No. S153852

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

AMERON INTERNATIONAL CORPORATION,
Plaintiff and APPELLANT,

v.

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, et al.,
Defendants and RESPONDENTS.

SUPREME COURT
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APPELLANT'S OPENING BRIEF

After a Decision By the Court of Appeal, First Appellate District, Division Five, Case No. A109755, San Francisco County Superior Court, Case No. 419929

COUNSEL FOR PETITIONER AMERON INTERNATIONAL CORPORATION

Jordan S. Stanzler (SBN 54620)
Stanzler Funderburk & Castellon LLP
180 Montgomery Street, Suite 1700
San Francisco, CA 94104
Telephone: (415) 677-1450
Facsimile: (415) 677-1476

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES . . . . -ii-

INTRODUCTION 1

STATEMENT OF FACTS AND PROCEDURAL HISTORY 3

A. THE TRIAL AND SETTLEMENT OF THE CONSTRUCTION DEFECT CASE 3

B. AMERON'S INSURANCE COVERAGE CHART 5

C. INA'S APPROVAL OF THE SETTLEMENT AND "LOW BALL" OFFER TO FUND A SMALL FRACTION OF IT 6

D. AMERON'S COMPLAINT 7

E. WAIVER AND ESTOPPEL ALLEGATIONS AND MOTION 8

F. DECISION OF THE SUPERIOR COURT 9

G. DECISION OF THE COURT OF APPEAL 12

H. 1988-89 INA PRIMARY POLICY (NO. 10777665) 14

I. UMBRELLA POLICIES SOLD BY PURITAN INSURANCE COMPANY 16

J. UMBRELLA POLICY SOLD BY OLD REPUBLIC INSURANCE COMPANY 17

K. PACIFIC EMPLOYERS INSURANCE COMPANY AND GREAT AMERICAN SURPLUS LINES INSURANCE COMPANY POLICIES 17

L. THE 1991-92 ICSOP POLICY 18

M. THE 1992-93, 1993-94 AND 1994-95 ICSOP POLICIES 19

STATEMENT OF APPEALABILITY 19

ARGUMENT 20

I. THE TRIAL BEFORE THE BOARD OF CONTRACT APPEALS IS A "SUIT", SINCE THE BOARD PERFORMS THE JUDICIAL FUNCTION OF ADJUDICATION 20

A. In Ordinary Usage, "Suit" Includes a Trial Before an Administrative Agency 20

B. "Suit"Also Has A Specialized Meaning Here, Since Congress Defined Litigation Before the Board As A "Suit" 24

C. *Foster-Gardner* Does Not Apply to an Administrative Agency that Adjudicates a Dispute 29

D. If *Foster-Gardner* Precludes Coverage For A Trial Before The Board Of Contract Appeals, Then *Foster-Gardner* Should Be Modified Or Reversed 30

II. THE 1988-89 INA POLICY PROVIDES COVERAGE FOR *"CLAIMS"* AS WELL AS "SUITS"; AND FOR "DAMAGES" INCURRED OUTSIDE OF A COURT 35

III. EACH PURITAN AND OLD REPUBLIC UMBRELLA POLICY CONTAINS TWO INSURING AGREEMENTS -- THE SECOND PROVIDES THE UMBRELLA COVERAGE FOR INVESTIGATION AND SETTLEMENT OF "*CLAIMS*" AS WELL AS "SUITS" 37

IV. THE "ULTIMATE NET LOSS PROVISION" IN THE PACIFIC AND GREAT AMERICAN POLICIES COVERS "DAMAGES" PAYABLE FOR THE SETTLEMENT OF THE GOVERNMENT'S "LOSSES" 43

V. 1991-92 ICSOP POLICY'S COVERAGE FOR "SUITS" APPLIES TO THE LITIGATION BEFORE THE BOARD 44

VI. THE 1992-1995 ICSOP POLICIES PROVIDE COVERAGE ... 44

VII. THE COMPLAINT PROPERLY ALLEGED WAIVER AND ESTOPPEL BY ALLEGING KNOWING, INTENTIONAL VIOLATION OF REGULATIONS REQUIRING THE INSURANCE COMPANIES TO EXPLAIN THEIR REASONS FOR DENIAL OF COVERAGE 45

CONCLUSION 48

CERTIFICATE OF WORD COUNT 50

TABLE OF AUTHORITIES

Cases Pages

Aetna Cas. & Surety Co. v. Commonwealth of Kentucky,
(Ky. 2005) 179 S.W.3d 830 31

AIU Ins. Co. v. Superior Court,
(1990) 51 Cal. 3d 807 . . . . 31- 32

Aire Frio, S.A. v. United States Fidelity & Guarantee Co.
(1970) 309 F. Supp 1388 (D. Canal Zone) 24

Ameron International Corporation v. Insurance Company of the State of Pennsylvania, et al.,
150 Cal. App. 4th 1050 (2007) 19

Aviles v. Lutz,
(10th Cir. 1989) 887 F.2d 1046 28

Avondale Industries, Inc. v. Travelers Indem. Co.,
(2d Cir. 1989) 887 F.2d 1200 17

A.Y. McDonald Indus. v. Insurance Co. of N. Am.
(Iowa 1991) 475 N.W.2d 607 21

Campbell Soup v. Liberty Mutual Insurance
(1988) 239 N.J. Super. 488, 497, *aff'd* 571 A. 2d 909 ((N.J. Superior App. Div.), *cert. denied*, 584 A.2d 230 22

Century Indemnity Co. v. London Underwriters
(1993) 12 Cal. App. 4th 1701 39

Century Indemnity Wells Fargo Bank, N.A. v. California Insurance Guarantee Association (1995) 38 Cal. App. 4th 936 39

Cherokee Nation of Oklahoma v. Leavitt,,
(2005) 125 S. Ct. 1172 . . . . 11, 12, 13, 29, 33

Chodos v. Insurance Co. of North America
(1981) 126 Cal. App. 3d 86 34

City of Edgerton v. General Casualty Co.
(1994) 517 NW2d 463 31

Coakley v. Maine Bonding & Casualty Co.,
(N.H. 1992) 618 A.2d 777 17

Coco Brothers, Inc. v. Pierce
(1984) 741 F.2d 675 (3 Cir.) 25

Community Unit School District No. 5 v. Country Mutual Insurance Co.
(1981) 95 Ill. App. 3d 272 22

Compass Ins. Co. v. City of Littleton
(1999) 984 P.2d 606 31

County of San Diego v. Ace Property & Casualty Insurance
(2005) 37 Cal. 4th 406 . . . . 41, 42

Crane v. State Farm & Cas. Co.
(1971) 5 Cal. 3d 112 30

Critz v. Farmers Ins. Group
(1964) 230 Cal. App. 2d 788 34

DeMalherbe v. International Union of Elevator Constructors
(1978) 449 F. Supp. 1335 (N.D. Cal.) 28

Fireman's Fund Ins. Co. v. Superior Court,
(1997) 65 Cal. App. 4th 1205 . . . . 21, 22

Foster-Gardner, Inc. v. National Union Fire Ins. Co.,
18 Cal. 4th 857 (1998) 2, 3, 10, 12, 21, 28, 29, 30, 31

Greenfield Mills, Inc. v. Governor O'Bannon,
(N.D. Ind. 2002) 189 F. Supp. 2d 893 28

Hamilton v. Oakland School District
(1933) 219 Cal. 322 33

Hardwick Recycling & Salvage, Inc. v. Acadia Ins. Co.
(2004) 869 A2d 82 31

Hightower v. Farmers Ins. Exchange
(1995) 38 Cal. App. 4th 853 34

Honeywell, Inc. v. Consumer Product Safety Commission,
(D. Minn. 1983) 566 F. Supp. 500 28

Hulett v. Farmers Ins. Exchange
(1992) 10 Cal. App. 4th 1051 34

Johnson Controls, Inc. v. Employers Ins. Of Wausau,
(Wis. 2003) 665 N.W.2d 257 31

MacKinnon v. Truck Insurance Exchange
(2002) 31 Cal. 4th 635 . . . . 20, 32

Melvin v. Pence (1942)
130 F. 2d 423 (D.C.Cir.) 23

Montrose Chemical Corporation v. Admiral Insurance Co.
(1995) 10 Cal. 4th 645 32

Padilla Construction Co, Inc. v. Transportations Ins. Co.
(2007) 150 Cal. App. 4th 984 39

Palmer v. Financial Indem. Co.
(1963) 215 Cal. App. 2d 419 34

Powerine Oil Co, Inc. v. Superior Court of Los Angeles
(2005) 37 Cal. 4th 377 . . . . 10, 40, 42

R.T. Vanderbilt Co., Inc. v. Continental Casualty Co.
(Ct. 2005) 870 A.2d 1048 . . . . 21, 31

Safeway Moving & Storage Corp. v. Aetna Insurance Co.
(1970) 317 F. Supp 238 (E.D.Va.), *aff'd* 452 F.2d 79 (1971)(4th Cir.) . . . 23

S&E Contractors, Inc. v. United States
(1972) 406 U.S. 1 28

Shade Foods, Inc v. Innovative Products Sales & Marketing, Inc.
(2000) 78 Cal. App. 4th 847 34

Southwest Marine, Inc. v. United States
(1988) 680 F. Supp. 1400 (N.D.Cal.), reconsideration denied,
(1988) 680 F. Supp. 327 27

State Farm Mut. Auto Ins. v. Crockett
(1980) 163 Cal. App. 3d 352 37

Taranow v. Brookstein
(1982) 135 Cal.App.3d 662 21

Travelers Indemnity Co. of Illinois v. INA
(1995) 886 F. Supp. 1520 (S.D. Cal.) 37

TRB Invest, Inc. v. Fireman's Fund Ins. Co.
(2006) 40 Cal. 4th 19 24-25

U.S. v. Lockheed
(1987) 817 F. 2d 1565 (Fed. Cir.) 28

United States v. Utah Construction & Mining Co.,
(1966) 384 U.S. 394 . . . . 2, 20, 29

Waller v. Truck Ins. Exchange, Inc.
(1995) 11 Cal. 4th 1 31

Walters v. American Ins. Co. (1960)
185 Cal. App. 2d 776 34

White v. Western Title Co.
(1985) 40 Cal. 3d 870 31

STATUTES

41 U.S.C

§601 7
§§605-609 . . . . 1, 25
607(d) 1, 25, 27
609(a)(1) 6, 25
609(d) 6, 7, 25, 27
§610 27

43 C.F.R.

§4.107 27

10 C.C.R.
§2695.2(f) 46
§2695.4(a) 46
§2695.7(b)(1) 45

INTRODUCTION

The question presented for review by this Court is whether an actual trial of twenty-two days before a federal administrative law judge constitutes a "suit", as that term is used in a general liability policy which does not define "suit". Ameron International Corporation ("Ameron") submits that the question is easy to answer. The ordinary person understands that an actual trial is a "suit".

The trial in this case took place before the Hon. Cheryl Scott Rome, an administrative law judge of the U.S. Department of Interior Board of Contract Appeals. The purpose of the trial was to determine whether Ameron was responsible for construction defects in an aqueduct built under contract with the U.S. Department of Interior, Bureau of Land Management. The United States Congress has established boards of contract appeals in the various federal agencies to provide a federal contractor with the choice of litigating a contract dispute either before the agency or before the U.S. Court of Federal Claims. Congress has enacted certain statutes that make the two forums equivalent to each other, providing concurrent jurisdiction over contracts involving the United States. To that end, Congress has defined litigation before the Board as a "suit"; provided that a "suit" filed before the Board can be transferred to federal court; and provided that a "suit" filed in federal court can be transferred to the Board.[1] To establish equivalency between the two forums, Congress has further provided that the administrative law judge of the Board has the same authority as a federal judge to issue subpoenas, take testimony, and award damages.[2] The U.S.

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[1] See 41 U.S.C. §§ 605-609 discussed below.
[2] See 41 U.S.C. § 607(d) discussed below.

Supreme Court has long recognized that the Board of Contract Appeals acts in a "judicial capacity". *See, e.g., United States v. Utah Construction & Mining Co.* (1966) 384 U.S. 394, 422.

In this case the Court of Appeal reasoned that litigation before the Board does constitute a "suit" under an insurance policy that does not define the term "suit". Nevertheless, the Court believed that it was bound by "dicta" in *Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal. 4th 857 ("*Foster-Gardner*"), to rule that a trial before an administrative agencies does not constitute a "suit".[3]

Ameron respectfully submits that the Court of Appeal's interpretation of "dicta" is erroneous and that this Court never suggested in *Foster-Gardner* that the meaning of "suit" does not include an actual trial before a tribunal empowered to award money damages. The Court of Appeal ignored the important caveat in *Foster-Gardner* that this Court was concerned with insurance coverage for an agency order (not a trial); and that the agency order did not commence either a lawsuit or an adjudicative procedure before an administrative tribunal.[4]

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[3] "Were we writing on a blank slate, we would conclude that a knowledgeable government contractor, like Ameron, would reasonably expect that the IBCA litigation was a 'suit seeking damages' that triggered insurance coverage in a policy worded like the one in *Foster-Gardner*. But we are not...Because the administrative proceedings in *Foster-Gardner* involved a pollution remediation order, we might fairly regard its broad rule as dicta when applied to the very different administrative proceedings in this case... .While we may believe the adjudicatory proceedings of the IBCA at issue here should trigger coverage under the policy language examined in *Foster-Gardner*, we are mindful of our subordinate role in the judicial hierarchy." Slip opinion at 23-24.

[4] *See Foster-Gardner* at 878: "As the Court of Appeal acknowledged, ' A Determination and Order does not commence either a

It defies common sense to say that a trial is not a "suit". Congress itself has defined the proceedings before the Board as a "suit". Furthermore, the common, ordinary meaning of "suit" includes not only an action filed in a court, but also the use of legal process to secure a right before any tribunal. Thus, the ordinary layperson would understand that a trial before the Board of Contract Appeals is indeed a "suit".

Ameron argues, in the alternative, that *Foster-Gardner* should be modified, clarified, or reversed, if indeed this Court intended to say in that case that an actual trial is not a "suit."

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. THE TRIAL AND SETTLEMENT OF THE CONSTRUCTION DEFECT CASE

Ameron subcontracted with Peter Kiewit Sons' Co. to build siphons (large pipes) made of pre-stressed concrete for the U.S. Bureau of Reclamation, as part of the Central Arizona Project, which carries water from the Colorado River to Arizona cities. Construction took place between 1975 and 1980. AA 1964-1965. In October, 1990 the Contracting Officer of the Bureau determined that there were defects in the siphons, requiring replacement to avoid a catastrophic failure. In a final decision of the Contracting Officer dated September 29, 1995, the government sought over $40 million due to alleged manufacturing defects in the siphons. The government alleged *inter alia*, that the wire used to wrap the concrete pipes was defectively manufactured; and that the wire was not encased properly with cement and mortar slurry. On December 13, 1995 Ameron filed a

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lawsuit or an adjudicative procedure before an administrative tribunal. It is simply an order from an administrative agency'".

Complaint before the U.S. Department of Interior Board of Contract Appeals, to contest the decision of the Contracting Officer. AA 1964[5]. Ameron asserted that it had fully complied with all specifications required by the Bureau, which designed the siphons. The Bureau of Reclamation filed an Answer and Counterclaim on January 26, 1996, which incorporated the allegations of the Contracting Officer. AA 1975. Ameron thereafter filed a motion for partial summary judgment on liability, which Administrative Law Judge Cheryl Scott Rome denied in a forty-four page decision dated June 8, 1999, finding that there were genuine issues of material fact in dispute, namely whether the corrosion of the pipes was caused by design defects (the responsibility of the Bureau) or by construction defects (the responsibility of Ameron). AA 1998-2041. Trial commenced on November 6, 2000 with the government calling numerous engineering witnesses to testify that defects in the manufacturing process caused the siphons to corrode. These witnesses testified that the wire used to encase the mortar of the pipes had been manufactured improperly. Ameron cross-examined the government's witnesses to establish that the wire met the specifications set by Bureau; and that excessive chlorides (salt) in the soil caused corrosion of the pipes. Trial continued to December 15, 2000. After testimony consuming 6,000 pages

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"AA" refers to Appellant's Appendix. The action was prosecuted and paid for by Ameron in the name of Peter Kiewit Sons' Company, since Kiewit was the prime contractor with the government; since the Government alleged that the defects were caused by Ameron; and because Ameron had agreed to indemnify and defend Kiewit in connection with the construction of the siphons. Kiewit is an additional insured on the Ameron policies. In this action Ameron is seeking insurance coverage for itself and on behalf of Kiewit.

of transcript,[6] the parties engaged in mediation, which led to a settlement on January 21, 2003, in which Ameron agreed to pay the government $10 million.

B. AMERON'S INSURANCE COVERAGE CHART

The government alleged that the wire and mortar used in the siphons deteriorated continually and progressively, over a period of almost twenty years. Ameron accordingly notified its primary, umbrella and excess insurance companies who provided general liability coverage in the period 1978-1997. A chart summarizing this coverage is attached to Ameron's complaint in this matter (AA-1108-1112) and is reproduced as an exhibit to the Court of Appeal's decision.

Truck Insurance Exchange ("Truck") provided primary coverage in the period 1978-88; the Insurance Company of North America ("INA") provided primary coverage in the period 1988-1992; and Zurich Insurance Company provided primary coverage in the period 1992 -1996.

Between July 1, 1978 and August 1, 1987 Pacific Employers Insurance Company ("Pacific"), Puritan Insurance Company ("Puritan"), Old Republic Insurance Company ("Old Republic"), Twin City Fire Insurance Company ("Twin City"), Transcontinental Insurance Company ("Transcontinental") and Great American Insurance Company ("Great American") provided first layer excess of excess/umbrella policies over the Truck primary policies. For the period April 15, 1987 to July 1, 1988 International Insurance Company ("International") provided first layer excess/umbrella policies over Truck's primary policy. From July 1, 1987 to

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The trial transcript is found in the Appellant's Appendix at AA 2289 to AA 6630.

July 1, 1988 St. Paul Surplus Lines Insurance Company ("St. Paul") provided a second layer excess policy.

For the period August 1, 1988 to August 1, 1989 International Insurance Company ("International") issued a first layer excess/umbrella policy over the INA primary policy. St. Paul issued a second layer excess policy.

During the period August 1, 1989 to August 1, 1991 International provided a first layer excess/umbrella policy over the INA primary policy. Harbor Insurance Company ("Harbor") and Insurance Company of the State of Pennsylvania ("ICSOP") provided second layer excess coverage.

For the period August 1, 1991 to December 1, 1995 ICSOP provided a first layer excess/umbrella policy over the underlying primary policies.

C. INA'S APPROVAL OF THE SETTLEMENT AND "LOW BALL" OFFER TO FUND A SMALL FRACTION OF IT

Ameron first provided notice to INA on October 29, 1990 (AA 931) and provided subsequent notice in 1992 (AA935), 1995 (AA939) and 1996 (AA 958). INA did not issue a reservation of rights letter until May 8, 1998 (AA 961), which did not express any reservation of rights about the forum chosen.

INA monitored the litigation closely and attended the mediation session which resulted in the settlement between Ameron and the Government. INA approved of the decision to settle the case for $10 million and offered to pay $750,000 towards it (AA 923), but Ameron rejected this sum as insufficient, since Ameron had incurred $10 million to settle with the Government and another $10 million in defense costs and expert witness fees during the trial. Ameron subsequently entered into a settlement with Truck in which Truck paid certain sums with respect to the litigation in

question.[1]

D. AMERON'S COMPLAINT

In April 2003 Ameron filed a complaint, in its own name, and as an assignee of Kiewit's rights, against the insurance companies that had failed or refused to provide coverage or pay for the settlement with the Bureau. The complaint alleges causes of action for breach of contract, breach of the covenant of good faith and fair dealing, declaratory relief, waiver and estoppel, and contribution. The gist of the complaint is that the insurance companies failed to defend or settle Ameron in the litigation before the Board of Contract Appeals, failed to indemnify Ameron for its settlement with the government, and failed to investigate the potential for coverage.

The complaint alleges that the litigation before the Board constitutes a "claim", a "civil proceeding" and a "suit" within the meaning of the respective insurance policies, in which the Government alleged that it suffered monetary damages because of "property damage" to the Government's property.

The complaint alleges that the Board acts in a "judicial capacity" when conducting hearings or deciding contested issues of fact. Ameron also alleged that pursuant to the Contract Disoutes Act of 1978, 41 U.S.C. §601, *et seq.*, Ameron had the choice of forum: it had the choice of litigating before the Board of Contract Appeals or before the United States Court of Federal Claims.

Ameron alleged that the various insurance companies denied coverage on grounds that litigation before the Board is not a lawsuit in court; that the insurance companies never asserted this position prior to

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[1] The settlement was confidential; the complaint does not indicate the amount of the settlement or whether the settlement was for defense costs or indemnity costs incurred by Ameron.

being sued; that the insurance companies remained silent when they had a duty to speak; and that Ameron could have chosen to litigate in the U.S. Federal Court of Claims, had the insurance informed Ameron that they provide coverage only for litigation in court only; and not for the same litigation before the Board of Contract Appeals. Ameron accordingly asserted that the insurance companies should be estopped from denying coverage, when they remained silent when they had a duty to set forth the their coverage position.

Ameron also sought a declaratory judgment that Ameron could select a single year of "vertical"coverage and could thus decide which insurance companies providing coverage should pay, and the order in which they should pay.

Ameron also alleged a cause of action for contribution, as an assignee of Truck, seeking equitable contribution from INA and Zurich for the amount paid by Truck.

E. WAIVER AND ESTOPPEL ALLEGATIONS AND MOTION

Ameron alleged that each of its insurance companies should be estopped from denying coverage, because they failed to inform Ameron that there was no coverage for litigation before the Board of Contract Appeals. Ameron relied to its detriment on this silence, since Ameron could have proceeded in the Court of Claims had the insurance spoken when they had a duty to speak.

On May 17, 2004 Ameron filed a Motion to Estop INA from arguing that there is no coverage for proceedings before the Board on grounds that INA had specifically approved of the settlement and had never mentioned that there was no coverage for litigation before the Board. AA 911. The motion asserted that INA had received notice of the Government's claims in

1990, 1992, and September 27, 1995. AA 913. Having heard no objections to coverage, Ameron filed its complaint in the Board of Contract Appeals on December 13, 1995. AA 947-956. Ameron provided further notice of the Board litigation on September 11, 1996. AA 958. INA did not issue a reservation of rights letter until May 8, 1998 (AA 961), which did not state that there was no coverage for litigation before the Board. The Declaration of James Somberg accompanied the motion stating that INA participated in a mediation between January 29, 2001 and February 2, 2001, and approved of the decision to settle the case for $10 million. AA 923. The Superior Court denied the motion as procedurally improper, on grounds that it was a supplemental opposition to the demurrer, but indicated that the Plaintiff could raise the issue of estoppel in the future. AA 1047.

F. DECISION OF THE SUPERIOR COURT

In granting demurrers to the Third Amended Complaint, the Superior Court made inconsistent, contradictory rulings, finding both that the litigation before the Board was a claim and was not a claim; but that there was no coverage, in any event:

1) "INA does not owe a duty to defend in litigation before the Board of Contract Appeals *as it is a 'claim'*" and "according to the Defendant's specific policy language, a 'claim' does not trigger a duty on the part of the insurer". (Emphasis added) AA 4:16-17; AA 5:28-6:1.

2) "Defendant [Pacific Employers] had no duty to settle the litigation before an administrative proceeding because the matter before the Board of Contract Appeals was a suit and *not a claim*". (Emphasis added) AA 7:12-14.

"Any settlement of the litigation brought before the Board of Contract Appeals does not constitute "damages", as the litigation is not before a court of law, but rather an administrative body". AA 7:16-18.

The Superior Court ignored the provisions of the INA policy which impose a duty to reimburse the payment of claims, namely the Deductible Endorsement, the definition of Loss Adjustment Expense in that endorsement, and the definition in the policy of "suit" as a "civil proceeding." The Court did not recognize that the term "suit" is defined as a "civil proceeding" in that policy. Nor did the Court recognize that these provisions are different from the provisions of the standard policy at issue in the *Foster-Gardner* case.

The Court rejected Ameron's claims of waiver and estoppel on grounds that "no applicable regulation that imposes an affirmative duty to speak exists. . .as a matter of law, Defendant had no duty to speak and its actions cannot constitute waiver or estoppel." AA 5:17-18. The Court made no mention of the regulations which Ameron did cite, which do impose a duty to speak. The Superior Court recognized that Twin City "will defend any claim or suit" but held that there was no duty to defend because "the litigation brought before the Board of Contract Appeals does not constitute 'damages', as the litigation is not before a court of law but rather an administrative body", citing *Powerine.* (AA 11:3-8) For the same reason, there was no duty to settle. The Court stated that "plaintiff has not alleged sufficient facts showing that Defendant was obligated to settle "claims" (AA 7:18-20). The Court ignored those provisions in the policy stating that Twin City will pay "all expenses incurred by the Insured or the Company in the investigation, negotiation, settlement or defense of any claim or suit seeking damages".

The court sustained the demurrer of International Insurance Company for the same reasons given as to Twin City's demurrer (AA 14:22-26), but gave no consideration to the definition in the International policy of "suit" as a "civil proceeding" ; or that the International will pay both "damages" and "expenses" incurred "to investigate, negotiate, settle or defend any claim or suit".

Likewise, the court sustained the demurrer of St. Paul Insurance Company (AA 14-15), without considering that its policy will indemnify for "loss", which is defined as "the sum paid as damages in settlement of a claim or in satisfaction of a judgment."

Similarly, the court sustained the demurrer of Pacific Employers Insurance Company (AA 7-9) and Great American Insurance Company (AA 13) for the same reasons, without considering that those policies indemnify for "ultimate net loss", defined as "the sum paid or payable in cash in the settlement or satisfaction of losses for which the insured is liable either by adjudication or compromise."

In similar fashion, the court upheld the demurrer of the Insurance Company of the State of Pennsylvania (AA 16-17) on grounds that "damages" can only be awarded by a court, but never considered the policy language that provides coverage for "expenses" as well as "damages." Finally, the court upheld the demurrers of Old Republic (AA 10) and Twin City (AA 11-12), without considering that their policies provide coverage for "ultimate net loss", defined as the total sum which the insured shall pay through "adjudication or compromise" and covers the "litigation, settlement, adjustment and investigation of claims or suits." The demurrer of Transcontinental was also sustained. AA 12.

The court also ruled that there was no justiciable controversy as to any excess or umbrella insurance company. AA 9:1-5. The Court dismissed the allegations of bad faith made against all the insurance companies, since the Court determined there was no coverage.

G. DECISION OF THE COURT OF APPEAL

The Court of Appeal issued a lengthy decision, affirming the decision of the Superior Court as to some demurrers and reversing the decision as to other demurrers. The Court reluctantly followed and applied *Foster-Gardner* with respect to those policies in which the insurance company agrees to defend a "suit", but does not define the word "suit". The Court noted that "[t]he IBCA proceeding at issue here was, by any measure, an adjudicative administrative hearing. It was commenced by the filing of a notice and complaint and was presided over by a judge governed by federal evidence rules and charged with setting damages for an alleged contract breach". Slip Opinion at 23.

> Were we writing on a blank slate, we would conclude that a knowledgeable government contractor, like Ameron, would reasonably expect the IBCA litigation was a "suit seeking damages" that triggered insurance coverage in a policy like the one in *Foster-Gardner*. But we are not...Because the administrative proceedings in *Foster-Gardner* involved a pollution remediation order, we might fairly regard its broad rule as dicta when applied to the very different administrative proceedings in this case. But, " '[e]ven if properly characterized as dictum, statements of the Supreme Court should be considered persuasive...' " [citations omitted]...
>
> While we may believe that the adjudicatory proceeding before the IBCA at issue here should trigger coverage under the policy language examined in *Foster-Gardner*, we are mindful of our subordinate role in the judicial hierarchy. [citation] Thus, to the extent the language of the policies before us is consistent with the policies' language in *Foster-Gardner*,

> *Powerine I*, *Powerine II* and *Ace*, we are bound by principles of stare decisis to follow those cases.[citation]. Slip Opinion at 23-24.

The Court therefore ruled that there was no coverage under these policies:

> 1988-89 INA primary policy
>
> 1992-95 umbrella policies of the Insurance Company of the State of Pennsylvania
>
> 1979-81 umbrella policies of Puritan Insurance Company
>
> 1981-82 umbrella policy of Old Republic Insurance Company
>
> 1978-79 excess policy issued by Pacific Employers
>
> 1986-87 excess policy issued by Great American Insurance Company
>
> 1991-1992 ICSOP umbrella policy (no defense costs, but indemnity costs covered).

The Court of Appeal reversed as to those insurance policies which provided for a duty to defend a "suit" and defined as "suit" as "civil proceeding in which damages because of ...'property damage' to which this insurance applies are alleged" and includes an "arbitration" seeking damages. The court held that the term "civil proceeding " is broad enough to cover litigation before the Board of Contract Appeals. Slip Opinion at 26-29. The Court also held that the definition of "suit" does not limit "damages" to money order by a court: the provision to defend an arbitration proceeding alleging damages requires a definition of "damages" that is broader than money ordered by a court. *Id.* at 26. The court accordingly found that the following policies provide coverage for the litigation before the Board of Contract Appeals:

1989-1992 INA primary policies

1988-1991 International umbrella policies

1982-1985 Twin City umbrella policies

1989-1990 Harbor second layer excess/umbrella policy

1990-1991 ICSOP umbrella policy

1991-1992 ICSOP umbrella policy (indemnity only)

1987-89 St. Paul excess policies.

With respect to the 1991-1992 ISOP Policy, the Court held that Ameron was not entitled to defense coverage, but was entitled to indemnity coverage. With respect to the 1985-1986 policy, the Court ruled that the trial court erred by denying Ameron leave to amend to properly plead the Transcontinental policy. The Court sustained the demurrers on the cause of action for waiver and estoppel, finding that the insurance companies had "no duty to speak" to Ameron.

Ameron seeks review only as to those policies as to which the Court of Appeal found no coverage, and the ruling on waiver and estoppel.

H. 1988-89 INA PRIMARY POLICY (NO. 10777665)

The insuring agreement provides: "The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of A. bodily injury or B. property damage to which this insurance applies, caused by an occurrence and the Company shall have the right and duty to defend any suit against the Insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the Company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the Company's liability has

been exhausted by payment of judgments or settlements." AA 00294. The terms "suit" and "claim" are not defined in the policy.

The Deductible Endorsement provides, however, that Ameron has entered into a Claims Service Agreement with ESIS, Inc. (a company related to INA) under which ESIS will provide "investigation, defense and settlement services . . . in connection with claims made or suits brought" under the policy. AA 303. Accordingly, INA shall not have any duty "to provide investigation, defense or settlement services with respect to such claims or suits." Nevertheless, the Deductible Agreement of the 1988-89 policy goes on to provide that INA will pay for the settlement of a claim or suit; and will also pay its share of defense costs incurred in defending that claim:

> All Loss Adjustment Expense incurred as a result of any Occurrence to which this policy applies shall be apportioned between the Named Insured and the Company as follows:
> a) If the amount of the Judgment or settlement exceeds the amount of the Deductible-Per Occurrence, all Loss Adjustment Expense in connection therewith shall be borne by the Named Insured and the Company in the same proportion as their respective obligations under this policy for payment of the amount of the judgment or settlement. (AA 303-304; 342).

The Deductible Endorsement states that "Loss Adjustment Expense" means:

> a) attorneys' fees for professional services rendered in connection with *claims* under this policy, plus
> b) court costs and other expenses in connection with investigation, defense or settlement of *claims* under this policy, such as fees for medical examinations, expert testimony, stenographic services, witnesses and summonses, copies of documents and photographs; also premium on bonds to release attachments, premiums on appeal bonds and the amount of interest on judgments. (Emphasis added) (AA 304; 343).

Thus, for example, INA will pay 90% of the defense costs and 90% of the settlement amount, if a claim settles for $1 million and a $100,000 deductible applies.

I. UMBRELLA POLICIES SOLD BY PURITAN INSURANCE COMPANY

Puritan Insurance Company sold an "Umbrella Liability Policy" to Ameron for July 1, 1979-July 1, 1980 and from July 1, 1980 to July 1, 1981. AA 539-540. The Policy contains two "Insuring Agreements". Insuring Agreement I entitled " I. Coverage" provides that "The Company agrees ... to indemnify the Assured for all sums which the Assured shall be obligated to pay a) imposed by law, or b) assumed under contract or agreement...for damages on account of ...ii) property damage...caused by or arising out of each occurrence happening anywhere in the world". AA 539.

The second Insuring Agreement is entitled "II. Limit of Liability" and provides that "The Company shall only be liable for the ultimate net loss the excess of either a) the limits of the underlying insurances as set out in the attached schedule in respect of each occurrence covered by said underlying insurances, or b) the amount set out in item (c) of the Declarations [i.e., $25,000] ultimate net loss in respect of each occurrence not covered by said underlying insurances..."

The term "ultimate net loss" is defined as "the total sum which the Assured, or his Underlying Insurers, as scheduled, or both, become obligated to pay by reason of ...property damage...wither through adjudication or compromise, and shall also include hospital, medical, and funeral charges and all sums paid as salaries, wages, compensation, fees, charges and law costs, premiums on attachment or appeal bonds, interest, expenses for doctors, lawyers nurses and investigators and other persons

and for litigation, settlement, adjustment of investigation of claims and suits which are paid as a further consequence of any occurrence covered hereunder, excluding only the salaries of the Assured's or of any underlying insurer's permanent employees." AA 544. Furthermore, each policy provides in the Cross Liability provision that "in the event of claims being made by reason of damage to property belonging to any Assured hereunder for which another Assured is, or may be liable, then this policy shall cover such Assured against whom a claim is made or may be made in the same manner as if separate policies had been issued to each Assured hereunder." AA 546.

J. UMBRELLA POLICY SOLD BY OLD REPUBLIC INSURANCE COMPANY

Old Republic Insurance Company sold an umbrella policy for the year 1981-82 with the same wording as the Puritan umbrella policy. AA 749-750.

K. PACIFIC EMPLOYERS INSURANCE COMPANY AND GREAT AMERICAN SURPLUS LINES INSURANCE COMPANY POLICIES

Pacific Employers Insurance Company sold an excess policy for the year 1978-79 (AA 474) which contains the same policy language as the excess policy which Great American Surplus Lines Insurance Company sold for the year 1986-87. (AA 249). The insurance company "will indemnify the insured for ultimate net loss in excess of the retained limit hereinafter stated which the insured shall become legally obligated to pay as damages because of ...B. property damage ...to which this insurance applies, caused by an occurrence." "Ultimate net loss" is defined as "the sum actually paid or payable in cash in the settlement or satisfaction of losses for

which the insured is liable by adjudication or compromise with the written consent [of the insurance company]..."

Each policy further provides that the insurance company will have "the right and duty to defend any suit against the insured seeking damages ...and may make such investigation and settlement of any claim or suit as it deems expedient..." The insurance company must defend the "suit" when the limits of underlying insurance are exhausted or when there is an occurrence covered by the insurance company but not covered by underlying insurance.

L. THE 1991-92 ICSOP POLICY

The Insurance Company of the State of Pennsylvania sold an umbrella policy to Ameron for the period August 1, 1991 to August 2, 1992. AA 81. Under Insuring Agreement I, in Endorsement No. 2, the policy provides that the company will "indemnify the insured for all sums which the insured shall be legally obligated to pay by reason of the liability a) imposed upon the insured by law, b) assumed under contract or agreement by the named insured ....for damages, *direct or consequential and expenses*, all as more fully defined by the term 'ultimate net loss' on account of ...property damage .....caused by or arising out of each occurrence..." (Emphasis added). AA 121.

The term "ultimate net loss" is defined as "the amount payable in settlement of the liability of the insured ...and shall exclude all costs, which are paid by the company in addition to the ultimate net loss." AA 124. The term "costs" is defined to include "investigation, adjustment and legal expenses ..." AA 124.

The policy does not define "damages" or "expenses". However, the policy will pay for "costs" which the company pays in addition to the

ultimate net loss, meaning that the company will pay investigation, adjustment and legal expenses in addition to the "ultimate net loss" amount. That is, defense costs are provided in addition to the limits of the policy. Under Insuring Agreement II, in Endorsement No. 2, the policy provides that "with respect to any occurrence covered only by the terms and conditions of this policy ....the company shall a) defend any suit against the insured alleging liability insured under the provisions of this policy and seeking damages on account thereof ..." AA 122.

M. THE 1992-93, 1993-94 AND 1994-95 ICSOP POLICIES

In these policies the Insuring Agreement states that ICSOP will "pay on behalf of the Insured that portion of the ultimate net loss in excess of the retained limit as hereinafter defined, which the insured shall become legally obligated to pay as damages to third parties ..." AA 145; 184; 221. The term "ultimate net loss" is defined as "the amount payable in settlement of liability of the Insured .. and shall exclude all costs, which are paid by the Company in addition to ultimate net loss". AA 155; 193; 232. The word "costs" is defined as "any expenses incurred for the adjustment of the claim including, but not limited to, defense expenses, investigation expenses, and all expenses described in Insuring Agreement II." Thus, ICSOP pays for the settlement of the insured's liability, *plus* the expenses incurred in settling *claims*. This grant of coverage does not further define "settlement."

STATEMENT OF APPEALABILITY

Ameron appeals from the decision of the Court of Appeal, *Ameron International Corporation v. Insurance Company of the State of Pennsylvania, et al.*, 150 Cal. App. 4th 1050 (2007), which sustained in part, and reversed in part, the decision of the Superior Court, granting demurrers as to Ameron's Third Amended Complaint, with prejudice, and without

leave to amend. This Court granted review on August 15, 2007.

ARGUMENT

I. THE TRIAL BEFORE THE BOARD OF CONTRACT APPEALS IS A "SUIT", SINCE THE BOARD PERFORMS THE JUDICIAL FUNCTION OF ADJUDICATION

The policies of INA[2], Great American, Pacific and ICSOP[3] promise to defend "any suit", but do not define the word "suit". There is no question, however, that a trial of twenty-two days is a "suit". The Board of Contract Appeals performed a judicial function – deciding contested issues of fact and law. *See United States v. Utah Construction & Mining Co.* (1966) 384 U.S. 394, 422 (Board acts in a "judicial capacity") By any definition, such a trial is a "suit". Indeed, Congress has defined such litigation as a "suit".

The provisions of an insurance policy must be interpreted in their "'ordinary and proper sense'" unless "'used by the parties in a technical sense or a special meaning is given to them by usage.'" *MacKinnon v. Truck Insurance Exchange* (2002) 31 Cal. 4th 635, 648, citing California Civil Code §1644. The court must "put itself in the position of a layperson and understand how he or she might reasonably interpret the language." *Id.* at 649.

A. In Ordinary Usage, "Suit" Includes a Trial Before an Administrative Agency

The ordinary definition of the term "suit" includes a trial before an administrative agency acting in a judicial capacity. But there is also a "special meaning" that applies here as well. Congress has specifically defined litigation before the Board of Contract Appeals as a "suit"; and

[2]INA's 1988-89 policy.
[3]ICSOP's 1991-92 policy.

enacted statutes making a "suit" before the Board the equivalent of a "suit" in federal court. See section B, below.

To determine the "ordinary" meaning of a term, courts often look to dictionaries. The term "suit" has both a narrow and broader meaning. The narrow definition refers to an action in a court of law, but the broader definition refers to a legal proceeding of any kind. The various editions of Webster's dictionary over the years have defined "suit" to include "any attempt to gain an end by legal process" and to include "prosecution of a right before any tribunal." *See, e.g.*, 4 Webster's New International Dictionary of the English Language (2d Ed. 1957)[4]; Webster's Third New International Dictionary[5]; Webster's Third New International Dictionary of the English Language (1964)[6]; Webster's Third New International Dictionary (1993) page 2286.[7]

The common understanding of "suit" was summarized in *Taranow v. Brookstein* (1982) 135 Cal.App.3d 662, 665:

> While the term "suit" will ordinarily refer to an action commenced in a court of law, it has often been given a much broader meaning...The word signifies "the prosecution of any claim, demand or request ..."[citation omitted]... it "is a more general term denoting any legal proceeding of a civil kind" [citation omitted]...and it "simply connotes an 'adversary proceeding' [citation omitted], or 'a process in law instituted by one party to compel another to do him justice'" [citation omitted].

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4 Cited in *R.T. Vanderbilt Co. Inc. v. Continental Cas. Co.* (2005) 870 A.2d 1048, 1059.

5 Cited in *A.Y. McDonald Industries, Inc. v. INA* (1991) 475 NW2d 607, 628;

6 Cited in *Foster-Gardner, Inc.*, 18 Cal. 4th at 891 (Kennard, J. dissenting)

7 Cited in *Fireman's Fund Ins. Co. v. Superior Court* (1997) 65 Cal. App. 4th 1205, 1221 (Spencer, P.J., concurring).

See also Fireman's Fund Ins. Co. v. Superior Court (1997) 65 Cal. App. 4th 1205, 1222 (Spencer, P.J., concurring):

> In my view. . .the common, ordinary meaning of "suit" is broad enough to cover alternative dispute resolution proceedings such as adjudicatory administrative proceedings.

Using the same analysis, *Community Unit School District No. 5 v. Country Mutual Insurance Co.* (1981) 95 Ill. App. 3d 272, 279 held that an insurance policy requiring the duty to defend a "civil suit" provided coverage for a complaint filed before the Fair Employment Practices Commission of Illinois:

> "Civil suit" in the strict sense of a suit filed in a common law court is a term of art in the legal profession, and such specialized and restricted meaning is not the common understanding and meaning of the term. A suit, in common understanding and meaning, is an attempt to gain legal redress or enforce a right. It need not be in a common law court, but may be before administrative or quasi-judicial bodies, such as workmen's compensation boards, police and fire commissions, or the Human Rights Commission. The common meaning of suit does not limit it to legal actions in the common law courts...
> We also note that there is nothing in the insurance policy in question that indicates "civil suit" is to have the specialized meaning attributed to it by the insurer.

See also Campbell Soup v. Liberty Mutual Insurance (1988) 239 N.J. Super. 488, 497, *aff'd* 571 A. 2d 909 ((N.J. Superior App. Div.), *cert. denied*, 584 A.2d 230.

> The duty to defend [a "suit"] is triggered when the insured is involved in an adversarial proceeding, a consequence of which is the factual determination that legal liability may or may not be imposed upon the insured. It matters not whether the factual determination is made by a judicial body after the filing of a complaint and a plenary hearing, or whether the

> determination is made by an administrative body which has authority to impose liability upon the insured. It is not the forum in which the proceeding is held that is critical, but whether, as a result of the hearing, liability may be imposed.

Federal courts long ago recognized that the protection of rights should not depend upon whether the forum is administrative or judicial:

> Much of the jurisdiction formerly residing in courts has been transferred to administrative tribunals, and much new jurisdiction involving private rights and penal consequences has been vested in them. In a broad sense their creation involves the emergence of a new system of courts, not less significant than the evolution of chancery...
>
> When private as well as public rights more and more are coming to be determined by administrative proceedings, it would be anomalous to have one rule for them and another for the courts in respect to redress for abuse of their powers and processes.
>
> *Melvin v. Pence* (1942) 130 F. 2d 423, 426-427 (D.C.Cir.) (concluding that tort of malicious prosecution applied to administrative as well as judicial proceedings)

Thus, federal courts have ruled that litigation before the Board of Contract Appeals is a "suit" covered by insurance. In *Safeway Moving & Storage Corp. v. Aetna Insurance Co.* (1970) 317 F. Supp 238 (E.D.Va.), *aff'd* 452 F.2d 79 (1971)(4th Cir.), for example, the court ruled that an insurance company breached its contract when it refused to defend the policyholder in proceedings before the Armed Services Board of Contract Appeals. The policy provided that it would pay "all sums which the Insured shall become legally obligated to pay as damages" ; and promised to defend "any suit...even if such suit is groundless, false or fraudulent". The court ruled that insurance coverage did not depend upon the forum:

> The Court construes the words "imposed by law" to describe

> that *kind* of liability which the insurer agreed to insure against, and does not, as defendants urge, construe such language as qualifying the forum in which the defendants agreed to become liable if liability was ultimately established...The defendants make no argument that the liability which arose against plaintiff was not of a type insured against by the parties, nor is it argued that the plaintiff is not legally obligated to the government and that such liability is not one imposed by law. Indeed, in view of the relationship between the plaintiff and the government (such relationship being known to the defendants) as contemplated by the policy, apt language could have been used to state clearly the defendants' position with respect to the forum choosing. Failing this, the plaintiff is entitled to recover for the liability which the parties insured against...the suit before the administrative board was within the policy coverage. 317 F. Supp. at 243, 245 (emphasis in original; footnotes omitted)

Likewise, *Aire Frio, S.A. v. United States Fidelity & Guarantee Co.*, (1970) 309 F. Supp 1388 (D. Canal Zone) held that litigation before the Board of Contract appeals is a "suit". *See also* 7C John A. Jean Appelman, *Insurance Law and Practice* §4682 (1979)(administrative proceedings in which it is claimed that policyholder has legal liability for damage to person or property invoke duty to defend).

B. "Suit"Also Has A Specialized Meaning Here, Since Congress Defined Litigation Before the Board As A "Suit"

It is particularly significant that a federal statute defines litigation before the Board of Contract Appeals as a "suit". These proceedings therefore have a "specialized meaning" in the field of government contracts – a specialized meaning that the drafters of the insurance policies either knew, or are deemed to have known. At the very least, Ameron could reasonably expect that coverage for "suits" included these proceedings defined by Congress to be a "suit." *Cf., TRB Invest, Inc. v. Fireman's Fund*

Ins. Co. (2006) 40 Cal. 4th 19, 28-29 (to interpret "common meaning" of term "construction," court refers to legislature's definition of term "construction.").

Under the Contract Disputes Act of 1978, Congress created "concurrent jurisdiction" in the U.S. Court of Claims (now called the U.S. Court of Federal Claims) and the agency boards of contract appeals to review decisions of contracting officers. *Coco Brothers, Inc. v. Pierce* (1984) 741 F.2d 675, 678 (3 Cir.), 42 U.S.C. §606, 609(a)(1). The Contracting Officer first renders a decision that there has been a deficiency in the performance of a government contract; the contractor can then "appeal" either by filing an "appeal" (in the form of a complaint following the Federal Rules of Civil Procedure) before the particular Board of Contract Appeals, 41 U.S.C. §605; or by filing a complaint in the United States Court of Federal Claims, 41 U.S.C. §609(a)(1). The Contract Disputes Act, 41 U.S.C. §609(d), defines both procedures as "suits":

> If two or more *suits* arising from one contract are filed in the United States Court of Federal Claims and one or more agency boards, for the convenience of the parties or witnesses or in the interest of justice, the United States Court of Federal Claims may order the consolidation of such *suits* in that court or transfer any *suits* to or among the agency boards involved. (Emphasis added).

Furthermore, "the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims." 41 U.S.C. §607(d).

In the legislative history leading up to passage of the Act, Congress recognized that the agency boards of appeal, as they had functioned historically, litigated "suits." Specifically, the legislative history of the consolidation provision, 41 U.S.C. §609(d), reflects the understanding that

the Boards litigated "suits." Congress gave the Court of Claims the authority to consolidate "suits" before the Boards, a power the Boards already had:

> A $40,000 *suit* cannot and should not be able to be split into four $10,000 *suits*. . .the Boards have the authority to consolidate these *suits* when they clearly arise from the same cause of action. Conversely, it is intended that the Court of Claims have the same authority to consolidate *suits* that are split between the courts and the agency boards, S.Rep. 95-118, 1978 Code Congressional and Administrative News 5265. (Emphasis added)

Furthermore, Congress considered the boards of contract appeals, as they then existed, to be "trial courts":

> [T]he Boards [of Contract Appeals] have evolved into *trial courts*...The agency boards of contract appeals as they exist today, and as they would be strengthened by this bill, function as quasi-judicial bodies. Their members serve as administrative law judges in an adversary-type proceeding, make findings of fact, and interpret the law. Their decisions set the bulk of legal precedents in government contract law, and often involve substantial sums of money. *Id.* at 5260. (Emphasis added).
>
> ***
>
> The contractor should feel that he is able to obtain his "*day in court*" at the agency boards and at the same time saved time and money through the agency board process. If this is not so, then contractors would elect to go directly to court and bypass the boards since there would be no advantage in choosing the agency board route for appeals. *Id.* at 5259. (Emphasis added).
>
> ***
>
> Because of Supreme Court decisions and the Wunderlich Act, contractors and their counsel have become increasingly aware

> that a hearing before an agency board was often their only opportunity to develop and present their case. As a consequence, the parties pressed for adoption and implementation at the board level of all procedures associated with due process: full discovery, filing of responsive pleadings and briefs, and thorough adversary hearings with cross-examination. *Id.* at 5246.

Virtually identical rules apply to litigation whether filed in the Board or filed in the U.S. Court of Federal Claims. The "appeal" to the Board of Contract Appeals is followed by a complaint setting forth a "simple, concise, and direct statements of each claim.", 43 C.F.R. § 4.107, which parallels the requirements of a complaint under Rule 8 of the Federal Rules of Civil Procedure requiring "a short and plain statement of the claim." The government then files an Answer and Counterclaim setting forth its contentions. Opposing sides may take depositions and subpoena witnesses, who are sworn and subject to cross-examination. 41 U.S.C. §610; 43 C.F.R. §§ 4.115, 4.23. Admissibility of evidence is governed by "the generally accepted rules of evidence applied in the courts of the United States in non jury trials..." *Id.* at 4.122. The agency Board can award the same relief, including damages, that the U.S. Court of Federal Claims can award. 41 U.S.C.§607(d).

Furthermore, under the consolidation statute, 41 U.S.C. §609(d), a "suit" filed before the Board can be transferred to the U.S. Court of Federal Claims to be consolidated with a "suit" pending there; or a "suit" filed in federal court can be transferred to the Board, to be consolidated with a "suit" pending there. *See, e.g., Southwest Marine, Inc. v. United States* (1988) 680 F. Supp. 1400, 1404 (N.D.Cal.), reconsideration denied, (1988) 680 F. Supp. 327 (transferring lawsuit filed in federal court to Armed

Services Board of Contract Appeals).[8]

Thus, Ameron litigated a proceeding which Congress defined as a "suit" before a tribunal which Congress considered to be a "trial court." The concept of an "administrative suit" is not new. *See, e.g., Aviles v. Lutz* (1989) 887 F.2d 1046, 1047 (10th Cir.)(plaintiff filed two civil and five "administrative suits"); *Honeywell, Inc. v. Consumer Product Safety Commission* (1983) 566 F. Supp. 500, 502 (D. Minn.)(commission issued administrative complaint; "administrative suit" to impose penalties is challenged in court); *DeMalherbe v. International Union of Elevator Constructors* (1978) 449 F. Supp. 1335, 1347 (N.D. Cal.)(complaint filed with California Fair Employment Practices Commission referred to as "administrative suit"); *Greenfield Mills, Inc. v. Governor O'Bannon* (2002) 189 F. Supp. 2d 893, 897, n.2 (N.D. Ind.)(plaintiff filed "administrative suits" against agency).

A reasonable policyholder would therefore believe that a policy providing coverage for a "suit" would provide coverage for a twenty-two day trial which Congress defined as a "suit."

8

Ameron had an advantage in litigating before the Board because the federal contracts in question were executed before Congress enacted the Contract Disputes Act. With respect to pre-existing contracts, the Act gave the contractor the option of litigating under the law pre-dating the Act. Under pre-existing law, the contractor could appeal from an adverse decision from the Board, but the Government could not appeal an adverse ruling from the Board. *See, e.g., S&E Contractors, Inc. v. United States* (1972) 406 U.S. 1. The Contract Disputes Act corrected this imbalance by allowing the government to appeal an adverse decision from the Board. *See., e.g., U.S. v. Lockheed* (1987) 817 F. 2d 1565, 1566 (Fed. Cir.).

C. *Foster-Gardner* Does Not Apply to an Administrative Agency that Adjudicates a Dispute

The Board of Contract Appeals acts in a "judicial capacity" when it conducts hearings and decides cases. *United States v. Utah Construction & Mining Co.* (1966) 384 U.S. 394, 422. Furthermore, the Board has the authority to award money damages. *See, e.g., Cherokee Nation of Oklahoma v. Leavitt* (2005) 543 U.S. 631 (upholding decision by U.S. Department of Interior Board of Contract Appeals to award $8.5 million in damages). The adjudication of a claim by an administrative agency must be distinguished from other functions of administrative agencies, such as issuing administrative orders when there is no adjudication. This very distinction was in fact made in *Foster-Gardner*.

> The Order here essentially required Foster-Gardner to continue monitoring hazardous waste levels at the Site, prepare studies documenting the extent of Site contamination, and draft a proposal for remediating the Site. As the Court of Appeal acknowledged, "A Determination and Order *does not commence either a lawsuit or an adjudicative procedure before an administrative tribunal*. Instead, it is simply an order from an administrative agency. . ." 18 Cal. 4th at 878 (emphasis added)

This Court therefore did not consider insurance coverage for an adjudicative procedure, carved an adjudicative procedure out of the reach of its decision, and implied that its decision would have been different, had an adjudicative procedure been involved.

We recognize that this Court established a "bright line rule" in *Foster-Gardner*. But that rule was established to deal with the unique facts presented – whether an order (as opposed to a trial on the merits before an agency acting in a judicial capacity with the authority to award damages) met the definition of a "suit". This Court noted the "bright line rule" was

created to foreclose future litigation as to whether "each new and different *letter*" from an environmental agency constituted a "suit". 18 Cal. 4th at 887 (emphasis added). We therefore submit that this Court did not intend the "bright line rule" to apply to the very different facts of this case.

We also recognize that this Court made a distinction between "claims" and "suits", noting that the insurance company had a duty to defend "suits", but had no duty to defend "claims". The words do have different meanings, but that does not lead to the conclusion that a "suit" means a lawsuit in court; and nothing else. Here, the Government asserted a "claim" against Ameron when the Contracting Officer of the Bureau asserted that Ameron was responsible for construction defects. That "claim" evolved into a "suit" when the litigation commenced before the Board of Contract Appeals.

D. If *Foster-Gardner* Precludes Coverage For A Trial Before The Board Of Contract Appeals, Then *Foster-Gardner* Should Be Modified Or Reversed

If the "bright-line rule" does apply here, then it creates a manifest injustice, so extreme that the rule should be modified, reversed, or withdrawn. Indeed, the rule is flatly inconsistent with other decisions of this Court on the interpretation of insurance policies. In actuality, the majority opinion of *Foster-Gardner* applies the legal, technical definition of "suit". To many lawyers and judges, whose profession is litigation, the word "suit" means "lawsuit". But "suit" has a broader meaning as well, as pointed out in the dissenting opinion of Justice Kennard. The insurance policy must be interpreted as a "layman would read it and not as it might be analyzed by an attorney or an insurance expert". *Crane v. State Farm & Cas. Co.* (1971) 5 Cal. 3d 112, 115.

A policy provision is ambiguous when it can have two or more

reasonable constructions. *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal. 4th 1, 18. It is certainly reasonable for the ordinary layperson to believe that a "suit" includes a litigation before an administrative agency, when dictionaries have for years defined "suit" to include "the attempt to gain an end by legal process"; when Congress uses the term "suit" to refer to litigation before an agency; and when the vast majority of courts around the country have recognized that the term" suit" is not limited to lawsuits in a court.[9] To state the matter another way, why is it unreasonable for a layperson to believe that the term "suit" includes litigation before the Board of Contract Appeals, when Congress has used that very term to define that very litigation?

The "bright line rule" is squarely at odds with the fundamental principle for interpretation of insurance policies that "'coverage clauses are interpreted broadly so as to afford the greatest possible protection to the insured.'" *White v. Western Title Co.* (1985) 40 Cal. 3d 870, 881; *AIU Ins.*

9

At the time *Foster-Gardner* was decided, the Supreme Courts of Iowa, Massachusetts, Michigan, Minnesota, New Hampshire, North Carolina and the Ninth Circuit Court of Circuit Court of Appeals had decided that the definition of "suit" was broad enough to cover PRP notification letters. *See* 18 Cal. 4th at 889. Since then the Supreme Courts of Colorado, *Compass Ins. Co. v. City of Littleton* (1999) 984 P.2d 606, Connecticut, *R.T. Vanderbilt v. Continental Casualty Co.* (2005) 870 A2d 1048, Kentucky, *Aetna Casualty & Surety Co. v. Commonwealth of Kentucky* (2005) 179 SW2d 830, Vermont, *Hardwick Recycling & Salvage, Inc. v. Acadia Ins. Co.*, (2004) 869 A2d 82 and Wisconsin, *Johnson Controls, Inc. v. Employers Ins. of Wausau* (2003) 665 NW2d 257, overruling *City of Edgerton v. General Casualty Co.* (1994) 517 NW2d 463, have come to the same conclusion. The decision by the Supreme Court of Wisconsin to reverse its earlier decision is especially noteworthy, since this Court's decision in *Foster-Gardner* relied upon *Edgerton*, a decision that has now been reversed. *See* 18 Cal. 4th at 879.

Co. v. Superior Court (1990) 51 Cal. 3d 807, 822; *Montrose Chemical Corporation v. Admiral Insurance Co.* (1995) 10 Cal. 4th 645, 667; *MacKinnon v. Truck Insurance Exchange* (2003) 31 Cal. 4th 635, 648. The duty to defend a "suit" is a grant of coverage which should be interpreted broadly, not narrowly.

The "bright line rule" would also make coverage turn upon the fortuity of the forum chosen. A federal contractor, henceforth, will never choose to litigate in the Board of Contract Appeals because that choice will result in the loss of insurance coverage. But choosing federal court is no guarantee, either, since a case filed in federal court can be transferred to the Board. The "bright line rule" would thus exalt form over substance, because litigation before the Board is the actual equivalent of litigation before a federal court. Whether the same case is heard by a federal administrative law judge or a federal court judge, the merits are still the same. The "bright line rule" would thus violate the precepts of *AIU Ins. Co. v. Superior Court* (1990), 51 Cal. 3d 807, 840-841 in which this Court stated that insurance should not hinge upon the government's choice of one remedy (injunction) over another remedy (restitution):

> It would exalt form over substance to interpret CGL policies to cover one remedy but not the other. Given the practical similarity of remedies available under the environmental statutes at issue here, we believe a reasonable insured would expect both remedies to fall within coverage as "damages"...to hold otherwise would make insurance coverage hinge on the "mere fortuity" of the way in which government agencies seek to enforce cleanup requirements, would unreasonably constrain the agencies' choice of cleanup mechanism, and would introduce substantial inefficiency into the cleanup process.

Those same concerns are present here.

Consider the procedural history of *Cherokee Nation of Oklahoma v. Leavitt* (2005) 543 U.S. 631 as an example. The Cherokee Nation brought one action in the U.S. Court of Federal Claims; and brought a second action, under a different contract, before the Department of Interior Board of Contract Appeals. Both cases raised the same legal issues. The federal court case was appealed to the Tenth Circuit Court of Appeals. The Board case was appealed to the U.S. Court of Appeals for the Federal Circuit. The Supreme Court ruled in favor of the tribe, resulting in the award of damages in both cases. The insurance companies take the position that coverage depends entirely upon the choice of forum selected. Under this artificial distinction, the Cherokee Nation would have coverage for the one lawsuit that originated in the Court of Federal Claims. There would be no coverage for the second lawsuit, when it began in the Board of Contract Appeals. But coverage would kick in when the case was appealed to the U.S. Court of Appeals. And of course there would be coverage for the judgment entered by the U.S. Supreme Court. This example shows the illogical position taken by the insurance companies. Ameron has been denied coverage, arbitrarily, because it settled its case, rather than pursue an appeal to the Court of Appeals for the Federal Circuit. Had Ameron taken an appeal there would be no question that Ameron had insurance coverage, since the case would have proceeded to a court. Thus, a ruling in favor of the insurance companies will mean that a policyholder will never settle a case before the Board, but will instead always take an appeal, in order to obtain insurance coverage. Such a ruling would be contrary to the "policy of the law. . . to favor compromises . . . made either in or out of court." *Hamilton v. Oakland School District* (1933) 219 Cal. 322, 329.

It has long been the law of the law of this State that an insurance

company has a duty to settle a claim even before the claim turns into a lawsuit. *See, e.g., Critz v. Farmers Ins. Group* (1964) 230 Cal. App. 2d 788, 797:

> Failure to settle may occur early or late in the game...That rejection of the compromise offer happened early rather than late, that it preceded judgment or trial or even commencement of suit does not preclude a finding of bad faith.

See also Shade Foods, Inc v. Innovative Products Sales & Marketing, Inc. (2000) 78 Cal. App. 4th 847(bad faith failure to settle claim where no lawsuit was ever filed); *Chodos v. Insurance Co. of North America* (1981) 126 Cal. App. 3d 86 (bad faith failure to pay pre-litigation settlement); *Walters v. American Ins. Co.* (1960) 185 Cal. App. 2d 776, 786 (bad faith rejection of settlement offer where no lawsuit had been filed); *Hulett v. Farmers Ins. Exchange* (1992) 10 Cal. App. 4th 1051, 1060 (same); *Palmer v. Financial Indem. Co.* (1963) 215 Cal. App. 2d 419, 430 (same); *Hightower v. Farmers Ins. Exchange* (1995) 38 Cal. App. 4th 853 (failure to settle prior to arbitration may give rise to bad faith where liability reasonably clear).

Ameron has specifically alleged a breach of the duty to settle; that duty arose here at the mediation in question. Ameron did not have to keep litigating the case through trial and through appeal to the U.S. Court of Appeals, in order to preserve its insurance coverage. *See, e.g., Critz*, 230 Cal. App. 2d at 801: "When the insurer breaches its obligation of good faith settlement, it exposes the policyholder to the sharp thrust of liability...He need not indulge in financial masochism, however. Whatever may be his obligation to the carrier, it does not demand that he bare his breast to the continued danger of personal liability." The "bright line rule" would require

a policyholder to do just that–avoid settling and keep litigating until the case is appealed to the federal court–solely in order to obtain insurance.

II. THE 1988-89 INA POLICY PROVIDES COVERAGE FOR *"CLAIMS"* AS WELL AS "SUITS"; AND FOR "DAMAGES" INCURRED OUTSIDE OF A COURT

The Court of Appeal concluded that there was no coverage under the 1988-89 INA policy because the policy did not define the term "suit"; and "suit" must be defined as a lawsuit filed in court. For the reasons explained above, that was an erroneous decision and must be reversed. However, the Court of Appeal decision must also be reversed for another reason, which the Court of Appeal never considered or addressed.

Specifically, the INA policy covers "*claims*" as well as "suits". The policy contains a Deductible Endorsement in which INA agrees to pay a percentage share of a) "attorneys' fees for professional services rendered in connection with *claims* under this policy"; and b) "court costs and other expenses in connection with investigation, defense or settlement of *claims* under this policy, such as fees for medical examinations, expert testimony, stenographic services, witness, summonses, copies of documents and photographs..." (Italics added).

Obviously, the litigation before the Board of Contract Appeal involved a *claim* by the U.S. Department of Interior, Bureau of Land Management, alleging that Ameron owed the government some $40 million for construction defects. The Deductible Agreement demonstrates a mutual intent for the coverage of *claims* under the policy. Paragraph 6 recites that Ameron has entered into a Claims Service Agreement with ESIS, Inc. under which ESIS agrees "to provide investigation, defense and settlement services on behalf of the Insured in connections with *claims* made or suits brought for which insurance is provided by this policy..."AA 00303

(emphasis added).[10] Under paragraph 4 (a) INA has the right "to control and to associate with the Insured in the investigation, defense and settlement of any *claims* or proceeding arising out of any occurrence" covered by the policy. (emphasis added).

Paragraph 7 provides that "Loss Adjustment Expense" shall be divided between Ameron and INA according to a mathematical ratio; and defines "Loss Adjustment Expense" to include the cost of attorneys' fees and other expenses incurred in connection with *claims* under the policy. The ratio apportions the expenses according to their responsibility for a settlement or judgment in excess of the deductible. Since the policy provides for a deductible of $100,000 per occurrence, a claim that settles for $ 1million dollars will be apportioned as follows: Ameron will pay 10% of the "Loss Adjustment Expense" and INA will pay 90% of the "Loss Adjustment Expense". Thus, INA will pay 90% of the attorneys' fees and "other expenses" incurred in connection with the settlement of a *claim* or a "suit".

These provisions all make it clear that coverage is tied to "*claims*". Since a "claim" is not the same thing as a lawsuit filed in a court, there is coverage for litigation before the Board of Contract Appeals.

But there is still more. The Deductible Endorsement provides in paragraph 1 that INA will pay "damages" in excess of the deductible. Paragraph 7 defines "damages" to include "amounts payable .... under state

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[10] The Claims Service Agreement is attached as an exhibit to Ameron's Complaint. AA 01114. Ameron paid ESIS (a related company of INA) a fee for each claim handled. AA 01117. It is absurd for INA to suggest that the parties did not contemplate the administration of claims and a specific agreement (the Deductible Endorsement) for sharing the cost of those claims.

No-Fault automobile insurance laws, Uninisured Motorist laws and for Medical Payment benefits." AA00304. The typical "no fault" automobile insurance law provides for the payment of benefits without litigation in a court. *See e.g., State Farm Mut. Auto Ins. v. Crockett* (1980) 163 Cal. App. 3d 352, 654-655, noting that the right to sue for certain medical expenses was abolished in Hawaii. This "no-fault" coverage provision is another indication that the parties did not limit coverage to lawsuits filed in a court.

The 1988-89 policy's Deductible Endorsement is unique to INA. The Deductible Endorsement has been summarized in *Travelers Indemnity Co. of Illinois v. INA* (1995) 886 F. Supp. 1520, 1528 (S.D. Cal.):

> The policy does obligate INA, under certain circumstances, to reimburse the insured in defending certain actions against the insured...[court quotes formula apportioning Loss Adjustment Expenses]
> This obligation to reimburse defense costs is thus only incurred if the insured incurs a *claim* loss exceeding the 'retained limit". (emphasis added; footnote omitted).

In its exhaustive decision, which otherwise discusses policy provisions in detail, the Court of Appeal failed to discuss the Deductible Endorsement in connection with the 1988-89 INA policy. That was error because that provision clearly demonstrates that INA intended to reimburse Ameron for "claims" as well as "suits".

III. EACH PURITAN AND OLD REPUBLIC UMBRELLA POLICY CONTAINS TWO INSURING AGREEMENTS -- THE SECOND PROVIDES THE UMBRELLA COVERAGE FOR INVESTIGATION AND SETTLEMENT OF "*CLAIMS*" AS WELL AS "SUITS"

The Court of Appeal concluded that there was no coverage under the Puritan and Old Republic umbrella policies because the policies do not define "suit" and because the IBCA proceedings are not a civil action filed

in a court of law. Slip Opinion at 48. For the reasons discussed previously-- that a "suit" is not limited to lawsuit in a court-- that ruling must be reversed. There are other aspects of the decision which are erroneous and require reversal. Specifically, these policies provide umbrella coverage for "claims" as well as "suits".

Each Puritan and Old Republic policy – specifically entitled "Umbrella Liability Policy" – contains two insuring agreements; the second insuring agreement contains the umbrella coverage which provides indemnity for "ultimate net loss", which is defined to include the "settlement, adjustment and investigation of claims and suits". Thus, the policy provides coverage for "claims" and therefore provides coverage for the "claims" of the Government against Ameron. The Court of Appeal committed error in its analysis of the policy, by failing to recognize the separate grant of umbrella coverage.

The policy clearly states that there are *two* "Insuring Agreements." The relevant page uses the plural-- "**INSURING AGREEMENTS**"– printed in bold, capital letters. The first insuring agreement is entitled "I. COVERAGE". It provides indemnity coverage for "all sums which the Assured shall be obligated to pay by reason of the liability (a) imposed upon the Assured by law or (b) assumed under contract or agreement ...for damages on account of ...property damage". The second insuring agreement is entitled "II. LIMIT OF LIABILITY". It provides umbrella coverage in subsection (b):

> The Company hereon shall be liable for the ultimate net loss the excess of either
> a) the limits of the underlying insurances set out in the attached schedule in respect of each occurrence covered by said underlying insurances, or

b) the amount as set forth in item 2 (c) of the Declarations [$25,000] ultimate net loss in respect of each occurrence not covered by underlying insurances...

It is the grant of coverage in section (b) of Insuring Agreement II which makes this policy an umbrella policy, because section (b) provides broader coverage than the underlying primary policy; it fills in gaps left by the primary policy. The quintessential characteristic of an umbrella policy – as opposed to a "pure" excess policy – is that the umbrella policy provides coverage that is broader than the primary policy. "Umbrella coverage is a 'type' of excess coverage typically providing ...for losses for which there may be no 'underlying insurance'". *Padilla Construction Co, Inc. v. Transportations Ins. Co.* (2007) 150 Cal. App. 4th 984, 990, n7; *Century Indemnity Co. v. London Underwriters* (1993) 12 Cal. App. 4th 1701, 1707, fn 5.

Century Indemnity Wells Fargo Bank, N.A. v. California Insurance Guarantee Association (1995) 38 Cal. App. 4th 936 made this very point in construing an umbrella policy with nearly identical language to the umbrella policy form at issue here.[11] The Court noted that there are <u>two</u> coverage provisions: "the two coverage provisions, when read together, make the INA/Mission policy applicable *either* as excess coverage over the limits of the underlying insurance when the underlying insurance 'covers' an occurrence, or as an alternative primary coverage as to losses 'not covered by' the underlying policy". *Id.* at 946. (Emphasis in original).

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"The INA/Mission policy provides: 'The Company shall only be liable for the ultimate net loss the excess of either ¶ (a) the underlying insurances as set out in the attached schedule in respect of each occurrence *covered* by said underlying insurances. ¶ or (b) the amount as set out in item 2 (c) of the Declarations [$10,000] in respect of each occurrence *not* covered by said underlying insurances:' " 38 Cal. App. 4th at at 947 (italics added by court)

This Court made the same point in *Powerine Oil Co, Inc. v. Superior Court of Los Angeles* (2005) 37 Cal. 4th 377, noting that the policy was an umbrella policy because it provided coverage for losses not covered by the primary policy. This Court specifically pointed to the "limitation of liability" provision:

> But the policies here in question are *not* merely intended to operate as excess insurance. Under the limitation of liability provision, Central National has agreed to pay the excess of "the amount of ultimate net loss. . .in respect of each occurrence *not covered by said underlying insurance.*" (Italics added). Hence these policies are umbrella policies, i.e., "alternative primary coverage as to losses 'not covered by' the primary policy." *Id.* at 398 (footnote omitted; citations omitted).

The Court of Appeal committed error by not recognizing Insuring Agreement II as a separate grant of coverage. The opinion analyzes "the central provision" in the Puritan and Old Republic policies, in the singular, but never recognizes Insuring Agreement II as a separate, independent insuring agreement which is crucial in providing the umbrella coverage. Without section II (b), the policy is simply an excess policy and is not an umbrella policy. Therefore, it was a fundamental error for the Court of Appeal to ignore Insuring Agreement II in its decision.

Very simply, Insuring Agreement II provides that "[t]he Company hereon shall be liable for the ultimate net loss" with respect to occurrences not covered by the primary policy. That is a grant of coverage for the payment of ultimate net loss when there is no coverage in the primary policy. The statement that the Company "shall be liable for the ultimate net loss" is a straightforward promise that the company will "pay for" and "indemnify for" the "ultimate net loss".

Accordingly, it follows that the "[t]he Company shall be liable" for those matters contained within the definition of "ultimate net loss", which is defined to include "the total sum" which the Assured shall become obligated to pay "through adjudication or compromise...and shall also include...expenses for doctors, lawyers, nurses,, and investigators...and for litigation, settlement, adjustment of claims and suits..." Hence there is coverage for "claims" and "suits".

In other words, when the umbrella policy provides coverage for an occurrence not covered by the primary policy, it "drops down" to the primary level and functions just like a primary policy: it pays for the investigation, settlement and adjustment of claims and suits. To repeat, that is why this policy is an umbrella policy and not simply an excess policy. Insuring Agreement I is the excess policy provision; Insuring Agreement II is the umbrella policy provision.

The Court of Appeal committed error by relying upon *County of San Diego v. Ace Property & Casualty Insurance* (2005) 37 Cal. 4th 406 because that case involved an excess policy, not an umbrella policy, in which the single insuring agreement was separate and apart from the limit of liability provision and did not "incorporate" or refer to it: "the definition of 'ultimate net loss' here is neither incorporated into, referenced, nor a part of the central insuring clause of the Ace policy" *Id.* at 419-420. The Puritan and Old Republic umbrella policies are the opposite: they do in fact "incorporate" the ultimate net loss provision into the grant of coverage. The "Limit of Liability " provision is itself Insuring Agreement II.

Furthermore, *County of San Diego* dealt with a different type of policy – an excess policy over a self-insured retention: "In that specific context, the definition of 'ultimate net loss' merely serves to define the

insured's total loss that will count towards such limits". *Id.* at 419-420. In other words, the policyholder had the initial duty to defend claims and could settle them; the settlement of claims counted towards exhaustion of the self-insured retention; but that did not mean that the settlement of claims would be covered by the Ace policy. The umbrella policies are fundamentally different. Puritan and Old Republic provide coverage when there is an occurrence not covered by the primary policy. When they provide such coverage, they promise to pay for the investigation, settlement and adjustment of claims.

It makes no sense to suggest, as the Court of Appeal did, that the "Limit of Liability" provision merely serves to define the total loss that will count toward the limits of liability. Slip Opinion at 48. That is one function of the provision, but not the most important function, as this Court observed in the passage quoted from *Powerine*. The predominant purpose is to explain what the insurance company will pay when there is no coverage in the primary policy, but there is coverage in the umbrella policy. To be sure, the provision is redundant, ungrammatical and therefore ambiguous, by repeating "ultimate net loss" twice: "The Company hereon shall be liable for the ultimate net loss excess of ...the amount set forth in 2 (c) of the Declarations ultimate net loss in respect of each occurrence not covered by underlying insurances..." The second "ultimate net loss" is superfluous, but the intent is clear to make the company liable for the "ultimate net loss" in excess of $25,000, when there is no coverage in the primary policy, but the occurrence is covered by the umbrella policy.

The Cross-Liability provision re-confirms coverage for *claims* since it states that "[i]n the event of claims being made by reason of damage to property belonging to any Assured hereunder for which another Assured is,

or may be, liable then this policy shall cover such Assured against whom a claim is made or may be made in the same manner as if separate policies hade been issued to each Assured hereunder. Nothing contained herein shall operate to increase the Company's limit of liability under Insuring Agreement II. " This provision confirms that there is indeed a second insuring agreement (Insuring Agreement II) that covers claims: the policy "shall cover" any Assured against whom a claim is made.

IV. THE "ULTIMATE NET LOSS PROVISION" IN THE PACIFIC AND GREAT AMERICAN POLICIES COVERS "DAMAGES" PAYABLE FOR THE SETTLEMENT OF THE GOVERNMENT'S "LOSSES"

In Section I of this brief, Ameron has argued that the undefined term "suit" in the Pacific and Great American policies includes the trial before the Board of Contract Appeals. On that basis alone, the decision of the Court of Appeal should be reversed, for the reasons previously stated. This Court need go no further.

Nevertheless, it is worth noting that the correct interpretation of the term "suit" necessarily undermines the Court of Appeal's analysis of the "ultimate net loss" provision in these policies. Each of the policies provides that the insurance company "will indemnify the insured for ultimate net loss in excess of the retained limit....which the Insured shall become legally obligated to pay as damages because of ...property damage...to which this insurance applies..." The policy defines "ultimate net loss" as "the sum actually paid or payable in cash in the settlement or satisfaction of losses for which the insured is liable either by adjudication or compromise with the written consent of [the insurance company]..." Clearly, Ameron paid money to settle the litigation. It paid money "in settlement" and "in satisfaction" of the "losses" of the Government. This was a "compromise"

following an "adjudication". Ameron paid money damages. All of the requirements of coverage are met under this provision.

The Court of Appeal erroneously concluded that the litigation before the Board was not a "suit" and that a "suit" is limited to a lawsuit in a court. The Court therefore drew the further erroneous conclusion that the term "damages" in the "ultimate net loss" provision was limited to "money ordered by a court". This conclusion is necessarily erroneous since the Board of Contract Appeals has the same authority to award money damages as a federal court.

V. 1991-92 ICSOP POLICY'S COVERAGE FOR "SUITS" APPLIES TO THE LITIGATION BEFORE THE BOARD

We agree with the Court of Appeal that this policy provides coverage for the settlement of the litigation and for the expenses that Ameron incurred (such as defense fees). However, we disagree that there is no coverage for that part of the policy in which ICSOP promises to defend a "suit," but does not define "suit." For the reasons previously argued, the term "suit" should be construed to mean an actual trial before the Board of Contract Appeals.

VI. THE 1992-1995 ICSOP POLICIES PROVIDE COVERAGE

These umbrella policies provide that for occurrences covered by ICSOP but not covered by the underlying policies, ICSOP shall defend any "suit"; but the policy does not define "suit". For the reasons previously discussed, the undefined term "suit" provides coverage for the litigation before the Board of Contract Appeals.

Likewise, coverage also applies to indemnity payments. The company agrees "[t]o pay on behalf of the insured that portion of the ultimate net loss in excess of the retained limit ...which the insured shall

become obligated to pay as damages to third parties for liability imposed upon the insured by law or liability assumed by the insured…" The term "ultimate net loss" is defined as "the amount payable in settlement of the liability of the insured…and shall exclude all costs, which are paid by the company in addition to ultimate net loss" "Costs" are defined as the "any expenses incurred for the adjustment of the claim including, but not limited to, defense expense, investigation expenses, and all expenses described in Insuring Agreement II". ICSOP clearly agrees to pay for settlements–but a settlement need not take place in a lawsuit in a court.

VII. THE COMPLAINT PROPERLY ALLEGED WAIVER AND ESTOPPEL BY ALLEGING KNOWING, INTENTIONAL VIOLATION OF REGULATIONS REQUIRING THE INSURANCE COMPANIES TO EXPLAIN THEIR REASONS FOR DENIAL OF COVERAGE

The Court of Appeal was clearly wrong in holding that "no regulation imposed an affirmative duty to speak to respondents [insurance companies]…Respondents had no duty to inform Ameron of legal theories that may have entitled them to coverage." The Court of Appeal failed to recognize the regulations that clearly do exist. The California Fair Claims Settlement Practices Regulations, 10 C.C.R. §2695.7 (b) (1) state:

> Where an insurer denies or rejects a first party claim in whole or in part, it shall do so in writing and shall provide to the claimant a statement listing all bases for such rejection or denial and the factual bases for each reason given for such rejection or denial which is then within the insurer's knowledge. Where an insurer's denial of a first party claim, in whole or in part, is based on a specific policy provision, condition, or exclusion, the written denial shall include reference thereto and provide an explanation of the application of the provision, condition, or exclusion of the claim.

The regulations, in section 2695.2 (f) define "first party claimant" as "any person asserting a right under an insurance policy as a named insured, other insured or beneficiary under the terms of the insurance policy, and including any person seeking recovery of uninsured motorist benefits." Under these regulations, Ameron is a "first party claimant" seeking coverage under its own policies and as an assignee of the rights of Kiewit under those policies. Therefore, the insurance companies were required to inform Ameron of "all bases for the rejection of coverage"; the "factual basis for each reason given"; and an "explanation" of each provision, condition, or exclusion the insurance company is relying on to deny coverage.

Furthermore, section 2695.4 (a) states that" [e]very insurer shall disclose to a first part claimant or beneficiary all benefits, coverage, time limits or other provisions of an insurance policy that may apply to the claim presented by the claimant."

Clearly these regulations do in fact impose a duty on the insurance companies to 1) speak) and 2) inform the policyholder of all bases for the denial of coverage. The Court of Appeal was plainly wrong in ignoring these regulations and concluding, as a matter of law, that no such regulations exist.

Therefore, Ameron properly pled a cause of action for waiver and estoppel, since the insurance companies never informed Ameron, at the time of denial of coverage, that there was no coverage for litigation before the Board of Contract Appeals.

The allegations against INA detail especially egregious misconduct. INA was informed of the Government's clams in 1990; received notice of Ameron's intent to proceed before the Board, monitored the litigation,

appeared at mediation, and encouraged Ameron to settle the case before the Board approved, the $12 million amount, and offered $750,000 to settle the Government's claims at mediation. (AA 923). INA induced Ameron to settle at the Board stage of litigation. Not once did INA ever state that it would deny coverage because the litigation was before the Board but was not in a court. Had INA ever said so, Ameron could have elected to proceed to federal court, so as to protect its insurance coverage. For example, Ameron might have decided not to settle at the Board stage but to litigate to conclusion and then take an appeal to federal court.

The operative complaint alleges in paragraph 153 that "Despite receiving timely notice, INA did not issue a reservation of rights letter to Ameron for almost two years." AA 1070. Paragraph 155 alleges that INA never issued any reservation of rights letter to Kiewet, at any time. Paragraph 158 that "INA knew of its obligations under California law and under the Fair Claims Practices Regulations of the California Department of Insurance that it had a duty to acknowledge communications and to disclose all benefits and coverages"; Paragraph 159 alleges that "INA knowingly and intentionally failed to do so." *Id.*

The complaint also alleges in paragraph 160 that "INA knowingly failed to inform Ameron of the position it is now taking, for the first time (aftere the lawsuit was filed), that there is no coverage for proceedings before the Board of Contract Appeals, because those proceedings are allegedly not a "suit". Paragraph 161 alleges that "Ameron and Kiewit relied to their detriment on INA's silence, when it had a duty to speak." *Id.*

It should not be forgotten that Kiewit is alleged to be an additional insured under the Ameron policies (Paragraphs 1, 30, 44)[12]; and that no

[12] The Puritan and Old Republic policies, for example, define the insured to

insured ever communicated, ever, with Kiewit. The Complaint alleges that all defendants waived their rights by never communicating with Kiewit, at all.

The silence of the defendants with respect to coverage of the "suit" before the Board is significant for yet another reason. The silence suggests that the insurance companies themselves believed, at the time, that Ameron did indeed have coverage for such a "suit". After all, *Foster-Gardner* was decided in 1998; the Board case was not settled until 2003. The insurance companies had years to advise Ameron (and Kiewit) of any reservations they had that there was no coverage for such a "suit". Presumably, the insurance companies themselves believed that there was coverage for this "suit" (notwithstanding *Foster-Gardner*). Their silence is evidence that all parties were in agreement that there was coverage for this "suit". If nothing else, their silence indicates that Ameron had a reasonable expectation of coverage.

The allegations of waiver and estoppel are pled sufficiently to state a cause of action.

CONCLUSION

Ameron respectfully requests that this Court:

1. Reverse the Court of Appeal on the interpretation of "suit".
2. Reverse the Court of Appeal on its conclusion that no regulations exist that impose an affirmative duty on the part of the insurance companies to speak and to communicate all reasons for the denial of coverage;

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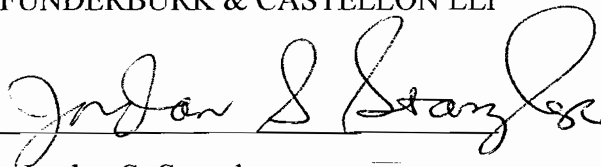
include anyone that Ameron has agreed to indemnify, making Kiewit an insured since Ameron had agreed to indemnify Kiewit.

3. Reverse the Court of Appeal on its analysis of waiver and estoppel;

4. Otherwise affirm the Court of Appeal and direct that those parts of the decision dealing with insurance policies that define "suit" as a "civil proceeding", or provide coverage for "loss" or for "claims" be published.

Respectfully submitted,

STANZLER FUNDERBURK & CASTELLON LLP

By: 

Jordan S. Stanzler

Attorneys for Ameron International Corporation

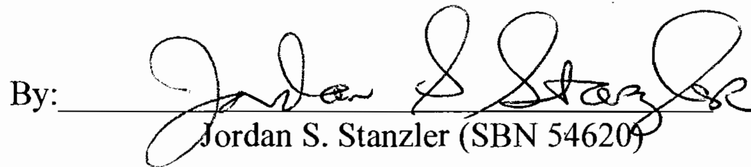
CERTIFICATE OF WORD COUNT

(Rule 8.504(d), Cal. Rules of Court)

I certify that this Opening Brief is proportionately spaced and is prepared in "Times New Roman" 13 point font. The brief contains 13900 words.

Respectfully submitted,

STANZLER FUNDERBURK & CASTELLON LLP

By: 

Jordan S. Stanzler (SBN 54620)

Attorneys for Ameron International Corporation

_PROOF OF SERVICE
[C.C.P. § 1013, C.R.C.§ 2008, F.R.C.P. Rule 5]

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AMERON INTERNATIONAL CORPORATION'S OPENING BRIEF

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Joseph DeHope, Esq.
Hinshaw & Culbertson
One California Street, 18th Fl.
San Francisco, CA 94111

INA, Pacific Employers, St. Paul Surplus Lines

Michael A. Barnes, Esq.
Sonia Renee Martin, Esq.
Sonnenschein, Nath & Rosenthal
525 Market Street, 26th Floor
San Francisco, CA

Great American Surplus Lines

Ira Revich, Esq.
Nicholas R. Andrea, Esq.
Charlston, Revich & Chamberlin LLP
1925 Century Park East, Suite 1250
Los Angeles, CA 90067-2746

Puritan, International

Andrew P. Sclar, Esq.
Ericksen, Arbuthnot, Kilduff, Day & Lindstrom
111 Sutter Street, Suite 575
San Francisco, CA 94104

Old Republic

Rosemary J. Springer, Esq.
McCurdy & Fuller
1080 Marsh Road, Ste.110
Menlo Park, CA 94025

Insurance Company of the State of PA

Thomas M. Downey, Esq.
Burnham Brown
P.O. Box 119
1901 Harrison Street 11th Floor
Oakland, CA 94612

Transcontinetal, Harbor

Blaise Curet, Esq.
Sinnott, Dito, Moura & Puebla
555 Montgomery Street, Ste. 720
San Francisco, CA 94111

Zurich

David R. Singer, Esq.
Hogan & Hartson, LLP
1999 Avenue of the Stars, 14th Floor
Los Angeles, CA 90067

Twin City

Catherine E. Stetson, Esq.
Hogan & Hartson, LLP
555 Thirteenth Street, NW
Washington, DC 20004

The Honorable Ellen Chaitin
San Francisco County Superior Court
400 McAllister Street, Dept. 220
San Francisco, CA 94102

California Court of Appeal
350 McAllister Street
San Francisco, CA 94102

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Dated: November 21, 2007

Sharran L. Rodd