Van Dyke, Heinrich, and Sienkewicz cases, and possibly others in the future, Dr. Sweet and his subrogated insurer, Amerisure, have incurred and/or will incur substantial defense costs that the United States is obligated, under the Brookhaven and MIT Indemnity Agreements, to indemnify. Those costs, including attorneys' fees, expert witness fees, and other expenses, have aggregated many hundreds of thousands of dollars, and continue to accrue.

23. At the time that Dr. Sweet filed this action in May 2000, the existing situation was as follows: In the Mayne, Van Dyke, Heinrich, and Sienkewicz cases, and possibly others in the future, Dr. Sweet may become obligated for substantial damages that the United States is obligated, under the Brookhaven and MIT Indemnity Agreements, to indemnify.

COUNT I: CONTRACTUAL INDEMNITY; MIT INDEMNITY AGREEMENT

24. Dr. Sweet hereby repeats and re-alleges the matters set forth in paragraphs 1 through 23, inclusive, as if fully set forth herein.

25. The United States is liable, under the MIT Indemnity Agreement, to indemnify Dr. Sweet against his costs in defending the Heinrich and Sienkewicz claims, however he met the costs of defending those claims, whether from earnings or savings or by purchasing insurance. In any event, Dr. Sweet is entitled to recover for himself all of "the reasonable costs of investigating ... and defending claims for public liability" that he paid himself, and to recover for the use and benefit of Amerisure all of "the reasonable costs of investigating ... and defending claims for public liability" that Amerisure paid.

26. The United States' failure to indemnify Dr. Sweet under the MIT Indemnity Agreement has caused and continues to cause him and his subrogated insurer, Amerisure, great damage, for which they are entitled to be made whole by the United States.

COUNT II: CONTRACTUAL INDEMNITY; BROOKHAVEN INDEMNITY AGREEMENT

27. Dr. Sweet hereby repeats and re-alleges the matters set forth in paragraphs 1 through 26, inclusive, as if fully set forth herein.

28. The United States is liable, under the Brookhaven Indemnity Agreement, to indemnify Dr. Sweet against his costs in defending the Mayne and Van Dyke claims, and against any liability he may have on those claims upon the entry of judgment, however he met or meets the costs of defending and paying those claims, whether from earnings or savings or by purchasing insurance. In any event, Dr. Sweet is entitled to recover for himself all of "the reasonable costs of investigating ... and defending claims for public liability" that he paid himself, and to recover for the use and benefit of Amerisure all of "the reasonable costs of investigating ... and defending claims for public liability" that Amerisure paid. In the event that the Mayne and Van Dyke claims ever result in any liability by Dr. Sweet, he also will be entitled to recover for himself any amounts

that he pays or is called upon to pay to satisfy such liability, and to recover for the use and benefit of Amerisure any amounts that it pays to satisfy such liability.

29. The United States' failure to indemnify Dr. Sweet under the Brookhaven Indemnity Agreement has caused and continues to cause him and his subrogated insurer, Amerisure, great damage, for which they are entitled to be made whole by the United States.

COUNT III: DECLARATORY JUDGMENT

30. Dr. Sweet hereby repeats and re-alleges the matters set forth in paragraphs 1 through 29, inclusive, as if fully set forth herein.

31. The Complaint in the Heinrich Civil Action alleges that patients Mayne, Van Dyke, Heinrich, and Sienkewicz were part of larger series of clinical trials of BNCT using the Brookhaven and MIT reactors, and involving "at least 66 patients." (Second Amended Complaint, ¶2.) They have sought, and been denied, class action status, and permission to "notify" "putative class members" of the pendency of the action. There is a very real possibility that other plaintiffs, some or all of whose claims may be subject to the indemnity obligations under the Brookhaven Indemnity Agreement, the MIT Indemnity Agreement, and possible other indemnity agreements, may join in the future or may commence separate actions against Dr. Sweet.

32. An actual controversy has arisen between Dr. Sweet and the United States as to the United States' obligations to indemnify Dr. Sweet against defense costs and potential liability in the case of claims brought by or on behalf of patients and/or their families.

WHEREFOR, Dr. Sweet prays that this Court enter judgment:

A. Awarding him as damages the amount of his defense costs in the Heinrich Civil Action, irrespective of how he met those defense costs, whether from earnings or savings or by purchasing insurance; or alternatively, awarding him personally the amount of his defense costs that he paid himself, and awarding him for the use and benefit of Amerisure all of his defense costs in the Heinrich Civil Action that Amerisure paid.

B. Awarding him as damages any amount for which he may be, or may become, liable in the Heinrich Civil Action, or alternatively, awarding him for the use and benefit of Amerisure all such amounts that Amerisure paid or pays;

C. Declaring the rights and liabilities of the parties under the Brookhaven and MIT Indemnity Agreements, and more particularly, declaring that the United States is obligated to indemnify Dr. Sweet against his defense costs and any potential liability in the case (at least) of any claim brought by or on behalf of any patient who received BNCT at Brookhaven or MIT, and/or their families; and

D. Awarding Dr. Sweet such other and further relief as is lawful and proper, whether for himself or for the use and benefit of Amerisure.

ELIZABETH DUTTON SWEET
AND FREDERICK H. GREIN, JR.,
AS EXECUTORS
By their attorneys,

/s/ JAMES B. RE
James B. Re
SALLY & FITCH LLP
225 Franklin Street
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Dated: February 24, 2005

APPENDIX TO
SECOND AMENDED COMPLAINT OF ELIZABETH DUTTON SWEET AND FREDERICK H. GREIN, JR, IN THEIR CAPACITIES AS EXECUTORS UNDER THE WILL OF WILLIAM H. SWEET

MICHIGAN MUTUAL LIABILITY COMPANY POLICIES,

NOS. 36-10713, 36-13630, AND 36-16288,

RESPECTIVELY COVERING THE PERIODS

SEPTEMBER 1, 1959 TO AUGUST 31, 1960,
SEPTEMBER 1, 1960 TO AUGUST 31, 1961, AND
SEPTEMBER 1, 1961 TO AUGUST 31, 1962.