No. S153852

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.

PETITION FOR REVIEW

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

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TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Appellant Ameron International Corporation ("Ameron") respectfully petitions the Court to review the following questions of first impression:

I. QUESTIONS PRESENTED

1. Does an actual trial of twenty-two days before a federal administrative law judge constitute a "suit" under a comprehensive general liability policy?
2. Should this Court clarify, modify or overrule its interpretation of the word "suit" in *Foster-Gardner v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857 ("*Foster-Gardner*")?

II. WHY REVIEW SHOULD BE GRANTED

This case presents a question of major importance to all policyholders in California who have purchased a standard form general liability policy – does that policy cover litigation and trial before an administrative agency?

The Court of Appeal invited review by this Court in an unusual ruling. The Court of Appeal believed that litigation before an administrative agency is a "suit." Nevertheless, the Court felt compelled by "dicta" in *Foster-Gardner* to rule that a trial before an administrative agency is not a "suit".[1] Ameron respectfully submits that the Court of

[1] "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

Appeal's interpretation of "dicta" was erroneous and that this Court never suggested in *Foster-Gardner* that an actual trial is not a "suit". This Court should grant review to clarify this point – whether the word "suit" in the standard general liability policy is broad enough to include an actual trial before an administrative agency.

It defies common sense to say that a trial is not a "suit". Ameron respectfully submits that this Court never intended that *Foster-Gardner* would be interpreted in a way that creates absurd and illogical results. This Court should accept review to clear up the apparent confusion over "dicta"in *Foster-Gardner* that confounded the Court of Appeal. As discussed more fully below, *Foster-Gardner* suggested that the definition of "suit" is in fact broad enough to cover an actual trial before an administrative agency. 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.

The trial in this case was conducted before 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 the Interior, Bureau of Land Management. In a series of statutes, Congress has defined these proceedings as a "suit"; provided that the federal contractor may litigate the "suit" either before the Board of

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applied to the very different administrative proceedings in this case.

And, while we may believe that adjudicatory proceeding in the IBCA issue here should trigger coverage under the policy language examined in *Foster-Gardner,* we are mindful of our subordinate role in the judicial hierarchy...we are bound by principles of stare decisis to follow [the *Foster-Gardner* line of cases]." Slip Opinion at 22-23, attached as Exhibit A.

Contract Appeals or before the U.S. Court of Federal Claims; and provided that a "suit" filed in one forum can be transferred to the other forum, in "the interests of justice."[2] Congress provided further that the administrative law judge of the Board has all the same authority as the federal judge of the Court of Claims to issue subpoenas, take testimony, and award damages.[3] The legislative history shows that Congress encouraged litigation before the Board to reduce the caseload of the federal court, while providing the the contractor with a more expeditious and less expensive forum.[4] In the words of one federal court, Congress created "parity" between the two forums.[5]

Under these circumstances, it makes no sense to state that a trial before the Board of Contract Appeals is not a "suit", when the same "suit" can be initiated either in federal court or before the Board. The reasonable policyholder would expect to have coverage for a trial, regardless of whether the trial was conducted in one or the other of two equivalent forums. The reasonable policyholder would not expert coverage to depend upon which forum was selected.

Surely, this Court did not intend in *Foster-Gardner* to create the bizarre and irrational anomaly that results from the Court of Appeal decision. Insurance coverage cannot depend upon whether the federal contractor exercises one choice provided by Congress (to litigate before a federal judge) but not the other choice provided by Congress (to litigate before an administrative law judge). Indeed a "suit" first filed in federal

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[2] See 41 U.S.C. §§605-609 discussed below.
[3] See 41 U.S.C. §§609(d), discussed below. *Garrett v. General Electric Co.*, 987 F.2d 747, 750 (5th Cir. 1993).
[4] See discussion below.
[5] *Garrett v. General Electric Co.*, 987 F.2d 747, 749 (5th Cir. 1993).

court can be transferred to the Board of Contract Appeals. Under the reasoning of the Court of Appeal's decision, the policyholder has coverage when it decides to file "suit" in federal court; but loses coverage the minute that the "suit" is transferred to the Board.

The Court of Appeal ignored the important caveat in *Foster-Gardner* that this Court was reviewing an agency order that *did not commence either a lawsuit or an adjudicative procedure before an administrative tribunal.* [6] The clear implication was that "an adjudicative procedure before an administrative tribunal" did constitute a "suit".

Therefore, this Court should grant review to clarify its interpretation of the word "suit" in the general liability policy, as applied to trials before administrative agencies.

III. STATEMENT OF THE CASE

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. AA 1964-1965.[7] 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 in damages due to alleged manufacturing defects in the siphons. The government alleged *inter alia*

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[6] "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.

[7] "AA" refers to Ameron's Appendix on appeal.

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 Complaint before the U.S. Department of Interior Board of Contract Appeals, to contest the decision of the Contracting Officer. AA 1964. 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 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 of transcript, the parties engaged in mediation, which led to a settlement in which Ameron agreed to pay the government $10 million.

B. The Choice of Forum Before The Board or Before The U.S. Court of Federal Claims

Litigation before the Board of Contract Appeals is defined as a "suit" under federal law. Under the unique procedures created by Congress to deal with claims by the federal government against government contractors, Congress established a statutory procedure by which a 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).

This is proof again that the Board litigates "suits." The Court of Federal Claims can consolidate these "suits" and order that the "suits" be tried before a Board or before the Court of Federal Claims. Procedurally and substantively, the two forums are interchangeable. 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). That is, "the CDA [Contract Disputes Act] *creates parity between these two lines of appeal." Garrett v. General Electric Co.,* 987 F. 2d 747, 750 (5th Cir. 1993)(emphasis added). Congress

intended to eliminate the "disharmony" between the boards and the courts which preceded the enactment of the CDA. *See Garrett*, 987 F.2d at 749.

C. The Legislative History

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." For example, 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 same authority to consolidate "suits" pending before the Boards:

> 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.
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> S.Rep. 95-118, 1978 Code Congressional and Administrative News 5265. (Emphasis added); reproduced in the appendix of non-California authorities filed by Twin City, Tab 10, at p. 12.

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); Twin City Tab 10, p. 3.
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>
> 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); Twin City Tab 10, p. 24.
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> 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, Twin City Tab 10, p. 12.

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., DeMalherbe v. International Union of Elevator Constructors*, 449 F. Supp. 1335, 1347 (N.D. Cal. 1978)(complaint filed with California Fair Employment Practices Commission referred to as "administrative suit"); *Greenfield Mills, Inc. v. Governor O'Bannon*, 189 F. Supp. 2d 893, 897, n.2 (N.D. Ind. 2002)(plaintiff filed "administrative suits" against agency); *In re Symbol Technologies Securities Litigation*, 762 F. Supp. 510, 517 (E.D.N.Y. 1991)("administrative suit" brought by SEC); *Aviles v. Lutz*, 887 F.2d 1046, 1047 (10th Cir. 1989)(plaintiff filed two civil and five "administrative suits"); *Honeywell, Inc. v. Consumer Product Safety Commission*, 566 F. Supp. 500, 502 (D. Minn. 1983)(commission issued administrative complaint; "administrative suit" to impose penalties is challenged in court).

A reasonable policyholder would therefore believe that a policy providing coverage for a "suit" would provide coverage for a twenty-two

day trial in the Board of Contract Appeals, which functions as a court.

D. Denial of Insurance Coverage

Ameron sought insurance coverage from ten insurance companies who had sold primary, umbrella and excess policies. The insurance companies provided coverage for "claims", for "civil proceedings", and for "suits". Since Ameron had litigated the government's "claims" in a "civil proceeding", which is defined as a "suit" under federal law, the lawsuit was clearly covered by insurance.

Ameron's primary insurance company, Insurance Company of North America ("INA") agreed to the settlement and offered to pay $750,000. Ameron rejected the offer as insufficient. INA raised no coverage issues at the time.

It was only when Ameron filed this lawsuit that its insurance companies argued, for the first time, that there was no coverage because the lawsuit was litigated before a federal agency rather than before a court. Had the insurance companies raised this objection earlier, Ameron could have proceeded in the Court of Federal Claims. Instead, the insurance companies waited until the case was settled to deny coverage. They remained silent when they had a duty to speak, then looked for a way to deny coverage. They seized upon the argument that Ameron had chosen the "wrong" forum, by litigating before an administrative law judge of the Board, instead of litigating before a district court judge in the Court of Federal Claims.

The Superior Court dismissed Ameron's Third Amended Complaint, granting a demurrer in favor of all insurance companies. Ameron then appealed.

E. The Court of Appeal Decision

The Court of Appeal upheld coverage under those insurance policies which define a "suit" as a "civil proceeding." But it denied coverage for those insurance policies which did not define "suit".

The Court of Appeal believed that it was bound to follow *Foster-Gardner:*

> In *Foster-Gardner*, *Powerine I* and *II*, and *Ace* an environmental agency issued an order notifying the insured that it was a responsible party for pollution, and requiring remediation. We find compelling a distinction embraced by Justice Spencer in her concurring opinion in *Fireman's Fund Ins. Co. v. Superior Court* (1997) 65 Cal.App.4th1205, 1221-1222. Justice Spencer concluded that such administration agency activity was "merely an investigative administrative proceeding seeking a negotiated settlement and a consent decree.... [T]he agency lacked the requisite authority to bind the disputants .. [and] this proceeding did not qualify as a suit." (*Id.* at p. 1222.) But "the common, ordinary meaning of the word 'suit' is broad enough to cover. . . adjudicative administrative hearings.... [Citation.]" (*Ibid.*) The 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.
>
> 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. But, "'[e]ven if properly characterized as dictum, statements of the Supreme Court should be considered persuasive.'[citation omitted]. . ."

> And, while we may believe that adjudicatory proceeding 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. [citation omitted] 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 be the principles of stare decisis to follow those cases. Slip Opinion at 23, 24. (Footnote omitted).

IV. DISCUSSION

A. An Actual Trial Is a "Suit"

The ordinary policyholder would understand that a trial is a "suit." Under Civil Code section 1644 "the words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning. . .." The trial before the Board is also a "suit" in the strict legal sense, since Congress has defined Board procedures as a "suit." In ordinary usage, a "suit" includes actions filed in a court, but also includes a proceeding to protect legal rights.

The Board of Contract Appeals acts in a "judicial capacity" when it conducts hearings and decides cases. *United States v. Utah Construction & Mining Co.,* 384 U.S. 394, 422 (1966). Furthermore, the Board has the authority to award money damages. *See, e.g., Cherokee Nation of Oklahoma v. Leavitt*, 125 S. Ct. 1172 (2005)(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 a draft 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.

The italicized language suggests that this Court was mindful that an adjudication by an administrative tribunal does constitute a "suit". This very point was made by Justice Spencer in her concurring opinion in *Fireman's Fund Ins. Co. v. Superior Court* (1997) 65 Cal. App. 4th 1205, 1221-1222:

> I do not agree, however, that the definition of "suit" is limited to proceedings in a court of law tried by a judge or jury. As noted in Webster's Third New International Dictionary (1993) page 2286, column 3, "suit" is not only "an action or process in a court for the recovery of a right or claim", but it may include "the attempt to gain an end by legal process", or "prosecution of [a] right before any tribunal ." (Italics added)....In my view, therefore, the common, ordinary meaning of "suit" is broad enough to cover alternative dispute resolution proceedings such as adjudicatory administrative hearings..." .

The Court of Appeal should have followed this simple logic. The decision of the Court of Appeal will lead to illogical results, forcing all federal contractors to choose litigation in federal court, lest they lose insurance coverage by choosing to litigate before the Board. Consider the procedural history of *Cherokee Nation of Oklahoma v. Leavitt* (2005)125 S. Ct. 1172, in which the Cherokee Nation brought two cases involving the same legal issues; one case was filed in federal court and one case was filed with the Board of Contract Appeals. The Supreme Court ultimately ruled in

favor of the tribe, resulting in the award of damages in both cases. Under the Court of Appeal's decision, the Cherokee Nation would have coverage for one trial (in federal court), but not the other trial (before the Board). The reasonable policyholder would not expect coverage to be denied simply because the policyholder exercised the choice, provided by Congress, to litigate before the Board.

B. Insurance Coverage Does Not Depend Upon the Fortuity of the Forum Chosen, Since Actions Can Be Transferred From One Forum To Another

Coverage cannot depend on the mere fortuity of whether an action is heard in the Board of Contract Appeals or the U.S. Court of Federal Claims, when both are equivalents, as a matter of law; and when an action can be transferred from one forum to the other. When a federal contractor's action is filed in federal court, that court can transfer the action to the board of contract appeals "in the interests of justice.". *See, e.g., Southwest Marine, Inc. v. United States*, 680 F. Supp. 1400, 1404 (N.D. Cal. 1988), reconsideration denied, 680 F. Supp. 327 (N.D. Cal. 1988). In that case the court transferred an action filed in federal court to the Armed Services Board of Contract Appeals, noting "the Claim Court's unabashed willingness to transfer cases to the agency boards." Id. If applied to these facts, the Court of Appeal decision would result in a bizarre, unnatural result. The federal contractor, who chose to litigate in federal court, to preserve insurance coverage, would see the insurance coverage disappear simply because the case was transferred to the board of contract appeals. That result makes no sense when there is no functional difference between the court and the agency board.

This equivalency between the Board of Contract Appeals and the U.S. Court of Federal Claims is critical for insurance purposes. In an analogous context, this Court found coverage for the cost of complying with injunctive relief, because injunctive relief was the equivalent of the U.S. government suing for money damages. In *AIU Ins. Co. v. Superior Court* (1990) 51 Cal. 3d 807 this Court reasoned as follows:

> It would exalt form over substance to interpret CGL policies to cover one remedy but not the other. . .Insofar as injunctive relief is an equivalent substitute for the goal of remedial action, the distinction is inapposite. . .Because an insured would reasonably expect *equal coverage for the costs of equivalent or alternative remedies*, the costs of injunctive relief under the statute in question here are "damages" for CGL purposes. Id. at 840, 841 (emphasis added).

Here, too, it would "exalt form over substance" to interpret the CGL policy as covering one forum for trial (in court) but not the equivalent, co-equal forum for the exact same trial. *See also Aetna Cas. & Surety Co. v. Pintlar Corp,* 948 F.2d 1507, 1517 (9th Cir. 1991)("coverage should not depend on whether the EPA may choose to proceed with its administrative remedies or go directly to litigation").

C. The "Bright Line" Rule Articulated in *Foster-Gardner* Does Not Apply, Or Should Not Apply, To An Actual Trial

The Court of Appeal made a point of noting that the proceedings before the Board of Contract Appeals involve a complaint, issuance of subpoenas, testimony under oath, and the possible award of money damages. Slip Opinion at 22. Thus, the administrative trial falls exactly within the parameters of a "suit" discussed in *Foster-Gardner*:

> The parameters of a "suit" – and therefore the limits of defense – are defined explicitly by the complaint, the policy, and any other information known to the insurer. It is because the insurer's duty to

> defend depends on the allegations of the *complaint* that the insurer may or may not owe a duty to defend those allegations.

18 Cal. 4th at 880 (emphasis in original)

When this Court mentioned the drawing of a "bright line", it was not in the context of an administrative trial, but in the context of whether letters might constitute a "suit":

> Our conclusion that a "suit" is a court proceeding initiated by the filing of a complaint creates a "bright-line rule that, by clearly delineating the scope of risk, *reduces* the need for further litigation. Indeed, it is the position taken by [these other jurisdictions] that will open the flood gates of litigation by inviting, and requiring, a case-by-case determination whether each new and different letter presenting the claim of an administrative agency is to be deemed the 'functional equivalent of a suit brought in a court of law.'"

Id. at 887-888 [citation omitted](underlining added). The concern about floodgates does not exist at all here, where Congress has given the federal contractor the choice of filing a complaint in federal court or a complaint before the Board.

We respectfully submit that this Court did not intend to exclude administrative complaints and administrative trials when speaking of the "bright line rule". At the very least, this Court should clarify whether it intended to exclude actual trials from the definition of "suit" simply because the policyholder exercised its statutory right to have the same exact trial take place before an administrative agency rather than in a court.

If, indeed, the *Foster-Gardner* decision was intended to exclude all trials before all administrative agencies, then that decision should be reconsidered. There is nothing in the common and ordinary definition of the word "suit" that limits its scope to trials in a court and excludes from its

scope broader proceedings, such as a trial before an administrative agency . The dissenting opinion in *Foster-Gardner* made this very point:

> "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. It is not essential that the proceeding should be originally instituted in a court.'[Citation]. The word signifies 'the prosecution of any claim, demand or request, and is much broader than the term "action" and may embrace it, but does not define it.' [Citation]....it 'is a more general term denoting any legal proceeding of a civil kind' [citation]...."

18 Cal. 4th at 890 (citation omitted).

The clear weight of authority in other jurisdictions recognizes that the common and ordinary definition of the term "suit" is not limited to actions filed in a court. *See, e.g.*,:

R.T. Vanderbilt Co., Inc. v. Continental Casualty Co. (Ct. 2005) 870 A.2d 1048, 1061 (discussing dictionary definitions of "suit");
Hartford Accident & Indem. Co. v. Dana Corp. (Ind. Ct. App. 1997) 690 N.E.2d 285(discussing dictionary definitions of "suit");
A.Y. McDonald Indus. v. Insurance Co. of N. Am. (Iowa 1991) 475 N.W.2d 607 830(discussing dictionary definitions of "suit");
Aetna Cas. & Surety Co. v. Commonwealth of Kentucky, (Ky. 2005) 179 S.W.3d 830("suit" is susceptible to more than one meaing);
Bausch & Lomb, Inc. v. Utica Mut. Ins. Co. (Md. 1993) 625 A.2d 1021;
Hazen Paper Co. v. United States Fidelity & Guar. Co. (Ma. 1990) 555 N.E.2d 576;
Michigan Millers Mut. Ins. Co. v. Bronson Plating Co. (Mich. 1994), 445 Mich. 550, 519 N.W.2d 864;
SCSC Corp. v. Allied Mut. Ins. Co. (Minn. 1995) 536 N.W.2d 305;

Coakley v. Maine Bonding & Casualty Co. (N.H. 1992) 618 A.2d 777;
Avondale Industries, Inc. v. Travelers Indem. Co. (2d Cir. 1989) 887 F.2d 1200 (applying New York law)(discussing dictionary definitions of "suit."); *Ryan v. Royal Ins. Co.* (lst Cir. 1990) 916 F.2d 731 (applying New York law);
C. D. Spangler Constr. Co. v. Industrial Crankshaft & Engineering Co. (N.C. 1990) 388 S.E.2d 557;
Schnitzer Investment Corp. v. Certain Underwriters at Lloyd's of London, 197 Ore. App. 147, 155-157 (2005)(discussing dictionary definition of "suit"), affirmed on other grounds, 341 Ore. 128 (2006);
Morrisville Water & Light Dep't. v. United States Fidelity & Guaranty Co. (D. Vt. 1991) 775 F. Supp. 718;
Johnson Controls, Inc. v. Emplrs. Ins. of Wausau (Wis. 2003) 665 N.W.2d 257 (reversing prior case law that a PRP letter is not a "suit.")[8];
Compass Ins. Co. v. City of Littleton (Colo. 1999) 984 P.2d 506.

There is simply nothing in the word "suit" to tell the reasonable policyholder that a trial before an administrative agency is not covered. This Court should re-examine the dictionary definition of "suit."

At the very least, this Court should clarify its discussion of the "bright line rule" in *Foster-Gardner*. This Court surely did not intend that its "bright line rule" would lead to irrational distinctions when applied to facts that were not before the Court. Accordingly, Ameron respectfully urges the Court to clarify, modify, or overrule the interpretation of "suit" in *Foster-Gardner*.

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[8] *Foster-Gardner*, 18 Cal. 4th at 870, quoted from *City of Edgerton v. General Casualty Co.* (1994), 517 N.W.2d 463, 477; that case was repudiated in *Johnson Controls*.

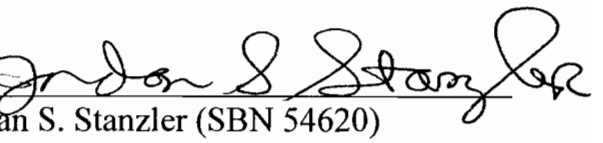
CONCLUSION

For all the foregoing reasons, Ameron respectfully requests that this Court grant review.

Respectfully submitted,

June 25, 2007

STANZLER FUNDERBURK & CASTELLON LLP

By: 

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CERTIFICATE OF WORD COUNT
(Rule 8.504(d), Cal. Rules of Court)

I certify that this Petition for Review is proportionately spaced and is prepared in "Times New Roman" 13 point font. The brief contains 5057 words.

Respectfully submitted,

June 25, 2007 STANZLER FUNDERBURK & CASTELLON LLP

By: _____
Jordan S. Stanzler (SBN 54620)

Attorneys for Petitioner Ameron International Corporation

EXHIBIT A

Filed 5/15/07

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

AMERON INTERNATIONAL CORPORATION, **Plaintiff and Appellant,** **v.** **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA et al.,** **Defendants and Respondents.**	**A109755** **San Francisco County Super. Ct. No. 419929)**
AMERON INTERNATIONAL CORPORATION, **Plaintiff and Appellant** **v.** **HARBOR INSURANCE COMPANY,** **Defendant and Respondent.**	**A112856** **San Francisco County Super. Ct. No. 419929)**

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, parts VII, VIII, IX, X and XI of this opinion are not certified for publication.

In this insurance coverage matter, plaintiff/appellant Ameron International Corporation (Ameron) seeks coverage from defendant/respondent insurers (collectively respondents)[1] for its $10 million settlement of a contract dispute with the federal government and for its related defense costs. The settlement occurred during a protracted administrative hearing before the United States Department of Interior Board of Contract Appeals (IBCA). Between 1978 and 1995, respondents issued a series of primary comprehensive and commercial general liability (CGL)[2] and excess/umbrella policies to Ameron. With respect to these policies, Ameron contends the trial court too narrowly construed respondents' duties to defend and indemnify and, as a result, erroneously granted Harbor's motion for judgment on the pleadings and sustained the other respondents' demurrers, without leave to amend, to Ameron's operative third amended complaint (complaint).[3] Resolution of this matter requires an analysis of four Supreme

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1 The respondents are: Insurance Company of the State of Pennsylvania (ICSOP), Century Indemnity Company (as successor to CCI Insurance Company, as successor to Insurance Company of North America) (INA), Pacific Employers Insurance Company (Pacific), St. Paul Surplus Lines Insurance Company (St. Paul), International Insurance Company (International), Puritan Insurance Company (Puritan), Transcontinental Insurance Company (Transcontinental), Old Republic Insurance Company (Old Republic), Twin City Fire Insurance Company (Twin City), Great American Surplus Lines Insurance Company (Great American), and Harbor Insurance Company (Harbor).

With the exception of Harbor, all respondents appear in case No. A109755. Harbor appears in case No. A112856. On our own motion and by an order separately filed, we have consolidated the two appeals.

2 In 1986, the standard CGL policy was amended, and one of the changes altered its name from *comprehensive* general liability insurance policy to *commercial* general liability insurance policy. (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 959, fn. 3 (*Powerine I*).) Throughout the balance of the opinion, we refer to each as a CGL policy.

3 All respondents are named in this complaint, and each filed a demurrer. The Harbor policy was addressed separately in a motion for judgment on the pleadings filed by Harbor, because no stipulation regarding the content of its policy was obtained until after the trial court hearing on the demurrer.

In the complaint, Ameron also sued Zurich Insurance Company (Zurich), which issued Ameron three primary liability policies between September 1, 1992 and March 1, 1997. Zurich is not a party to this appeal.

Court decisions issued between 1998 and 2005 that described the limits of the duties to defend and indemnify an insured for its expenses in complying with environmental agency activity prior to the filing of a complaint.

In *Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857 (*Foster-Gardner*) and *Powerine I, supra,* 24 Cal.4th 945, the court examined several primary CGL policies. In *Foster-Gardner*, the court held that the duty to defend a "suit seeking damages," where "suit" was not defined in the policy, was triggered only by a civil action prosecuted in a court of law. (*Foster-Gardner*, at pp. 878-882.) In *Powerine I,* at pages 950-951, the court held that in a policy imposing a duty to defend " 'in any suit seeking damages' " and a duty to indemnify the insured for " 'all sums that the insured becomes legally obligated to pay as damages,' where neither 'suit' nor 'damages' are defined within the policy" the duty to indemnify is "limited to money ordered by a court" and "does not extend to any expenses required by an administrative agency pursuant to an environmental statute." In *Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377 (*Powerine II*), the court acknowledged the importance of the precise wording of the policies' insuring agreements (*id.* at p. 389) and concluded that policies which included the word "expenses," as well as "damages" in the insuring agreement provided a duty to indemnify for the cleanup of contaminated sites (*id.* at pp. 383, 398-405). Finally, in a case decided the same day as *Powerine II,* the court reached the contrary conclusion because the "literal insuring language" of the excess/umbrella policies in that case neither referenced nor incorporated the term "expenses." (*County of San Diego v. Ace Property & Casualty Ins. Co.* (2005) 37 Cal.4th 406, 411 (*Ace*).)

Here, the trial court relied on *Foster-Gardner* and *Powerine I* and concluded (1) the subject proceeding before the IBCA was not a covered "suit" because a "suit" means a civil action initiated by a complaint in a court of law; and (2) the money paid by Ameron to settle the dispute was not covered "damages" because "damages" are limited to money ordered by a court. As to those policies before us whose insuring agreements are similar to those construed in *Foster-Gardner* and *Powerine I*, and where "suit" is not

defined, we conclude the bright-line rule announced by the Supreme Court in those two decisions is properly applied, despite the significant differences between the IBCA proceeding, involved here, and environmental remediation orders. However, as to the policies before us that contain a definition of the term "suit,"[4] and/or provide indemnity for "loss," not damages, there is a duty on the insurer to indemnify and/or defend. As to those policies, the trial court erred.

PROCEDURAL AND FACTUAL BACKGROUND[5]

Ameron is a Delaware corporation whose principal place of business is Pasadena, California. Respondents are 11 insurance companies who provided Ameron with primary, excess and/or umbrella insurance coverage between 1978 and 1995.

Beginning in 1975, the United States Department of the Interior, Bureau of Reclamation (Bureau), entered into general contracts with Peter Kiewit Sons' Company (Kiewit) for the manufacture and installation of concrete siphons to be used in the Central Arizona Project, an aqueduct system. Pursuant to a subcontract with Kiewit, Ameron manufactured the siphons between 1975 and 1980. Ameron was required by its contracts with Kiewit to defend and indemnify Kiewit, and Kiewit is an insured under Ameron's insurance policies.[6]

In 1990, defects in the siphons were discovered, requiring their replacement or repair. As a result of the defective siphons, in 1992 the Central Arizona Water Conservation District filed an action against Ameron in federal district court in Arizona (hereafter the CAWD action). Ameron provided timely notice of the CAWD action to its

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4 "In 1986, the standard insurance form was amended to define 'suit' as 'a civil proceeding in which damages because of [certain specified injuries] to which this insurance applies are alleged. "Suit" includes an arbitration proceeding alleging such damages to which you must submit or submit with our consent.' [Citations.]" (*Foster-Gardner, supra,* 18 Cal.4th at p. 864, fn 3.)

5 Preliminarily, we note that the parties cite to matters not alleged in the complaint, attached to the complaint or judicially noticed by the trial court. Since those matters are outside the scope of our review of the demurrers and judgment on the pleadings, we disregard them.

6 Kiewit is not a party to this appeal.

insurers. The CAWD action was dismissed, and an appeal taken to the Ninth Circuit Court of Appeals was dismissed in 1996.[7]

In 1995, during the pendency of the CAWD action, the Bureau's contracting officer issued two final decisions finding that Kiewit was responsible for defects in the siphons, necessitating their replacement at a cost of approximately $116 million.[8] The government sought approximately $40 million in damages from Ameron and Kiewit. Pursuant to their private contractual remedy, Ameron and Kiewit[9] elected to challenge the decisions of the Bureau's contracting officer before the IBCA. The government asserted that it had acted to prevent a "massive explosion" resulting from the rupture of the defective siphons. The defects alleged by the government involved "continuous and progressive deterioration" of the materials used to construct the siphons.

Ameron provided timely notice to respondents of the Bureau's claims and proceedings against Ameron and Kiewit. After 22 days of trial, on January 21, 2003, Ameron and Kiewit settled the government's claims for $10 million. Truck Insurance Exchange (Truck) one of Ameron's primary insurers, paid Ameron "certain sums with respect to the [Central Arizona Project] litigation."[10] Respondents failed or refused to

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7 The Ninth Circuit appeal is not a subject of the instant coverage action.

Solely as to INA, Ameron alleged in its first cause of action of the operative complaint that INA breached a duty to defend Ameron in the CAWD action. Because Ameron does not assert any claim of error as to the court's sustaining of INA's demurrer to this cause of action, we consider any such claim of error abandoned. (See *Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.)

8 We reject the January 18, 2006 request by Transcontinental and the February 10, 2006 joinder by Great American that we take judicial notice of the contracting officer's two final decisions because those decisions are irrelevant to our decision.

9 Ameron asserts in its opening brief that the IBCA litigation was prosecuted and paid for by Ameron in Kiewit's name, and in this action Ameron is seeking insurance coverage for itself and on behalf of Kiewit.

10 Whether Truck compensated Ameron for its defense costs and/or for the settlement it paid is unclear from the face of the complaint. Truck was neither named as a defendant in the instant action nor is it a party to this appeal.

pay for defense costs incurred in the litigation and failed or refused to pay for the settlement with the Bureau.

The Complaint

In April 2003, Ameron, in its own right and as an assignee of Kiewit's rights, filed its original complaint against respondents and others for breach of contract and related claims. Ameron filed its operative complaint on July 21, 2004.[11] In essence, 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 thrust of the complaint is that respondents failed or refused to defend Ameron or settle the IBCA litigation, failed to indemnify Ameron for its settlement of the IBCA litigation, and failed to investigate the potential of coverage.

Insurance Coverage[12]

Ameron purchased $15 million in primary insurance coverage[13] between July 1978 and March 1997. Truck issued primary policies between July 1, 1978 and July 1, 1988; INA issued primary policies between August 1, 1988 and August 1, 1992; and Zurich issued primary policies between September 1, 1992 and March 1, 1997.

Between July 1, 1978 and August 1, 1987, Pacific, Puritan, Old Republic, Twin City, Transcontinental and Great American issued Ameron first layer excess and/or

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11 With the exception of Transcontinental, each of respondents' policies for the relevant periods were deemed to be attached to the complaint.

12 Attached as an appendix to this opinion is a coverage chart.

13 Primary insurance "is insurance coverage whereby . . . liability attaches *immediately* upon the happening of the occurrence that gives rise to liability. [Citation.]" (*Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593, 597; Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2006) ¶ 8:176, p. 8-44.) A liability insurer providing such coverage has the primary duty to defend and indemnify the insured unless specific policy language provides an excuse or exclusion from coverage. (Croskey et al., at p. 8-45.)

excess/umbrella insurance[14] policies to Truck's primary policies. No second layer excess insurance was in effect as to Ameron during that period.

For the period April 15, 1987 to July 1, 1988, International issued Ameron first layer excess/umbrella policies to Truck's primary policy, and, from July 1, 1987 to July 1, 1988, St. Paul issued a second layer excess policy. For the period August 1, 1988 to August 1, 1989, International issued Ameron a first layer excess/umbrella policy and St. Paul issued Ameron a second layer excess policy overlying an INA primary policy. During the period August 1, 1989 to August 1, 1991, Harbor and ICSOP issued Ameron second layer excess policies to the International first layer excess/umbrella and INA primary policies. For the period August 1, 1991 to December 1, 1995, ICSOP provided Ameron a first layer excess/umbrella policy to the underlying primary policies.

Ameron's complaint alleged that proceedings before the IBCA are "civil proceedings" in which damages may be awarded for "property damage," and that the IBCA acts in a "judicial capacity" when conducting hearings and deciding contested factual issues. Ameron also alleged that pursuant to the Contract Disputes Act of 1978 (the Act), it had the choice of challenging the decision of the Bureau's contracting officer by appealing that decision to the IBCA or by bringing an action in the United States Court of Federal Claims. (41 U.S.C. §§ 605, 609.) It asserted that the Act refers to an action filed in either the IBCA or the Court of Federal Claims as a "suit," triggering respondents' coverage duties.

The waiver and estoppel causes of action alleged that respondents knowingly and intentionally failed to inform Ameron that there was no coverage for the IBCA proceeding because an IBCA proceeding is not a covered "suit." Ameron alleged that

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[14] Excess insurance provides coverage only after a predetermined amount of underlying primary insurance is exhausted. (*Wells Fargo Bank v. California Ins. Guarantee Assn.* (1995) 38 Cal.App.4th 936, 940, fn. 2; Croskey et al., Cal. Practice Guide: Insurance Litigation, *supra*, ¶ 8:177, at p. 8-45.) Umbrella policies provide " 'alternative primary coverage as to losses "not covered by" the primary policy.' [Citations.]" (*Powerine II, supra,* 37 Cal.4th at pp. 398-399.) Umbrella policies are usually excess policies in that they provide coverage that is excess over underlying primary insurance. (Croskey et al., ¶ 8:203, p. 8-49.)

had it been informed by respondents that IBCA proceedings are not covered under respondents' policies, Ameron "could have" proceeded against the Bureau in the Court of Federal Claims rather than before the IBCA.

The complaint's declaratory relief causes of action alleged that a present and justiciable controversy exists between Ameron and respondent excess insurers regarding coverage under respondents' policies, and the controversy exists whether or not the underlying primary insurance is exhausted. The declaratory relief cause of action also alleged, "Alternatively, the underlying insurance will be deemed exhausted if Ameron is permitted to select a single year of coverage for the settlement with the Bureau. [¶] . . . Alternatively, the underlying insurance may be deemed inapplicable at some point in this litigation, if the court should determine that certain underlying insurance does not provide coverage, but [a respondent excess insurer] does so. [¶] . . . The court is therefore requested to issue a declaratory judgment which will resolve these disputed issues and determine which policies are liable to provide coverage, and in which order."

In addition, as an assignee of the rights of Truck, Ameron sought equitable contribution from INA and Zurich for the amount paid by Truck.

Ameron's action against respondents was dismissed after the trial court granted judgment on the pleadings to Harbor and sustained without leave to amend the demurrers filed by the other respondents to each cause of action.

STANDARD OF REVIEW

We review an order sustaining a demurrer without leave to amend de novo, exercising our independent judgment as to whether, as a matter of law, the complaint states a cause of action on any available legal theory. (See *Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1501.) In doing so, we assume the truth of all material factual allegations together with those matters subject to judicial notice. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) However, no such credit is given to pleaded contentions or legal conclusions. (*Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 769.)

"A judgment on the pleadings in favor of the defendant is appropriate when the complaint fails to allege facts sufficient to state a cause of action. [Citation.] A motion for judgment on the pleadings is equivalent to a demurrer and is governed by the same de novo standard of review. [Citations.] All properly pleaded, material facts are deemed true, but not contentions, deductions, or conclusions of fact or law; judicially noticeable matters may be considered. [Citation.]" (*Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672.) Further, the court reviews the complaint liberally, giving it a reasonable interpretation, reading it as a whole and its parts in their context. (Code Civ. Proc., § 452; *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1323.)[15]

RULES OF INSURANCE POLICY INTERPRETATION

" ' "While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply." [Citations.] "The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties." [Citation.] "Such intent is to be inferred, if possible, solely from the written provisions of the contract." [Citation.] "If contractual language is clear and explicit, it governs." [Citation.]' [Citation.]

"Ambiguity exists when an insurance policy provision ' "is capable of two or more constructions, both of which are reasonable." [Citations.] The fact that a term is not defined in the policies does not make it ambiguous. [Citations.] Nor does "[d]isagreement concerning the meaning of a phrase," or " 'the fact that a word or phrase isolated from its context is susceptible of more than one meaning.' " [Citation.] " '[L]anguage in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the

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15 Though the complaint recites that many of respondent insurers issued multiple policies to Ameron during the relevant period, the causes of action are organized without regard to this. For example, INA issued Ameron four separate, successive policies between August 1, 1988 and August 1, 1992. But the causes of action naming INA do not plead the policies separately. Since a demurrer cannot be sustained (or a judgment on the pleadings granted) to part of a cause of action (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682), we must reverse as to any cause of action if even a single policy alleged in that cause of action provides a duty of coverage.

abstract.' " [Citation.] "If an asserted ambiguity is not eliminated by the language and context of the policy, courts then invoke the principle that ambiguities are generally construed against the party who caused the uncertainty to exist (i.e., the insurer) in order to protect the insured's reasonable expectation of coverage." [Citation.]' [Citation.]

"But if 'a term in an insurance policy has been judicially construed, it is not ambiguous and the judicial construction of the term should be read into the policy unless the parties express a contrary intent.' [Citation.]" (*CDM Investors v. Travelers Casualty & Surety Co.* (2006) 139 Cal.App.4th 1251, 1256-1257 (*CDM*).) However, we apply this rule only after determining that "the context in which the construed term appears is analogous to the context of the term before us." (*Lockheed Martin Corp. v. Continental Ins. Co.* (2005) 134 Cal.App.4th 187, 197 (*Lockheed*).)

" ' " '[A] liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity. [Citation.] . . . "[T]he carrier must defend a suit which *potentially* seeks damages within the coverage of the policy." [Citation.] Implicit in this rule is the principle that the duty to defend is broader than the duty to indemnify; an insurer may owe a duty to defend its insured in an action in which no damages ultimately are awarded. [Citations.]' [Citation.]" [Citation.] [¶] To prevail . . . on the issue of duty to defend, the insured must prove the existence of a potential for coverage, while the insurer must establish the absence of any such potential. "In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*." [Citation.]' [Citations.]" (*Ortega Rock Quarry v. Golden Eagle Ins. Corp.* (2006) 141 Cal.App.4th 969, 977 (*Ortega*).)

LEGAL BACKGROUND

A. *Foster-Gardner*

In *Foster-Gardner*, the court determined the scope of the duty to defend against administrative actions in pre-1986 standard primary CGL policies. The insured had been ordered by the Department of Toxic Substances Control of the California Environmental Protection Agency to undertake certain remediation activities in regard to contamination at a site in Coachella, California. (*Foster-Gardner, supra,* 18 Cal.4th at pp. 861-863.)

The insured tendered defense of the order to four of its insurers. The pre-1986 CGL policies examined in *Foster-Gardner*, with minor nonmaterial differences, stated, " '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, . . . and may make such investigation and settlement of any claim or suit as it deems expedient . . . ." (*Id.* at p. 863.) The terms "suit" and "claim" were not defined in the policies. (*Id.* at p. 864.)[16] Utilizing a " 'literal meaning' approach," the court concluded that the word "suit" in the duty to defend clause was not ambiguous and denoted "court proceedings initiated by the filing of a complaint." (*Id.* at p. 869.) The court declined to take either a "functional" or "hybrid" approach, rejecting the notion that "suit" means "anything equivalent to a suit." (*Id.* at pp. 871-872, 879.) Under the policies at issue in *Foster-Gardner*, an insurer had the duty to defend a suit, but discretion to investigate and settle a claim. (*Id.* at p. 878.) The court concluded that under those policies, the insurer's duty to defend a "suit seeking damages" was limited to defending a civil action prosecuted in a court. (*Id.* at pp. 878-888; see also *Powerine I, supra,* 24 Cal.4th at p. 959.) *Foster-Gardner* held that, based on the policy language, the insurer's duty to defend did not extend to an administrative agency proceeding pursuant to an environmental statute, which was not a "suit," but rather implicated a "claim." (*Foster-Gardner*, at pp. 878-888.)

"*Foster-Gardner* was intended to 'create[] a "bright-line rule that, by clearly delineating the scope of risk, *reduce[d]* the need for future litigation," ' by avoiding the ' "case-by-case determination whether each new and different letter presenting the claim of an administrative agency is to be deemed the 'functional equivalent of a suit brought in a court of law.' " [Citation.]' [Citation.]" (*CDM, supra,* 139 Cal.App.4th at p. 1258.) Thus, where "suit" and "claim" are not defined within the policy, " 'suit' in the policies means a civil action commenced by filing a complaint," and "[a]nything short of this is a 'claim.' " (*Foster-Gardner, supra,* 18 Cal.4th at p. 878.)

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[16] In 1986, the standard CGL form was amended to define "suit." (See fn. 4, *ante*, p. 4.)

B. *Powerine I*

In *Powerine I*, the Supreme Court considered the reach of the duty to indemnify in a pre-1986 standard primary CGL policy, and held that "the insurer's duty to indemnify the insured for 'all sums that the insured becomes legally obligated to pay as damages' " under such a policy "is limited to money ordered by a court." (*Powerine I, supra,* 24 Cal.4th at pp. 960, 964.) The court concluded that the duty to indemnify did "not extend to all sums, or even any sum, that the insured becomes legally obligated to pay other than as damages." (*Id.* at p. 964.)

Powerine I based its holding in part on the "*Foster-Gardner* 'syllogism' ": "The duty to defend is broader than the duty to indemnify. The duty to defend is not broad enough to extend beyond a 'suit,' i.e., a civil action prosecuted in a court, but rather is limited thereto. A fortiori, the duty to indemnify is not broad enough to extend beyond 'damages,' i.e., money ordered by a court, but rather is limited thereto." (*Powerine I, supra,* 24 Cal.4th at p. 961.)

Apart from the *Foster-Gardner* syllogism, *Powerine I* explained the term "damages," when viewed in either the narrow focus of the policy itself or the wider focus of the policy within the "legal and broader culture," is limited to money ordered by a court. (*Powerine I, supra,* 24 Cal.4th at pp. 961-962.) In considering the term "damages" within the narrow focus of the policy itself, the court noted that the duty to defend and duty to indemnify provisions expressly link "damages" to a " 'suit,' i.e., a civil action prosecuted in a court." (*Id.* at p. 962.) As to the duty to defend, it is in a "suit" that "damages" are sought through the court's order. As to the duty to indemnify, it is in a "suit" that " 'damages' are fixed in their amount through the court's order." (*Ibid.*) The court stated that when the policy is viewed within the wider legal and broader culture, " 'damages' exist traditionally inside of court," whereas " 'harm' exists traditionally outside of court." (*Ibid.*)

Powerine I noted that use of the term "damages" in the insuring agreement of the pre-1986 standard CGL policy precluded a finding that a broad right to indemnification *outside the context of a lawsuit* was intended under the policy language. (*Powerine I,*

supra, 24 Cal.4th at p. 961.) "[O]ne would *not* speak of any 'sum that the insured becomes legally obligated to pay *as damages*' *apart from any order by a court* . . . because, as a sum that the insured becomes legally obligated to pay, 'damages' presuppose an institution for their ordering, traditionally a court, albeit no longer exclusively. [Citations.] 'Damages' do not constitute a redundancy to a 'sum that the insured becomes legally obligated to pay,' but a limitation thereof." (*Id.* at p. 963, fn. omitted.) The Supreme Court stated that limiting the term "damages" to "money ordered by a court" "commends itself to society generally as laying down a bright-line rule." (*Id.* at p. 965.) This "has a tendency to promote fairness and efficiency in the judicial sphere," by "increasing certainty and decreasing uncertainty about the duty to indemnify." (*Id.* at p. 966.)

Powerine I acknowledged that although "damages" traditionally means money ordered by a court, administrative agencies occasionally have the power to order damages. (*Powerine I, supra,* 24 Cal.4th at pp. 963, 969.) However, the court noted that as to the pre-1986 standard CGL policy before it, " 'damages' exist *solely* inside of court, especially in light of their linkage therein to a 'suit' " that the *Foster-Gardner* court defined as a civil action prosecuted in a court. (*Powerine I,* at p. 969.)

Powerine I further acknowledged that, while the duty to indemnify may embrace "*all* money ordered by a court," it does not extend to "any money *in addition to that ordered by a court,*" i.e., expenses required by an administrative agency pursuant to an environmental statute. (*Powerine I, supra,* 24 Cal.4th at p. 966.)

As the Court of Appeal in *CDM* noted, "Read together, *Foster-Gardner* and *Powerine I* stand for the proposition that the duty to defend a 'suit' seeking 'damages' under pre-1986 CGL policies is restricted to civil actions prosecuted in a court, initiated by the filing of a complaint, and does not include *claims,* which can denote proceedings conducted by administrative agencies under environmental statutes. Likewise, the duty to indemnify for ' "all sums that the insured becomes legally obligated to pay as *damages*" ' [citation] in the same standard primary policies is limited to money ordered

by a court, and does not include *expenses* such as may be incurred in responding to administrative agency orders." (*CDM, supra,* 139 Cal.App.4th at p. 1259.)

C. *Powerine II*

In *Powerine II*, the Supreme Court considered the extent of the duty to indemnify in standard form excess/umbrella policies.[17] The central insuring clauses of the policies provided: " 'The Company hereby agrees . . . to indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of the liability . . . imposed upon the Insured by law . . . 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 happening anywhere in the world.' " (*Powerine II, supra* 37 Cal.4th at p. 395.) The policies defined "ultimate net loss" as " 'the total sum which the Insured, or any company as [its] insurer, or both, become obligated to pay by reason of . . . property damage . . . *either through adjudication or compromise, and shall also include* . . . all sums paid . . . for *litigation, settlement, adjustment and investigation of claims and suits*, which are paid as a consequence of any occurrence covered hereunder . . . ." (*Id.* at pp. 395-396.)

The Supreme Court focused on each policy's central insuring clause and held that this clause extended the insurers' indemnification obligation beyond court-ordered money damages to include expenses incurred in responding to government agency orders administratively imposed outside the context of a lawsuit. (*Powerine II, supra,* 37 Cal.4th at p. 398.) The court noted that in the central insuring clause of the standard primary CGL policy such as that in *Powerine I*, it is "the single word 'damages' " that limits the duty to indemnify to money ordered by a court. (*Id.* at p. 396.) The court stated that the term "damages" in the excess policies serves the same purpose it serves in the standard primary CGL policy—"it extends the indemnity obligation to 'money ordered by a court' in a suit against the insured." (*Id.* at p. 399.) However, the central insuring clause of the excess/umbrella policies at issue in *Powerine II* provided

[17] The nine policies covered periods from 1973 through February 1983. (*Powerine II, supra,* 37 Cal.4th at p. 384.)

indemnification coverage for "damages" *and* "expenses," thereby extending coverage beyond "damages" alone and beyond "money ordered by a court." (*Id.* at p. 397.)

Powerine II noted that the policies' central insuring clause further defined the indemnification obligation by incorporating the definition of "ultimate net loss," which included sums the insured becomes obligated to pay, through "compromise" or "settlement, adjustment and investigation of claims" that do not necessarily reflect an underlying lawsuit. (*Powerine II, supra,* 37 Cal.4th at p. 397.) The court concluded that "where the express insuring language of an excess/umbrella policy broadens indemnity coverage for sums paid in furtherance of a 'compromise' or 'settlement' of a 'claim' initiated by an administrative agency for [remedial relief pursuant to an environmental statute], the insured's liability for such expenses falls within the policy's indemnification obligation" despite the absence of a lawsuit. (*Id.* at pp. 397-398.)

The *Powerine II* court next considered the policies' central insuring provisions in the context of the policies as a whole. Although the policies followed the form[18] of underlying standard primary CGL policies like those considered in *Foster-Gardner* and *Powerine I,* they also provided that the insurer agreed to pay the excess of " 'the amount of ultimate net loss . . . in respect of each occurrence *not covered by said underlying insurances*,' " and thus provided umbrella indemnity coverage. That is, the policies provided " 'alternative primary coverage as to losses "not covered by" the primary policy.' [Citations.]" (*Powerine II, supra,* 37 Cal.4th at pp. 398-399.) The court concluded that the fact that the policies also provided umbrella indemnity suggests the insured would have expected the policies to provide broader coverage than that provided by the underlying primary policies. (*Id.* at p. 399.)

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[18] "A 'following form' policy incorporates the terms and conditions of another carrier's policy and provides the same scope of coverage as the underlying policy. [Citation.]" (*Wells Fargo Bank v. California Ins. Guarantee Assn., supra,* 38 Cal.App.4th at p. 940.)

The court rejected the insurers' argument that the policies' " 'assistance and cooperation' " clause[19] required an insurer to approve an out-of-court settlement or compromise as a condition of coverage. (*Powerine II, supra,* 37 Cal.4th at p. 400.)[20] It made clear that whether the excess/umbrella policies afforded coverage for environmental costs ordered outside the context of a lawsuit "*turns on the literal language of the insuring agreements.*" (*Ibid.*)[21]

D. *Ace*

On the same day it issued *Powerine II,* the Supreme Court also issued *Ace*, which considered whether a "nonstandard or 'manuscript form' " excess third party liability policy[22] afforded indemnity coverage for expenses incurred by the insured County of San Diego in responding to an administrative agency environmental remediation order and for sums expended by the insured to settle related third party property damage claims outside the context of a lawsuit. (*Ace, supra,* 37 Cal.4th at pp. 410-411.)

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[19] The " 'assistance and cooperation' " clause provided that the insurer has the right and opportunity to associate with the insured or the insured's underlying insurers in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit appears reasonably likely to involve the insurer. (*Powerine II, supra,* 37 Cal.4th at p. 400.)

[20] The court acknowledged that the condition could ultimately defeat recovery, but that issue was not before the court, which was reviewing the trial court's grant of a motion for summary adjudication of issues relating solely to coverage. (*Powerine II, supra,* 37 Cal.4th at pp. 400-401, 404.)

[21] The *Powerine II* court found it "significant" that the policies before it did not contain a "no action" clause. A typical no action clause bars any action against the insurer until the insured's liability to the claimant has been determined by a final judgment or a settlement approved by the insured. (See Croskey et al., Cal. Practice Guide: Insurance Litigation, *supra,* ¶ 7:394, p. 7A-131; accord, *Powerine II, supra,* 37 Cal.4th at p. 401.) The court explained that although a standard no action clause serves to discourage collusive settlements between an insured and a third party claimant, it also "appears to spell out the insurer's right to approve any out-of-court settlement, at least for purposes of making it a condition precedent to any suit brought directly against the insurer." (*Powerine II,* at p. 401.)

[22] The policy covered the period from 1974 through 1977. (*Ace, supra,* 37 Cal.4th at p. 411.)

The central insuring provision of the Ace policy required the insurer to indemnify the insured " 'for all sums which the insured is obligated to pay by reason of liability imposed by law or assumed under contract or agreement' arising from 'damages' " resulting from the destruction or loss of use of tangible property. (*Ace, supra,* 37 Cal.4th at p. 411.) The policy's "limits of liability" provision provided, " 'Liability under this policy shall attach to the company only after . . . the named insured [has] paid or [has] been liable to pay, the full amount of [its] respective *ultimate net loss* liabilities as follows: . . . .' " (*Id.* at p. 418.) "Ultimate net loss" was defined in the policy as " 'the sum or sums which the assured shall become legally obligated to pay in settlement or satisfaction of claims, suits or judgements . . . includ[ing] all expenses from the investigation, negotiation and settlement of claims . . . and shall include legal costs.' " (*Ibid.*)

This nonstandard excess policy provided the insured with excess liability coverage over and above its self-insured retention. Because the policy did not contain a duty to defend suits, the court found that the *Foster-Gardner* syllogism did not apply. (*Ace, supra,* 37 Cal.4th at p. 416.) As in *Powerine I*, the central insuring provision obligated the insurer to indemnify the insured for sums the insured was obligated to pay for "damages." In *Ace,* "damages" was the sole term of limitation in the indemnity agreement (*Ace*, at p. 417), and the term "ultimate net loss" appeared only in the limits of liability section of the policy (*id.* at p. 420).

Ace distinguished the central insuring provision in the *Powerine II* policies. That provision expressly contained the term "expenses" and then incorporated the definition of "ultimate net loss." The central insuring provision in the Ace policy, however, did not refer to or incorporate either term. (*Ace, supra,* 37 Cal.4th at pp. 419-420.) *Ace* explained that including the definition of "ultimate net loss" in the limits of liability provision "merely serves to define the insured's total loss that will count toward such policy limits. . . . Nothing in the 'limits of liability provision of the Ace policy purports to expand Ace's indemnification obligation, once triggered, to anything other than 'damages.' " (*Ibid.*)

The *Ace* court also noted that unlike the policy in *Powerine II,* the Ace policy contained a no action provision,[23] and also provided that the insured " 'shall not, except at [its] own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the occurrence.' " (*Ace, supra,* 37 Cal.4th at p. 420.) The court explained that these provisions, which usually appear in policies including the duty to defend, are intended to preclude collusion between an insured and a third party claimant, and give the insurer the right to control the defense. These provisions undermine the suggestion that the term "damages" in the Ace policy extends the duty to indemnify to any settlement entered into by the insured. (*Id.* at pp. 420-421.)

Ace concluded that the insuring clause in the standard CGL policy in *Powerine I* was substantively the same as the insuring clause in the Ace nonstandard excess third party liability policy and held that the out-of-court costs and expenses in responding to administrative agency orders and the settlements negotiated with third party claimants outside the context of a lawsuit were not within the coverage terms of the Ace policy's insuring agreement. (*Ace, supra,* 37 Cal.4th at p. 421.)

E. *Lockheed*

Lockheed considered whether CGL manuscript policies issued from 1969 through 1977 required the insurer to defend administrative proceedings before the California Regional Water Quality Control Board that had not ripened into lawsuits filed in court. The defense clause of the policies provided that the insurer shall defend " '*any suit or action* against the Insured alleging and seeking damages,' " but the insurer shall "'have the right to make such investigation, negotiation and settlement of *any claim, suit or*

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[23] The no action clause stated: " '[n]o action shall lie against the [insurer] unless, as a condition precedent thereto, . . . the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the [insurer].' " (*Ace, supra,* 37 Cal.4th at p. 420.)

action as may be deemed expedient.' " (*Lockheed, supra,* 134 Cal.App.4th at pp. 198-199.)[24]

In reliance on *Powerine I,* the insurer in *Lockheed* argued that it had no duty to defend because the phrase " 'any suit or action' " is linked to the term " 'damages.' " The court rejected that approach: "As *Powerine I* recognized, although 'damages' usually refers to money ordered by a court, orders to pay money made by administrative tribunals may also be viewed as 'damages.' [Citation.]" (*Lockheed, supra,* 134 Cal.App.4th at p. 199.) *Lockheed* then analyzed the policies' language in the context of the policies as a whole. As the court explained, it was undisputed that "suit" means lawsuit and "claim" means something short of a lawsuit, and the issue was whether "action" means some "third thing." As observed in *Foster-Gardener,* an administrative order is generally considered to be a "claim." Therefore, to construe an administrative proceeding as an "action" would create ambiguity. The court reasoned that the common understanding of both "action" and "suit" in the context of the policies means proceedings in court, and held that "any suit or action" unambiguously applies to proceedings in court and does not encompass administrative proceedings that do not involve a lawsuit. (*Lockheed*, at pp. 199-200.)

F. *CDM*

On remand following *Powerine II* and *Ace*, *CDM* considered whether a 1986 umbrella CGL policy provided indemnity coverage for environmental response costs incurred pursuant to an administrative order. (*CDM, supra,* 139 Cal.App.4th at pp. 1256, 1262, 1267, fn. 5.) The central insuring clause in the umbrella policy covered the plaintiffs for " 'the ultimate net loss in excess of the applicable underlying limit which the insured shall become legally obligated to pay as damages.' " (*Id.* at p. 1262.) The policy defined "ultimate net loss" as " 'the sum actually paid or payable in cash in the settlement or satisfaction of any claim or suit for which the insured is liable either by adjudication or settlement with the written consent of the [insurer].' " (*Ibid.*)

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[24] Apparently, the terms "suit," "claim" and "action" were not defined in the policies.

Consistent with *Ace* and *Powerine II,* the court in *CDM* concluded that although the central insuring clause used the term "ultimate net loss," the insured was indemnified only for that portion of the ultimate net loss "the insured [is] legally obligated to pay as damages." (*CDM, supra,* 139 Cal.App.4th at p. 1265.) *CDM* noted that the central insuring clause did not contain the term "expenses" and concluded that this clause was substantively the same as the one in the standard CGL policy construed in *Powerine I.* Both policies contained the "damages" limitation standing alone, made no reference to "expenses" and did not purport to further define the scope of indemnity coverage set out in the insuring clause by reference to the definition of "ultimate net loss." (*Id.* at pp. 1265-1266.) Echoing *Ace, CDM* stated that the term "ultimate net loss" was "used in reference to what amount the insurer will pay after the insurer becomes obligated to pay rather than as a trigger of the insurer's obligation to pay." (*CDM,* at p. 1265; *id.* at pp. 1263-1265.)

DISCUSSION

I. *Causes of Action Against INA*

INA issued Ameron four successive primary CGL policies providing coverage between August 1, 1988 and August 1, 1992. The final three policies, from August 1, 1989 to August 1, 1992, contain definitions of the term "suit" that compel the conclusion that INA assumed a duty to indemnify and to defend Ameron. Thus, the trial court erred in sustaining a demurrer for breach of the duty to defend the IBCA litigation, breach of the duty of good faith and fair dealing, and contribution (causes of action 2, 4 and 62). We begin, however, with a discussion of the first INA policy, covering the period from August 1, 1988 to August 1, 1989, though it is not material to a ruling on those causes of action. We do so because our conclusions regarding it are determinative regarding the extent of coverage of excess/umbrella policies issued by International and St. Paul which overlie this INA primary policy.

A. *1988-1989 INA 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 . . . bodily injury or . . . 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, . . . 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." "Suit" and "claim" are not defined in the policy.

The insuring clause language in this 1988-1989 policy is substantively the same as the policy language interpreted by the Supreme Court in *Foster-Gardner* and *Powerine I* as to the duties to defend and indemnify. Thus, where as here, "suit" and "claim" are not defined within the policy, " 'suit' in the policies means a civil action commenced by filing a complaint," and "[a]nything short of this is a 'claim.' " (*Foster-Gardner, supra,* 18 Cal.4th at p. 878.) Moreover, the duty to indemnify for "all sums which the Insured shall become legally obligated to pay as *damages*" (italics added), provided in this 1988-1989 policy, is limited to money ordered by a court. (*Powerine I, supra,* 24 Cal.4th at p. 961.) Since the IBCA proceeding was not a civil action filed in a court of law, it was a "claim," for which Ameron could not reasonably expect a duty of defense or indemnity. In addition, an insurer is obligated to settle a case only when the policy indemnifies the insured for liability for the claimant's loss. If the policy does not indemnify for the loss, the insurer cannot be held liable for failing to settle. (See *Johansen v. California State Auto. Assn. Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 19.) Since the policy did not create a duty to indemnify on the part of INA, no cause of action for breach of the covenant of good faith and fair dealing is stated.

Ameron argues, however, that this case "is completely outside the scope of" *Foster-Gardner, Powerine I, Powerine II* and *Ace* because those cases "dealt exclusively with environmental administrative agencies that issued orders to abate or clean-up pollution." There is much to commend in Ameron's contention that the very different administrative proceeding in this case is a "suit." The IBCA is a quasi-judicial

administrative agency board which holds hearings in which it considers and determines appeals from contracting officer decisions relating to contracts made by the Department of the Interior or any other executive agency. (15B Fed. Procedure L. Ed. (2006) Government Contracts, § 39:892, p. 117.) The appeal is commenced by the filing of a notice (43 C.F.R. § 4.102 (2005)), and, within 30 days after receipt of notice of docketing of the appeal, the appellant must file a complaint setting forth "simple, concise, and direct statements of each claim" (*id.* at § 4.107). The requirement of a filed notice and complaint eliminates one concern expressed in *Foster-Gardner*: avoidance of a " 'case-by-case determination whether each new and different letter presenting the claim of an administrative agency is to be deemed the "functional equivalent of a suit brought in a court of law." ' " (*Foster-Gardner, supra,* 18 Cal.4th at pp. 887-888.) During the subsequent hearings, the opposing sides may subpoena witnesses, who are sworn and subject to cross-examination. (43 C.F.R. §§ 4.120, 4.123, *supra.*) The admissibility of evidence is governed by "the generally accepted rules of evidence applied in the courts of the United States in nonjury trials. . . ." (*Id.* at § 4.122.) The administrative law judge who presides is authorized to grant any relief, including money damages, which would be available to a litigant asserting a contract claim in the Court of Federal Claims. (41 U.S.C. § 607(d); 15B Fed. Procedure L. Ed., *supra*, § 39:1085, at p. 243; e.g., *Cherokee Nation of Okla. v. Leavitt* (2005) 543 U.S. 631, 636.) Generally, the decision of an agency board of contract appeals such as the IBCA is final, subject only to amendment, reconsideration or appeal to the United States Court of Appeals for the Federal Circuit. (15B Fed. Procedure L. Ed., *supra*, §§ 39:1083, 39:1121, pp. 242, 270.)

In *Foster-Gardner, Powerine I* and *II,* and *Ace* an environmental agency issued an order notifying the insured that it was a responsible party for pollution, and requiring remediation.[25] We find compelling a distinction embraced by Justice Spencer in her concurring opinion in *Fireman's Fund Ins. Co. v. Superior Court* (1997) 65 Cal.App.4th 1205, 1221-1222. Justice Spencer concluded that such administration agency activity

[25] *CDM* and *Lockheed* also involved pollution remediation orders.

was "merely an *investigative* administrative proceeding seeking a negotiated settlement and a consent decree. . . . [T]he agency lacked the requisite authority to bind the disputants . . . [and] this proceeding did not qualify as a suit." (*Id.* at p. 1222.) But "the common, ordinary meaning of the word 'suit' is broad enough to cover . . . adjudicative administrative hearings . . . . [Citation.]" (*Ibid.*) The 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.

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 worded like the one in *Foster-Gardner.* But we are not. In *Foster-Gardner,* our high court consciously drew a " 'bright-line rule that . . . *reduces* the need for future litigation,' " by interpreting "suit," in a policy that left the term undefined, as "a court proceeding initiated by the filing of a complaint." (*Foster-Gardner, supra,* 18 Cal.4th at p. 887.) Normally, a case serves as authority only for those issues framed by its facts. "The doctrine of precedent, or stare decisis, extends only to the ratio decidendi of a decision, not to supplementary or explanatory comments which might be included in an opinion. To determine the precedential value of a statement in an opinion, the language of that statement must be compared with the facts of the case and the issues raised. Only statements necessary to the decision are binding precedents; explanatory observations are not binding precedent. [Citations.]" (*Western Landscape Construction v. Bank of America* (1997) 58 Cal.App.4th 57, 61.) 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. [Citation.]' [Citation.] Twenty years ago Presiding Justice Otto M. Kaus gave some sage advice to trial judges and intermediate appellate court justices: Generally speaking, follow dicta from the California Supreme Court. [Citation.] That

was good advice then and good advice now." (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169; accord, *People v. Superior Court* (*Maury*) (2006) 145 Cal.App.4th 473, 483.)

Foster-Gardner's decision to define "suit" in its policy narrowly to preclude the triggering of insurance coverage by any administrative proceeding was "carefully drafted. It was not '. . . inadvertent , ill-considered or a matter lightly to be disregarded.' [Citations.]" (*Hubbard v. Superior Court, supra,* 66 Cal.App.4th at p. 1169.) And, while we may believe the adjudicatory proceeding 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. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) 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. (*Auto Equity Sales, Inc.*, at p. 455.)

B. *1989-1992 INA Policies (Nos. HDOG 10778414, HDOG 14420757, & HDOG 15190413)*

The insuring agreement of each of these three policies provides: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. . . . The 'bodily injury' or 'property damage' must be caused by an occurrence. . . . We will have the right and duty to defend any 'suit' seeking those damages. . . . We may investigate and settle any claim or 'suit' at our discretion . . . ."

Each policy defines "suit" as: "a civil proceeding in which damages because of 'bodily injury,' 'property damage,' 'personal injury' or 'advertising injury' to which this insurance applies are alleged. 'Suit' includes an arbitration proceeding alleging such damages to which you must submit or submit with our consent." No relevant definition of "damages" is provided in the policies. (See fn. 26, *post.*)

Ameron contends that *Foster-Gardner* and *Powerine I* are distinguishable because the pre-1986 standard CGL policies at issue in those cases did not define the term "suit."

Ameron argues that by defining "suit" as a civil proceeding including arbitration, the INA policies do not restrict defense or indemnity coverage to lawsuits filed in a court.

INA responds that the definition of "suit" contained within its defense provision is limited to a civil proceeding alleging "damages" and its indemnity obligation is also limited to "damages." INA argues that *Powerine I* and its progeny have "unequivocally determined" that as a matter of law, "damages" can only be awarded by a court of law, and, therefore, INA had no obligation to defend or indemnify Ameron for the settlement reached in connection with the administrative IBCA proceeding. INA also asserts that since its policies' deductible endorsements also refer to the insurer's obligation to pay "damages," the endorsements bolster the parties' mutual understanding that INA's defense and indemnity obligations are limited to the payment of damages awarded by a court of law.[26] Because the INA policies are distinct contractual insurance policies whose wording and provisions were not before the Supreme Court in *Foster-Gardner, Powerine I* and *II*, and *Ace,* we examine the policies de novo, and consider the definition of "suit" and "damages" in the context of each policy as a whole to determine whether the policy provides coverage for the IBCA proceeding that the parties agree was not a proceeding in a court of law.

The three INA policies before us define suit as a "civil proceeding . . . includ[ing] an arbitration proceeding alleging . . . damages." The policies contain no definition of the term "civil proceeding," so we construe it based on its common usage. There is no dictionary definition for the term. "Civil," however, is defined as: "relating to private rights and remedies that are sought by action or suit, as distinct from criminal proceedings." (Black's Law Dict. (8th ed. 2004) p. 262, col. 1.) "Proceeding" is variously defined as "[t]he regular and orderly progression of a lawsuit, including all acts

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[26] With minor nonmaterial differences, the deductible endorsements provide that INA's "obligation to pay damages on behalf of the insured under this policy applies only to damages in excess of the amount of the deductibles . . . ." The deductible endorsement also provides: " 'Damages,' as used in this endorsement, includes amounts payable under this policy, if any, for the insured's liability under state No-Fault automobile insurance laws, Uninsured Motorist laws and for Medical Payment benefits."

and events between the time of commencement and the entry of judgment," "[a]ny procedural means for seeking redress from a tribunal or agency," and "[t]he business conducted by a court or other official body; a hearing." (*Id.* at p. 1241, col. 1.) Because "civil proceeding" is reasonably susceptible to more than one interpretation, including a hearing before an institution that is not a court, it is ambiguous and must be construed in the light most favorable to the insured. (*CDM, supra,* 139 Cal.App.4th at pp. 1256-1257.) We may reasonably define "civil proceeding" to encompass a proceeding in which redress is sought from an administrative agency.[27]

The policies also define "suit" to include "arbitration." The term "arbitration" is not defined within the policy, but is commonly defined as, "the hearing and determination of a case in controversy by a person chosen by the parties or appointed under statutory authority." (Webster's 9th New Collegiate Dict. (1987) p. 99.) By definition, "arbitration" is not a lawsuit commenced by filing a complaint in a court of law; it is an alternative dispute resolution mechanism to a legal action filed in a court. (See *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 713.)

This broad definition of "suit" within the duty to defend compels an equally broad definition of "damages." Thus, the promise in these policies to defend "an arbitration proceeding alleging . . . damages"[28] requires a definition of "damages" broader than money ordered by a court.[29] Since "damages" is not defined within the INA policies, we

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[27] Although not binding authority, we note that several out-of-state cases have construed "civil proceeding" within an insurance policy's definition of "suit seeking damages" to include an administrative proceeding. (See *Missouri Public Entity Risk v. Investors Ins.* (W.D.Mo. 2004) 338 F.Supp.2d 1046, 1056; *Monarch Greenback, LLC v. Monticello Ins. Co.* (D.Idaho 1999) 118 F.Supp.2d 1068, 1074-1075.)

[28] Arbitrators may be granted the authority to award compensatory and punitive "damages." (See, e.g., *Cobler v. Stanley, Barber, Southard, Brown & Associates* (1990) 217 Cal.App.3d 518, 530; cf. *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1084.)

[29] INA asserts that Ameron's complaint does not allege that the IBCA proceeding constituted an arbitration and argues, outside the pleadings, that the parties never considered the IBCA proceeding to be an arbitration. But the issue is not whether the IBCA proceeding constitutes an arbitration. The policies' coverage for "suits," defined to

again look to the plain meaning of that term within the context of the policies as a whole. In *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807 (*AIU*), the Supreme Court considered various lay and legal definitions of the term and concluded, "Whatever their semantic difference, the statutory and dictionary definitions of 'damages' share several basic concepts. Each requires there to be 'compensation,' in 'money,' 'recovered' by a party for 'loss' or 'detriment' it has suffered through the acts of another." (*Id.* at pp. 825-826, fns. omitted; accord *Golden Eagle Ins. Co. v. Insurance Co. of the West* (2002) 99 Cal.App.4th 837, 850.) The *AIU* court construed "compensation" to "encompass any remunerative payment made to an aggrieved party." (*AIU,* at p. 826, fn. 11.) Where the CGL policies before us do not compel a more limited definition of "damages," we adopt the meaning set forth in *AIU.*

The indemnity obligation in these INA policies is also limited by the term "damages": INA "will pay those sums that the insured becomes legally obligated to pay as *damages* because of 'bodily injury' or 'property damage' to which this insurance applies . . . caused by an occurrence." (Italics added.) INA argues we should construe "damages" in the indemnity clause differently, and more narrowly than "damages" in the defense clause. But accepting this argument would violate the rule of contract interpretation that "the same word used in an instrument is generally given the same meaning unless the policy indicates otherwise. [Citations.]" (*E.M.M.I., Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 475-476.) Moreover, limiting "damages" to money ordered by a court for purposes of indemnity, but not for purposes of defense would be nonsensical. While it is true that the duty to defend is broader than the duty to indemnify (*Powerine I, supra,* 24 Cal.4th at p. 961), the duty to defend applies only to " ' " 'claims that create a *potential* for indemnity.' " ' " (*Ortega, supra,* 141 Cal.App.4th at p. 977, italics added). Further, the language of these INA policies is consistent with that limitation. Giving "damages" the disparate meanings sought by INA would sever the

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include arbitrations, is important because it means that the terms "suit" and "damages" must be defined more broadly than in *Foster-Gardner.*

connection between the duties to defend and indemnify and require the insurer to defend suits before administrative tribunals for which it had no duty to indemnify. We decline INA's invitation to create this incongruity.

INA relies on *Powerine I* to argue the existence of a no action clause in its policies requires that the indemnity provision be limited to provide indemnification only for money ordered by a court. The no action clauses in the three INA policies are substantively the same, and state, typically, that "[n]o action . . . shall lie against the [insurer] unless . . . the Insured's obligation to pay shall have been finally determined either by [judgment] against the Insured after actual trial or by written agreement of the Insured, the claimant and the [insurer]." INA argues that Ameron has not contended, and cannot contend, that an "actual trial" occurred in the IBCA proceeding, and has not pled that any insurer consented to the settlement. INA's argument lacks merit.

In *Powerine I,* the Supreme Court, construing a pre-1986 CGL policy, stated that the reference to "a judgment" within the policy's no action clause "implie[d]" that the duty to indemnify is limited to money ordered by a court. (*Powerine I, supra,* 24 Cal.4th at p. 962, fn. 4; cf. *Ace, supra,* 37 Cal.4th at pp. 420-421; *Powerine II,* 37 Cal.4th at p. 401.) It is certainly true, for example, that an arbitrator issues an "award" not a "judgment." (Code Civ. Proc., §§ 1283.4, 1285.) Applying *Powerine I*'s implication here, however, would conflict with the insured's reasonable expectations generated by the broad definition of "suit" in the INA policies to include a court action or administrative proceeding as we have discussed, *ante*. Such a conflict must be resolved in favor of the insured. (*CDM, supra,* 139 Cal.App.4th at pp. 1256-1257.) Further, the INA no action clauses also provide for recovery against the insurer for certain settlements, and do not suggest that such settlements must follow the filing of a lawsuit. (See *Powerine II, supra,* 37 Cal.4th at p. 397 ["Sums that the insured becomes legally 'obligated to pay' . . . through 'compromise' . . . do not necessarily reflect an underlying

court suit."].) Thus, these no action clauses do not trump the broad interpretation we have given to the insurer's duties in these policies.[30]

We next address whether the IBCA proceeding is a civil proceeding, within the ambit of the policies' coverage,[31] and conclude that it is. Like an arbitration, IBCA proceedings involve the hearing and determination of a controversy, and like an arbitration, the administrative law judge or board member presiding over an IBCA proceeding issues a final decision and may award damages, i.e., monetary compensation, to the aggrieved party to the contract. Thus, an insured could reasonably expect that the IBCA proceeding at issue here was a covered "suit" under the policies' defense provision, and damages awarded in such a proceeding would be reimbursed under the policies' indemnity provision. Because Ameron has adequately pled that INA owed it a duty of coverage under INA's 1989-1992 policies, the trial court erred in sustaining the demurrer in favor of INA on the causes of action for breach of contract based on the duty to defend, breach of the duty of good faith and fair dealing based on INA's failure to defend, indemnify, settle and investigate, and for contribution (causes of action 2, 4 & 62).

II. *Causes of Action Against International*

International issued Ameron five successive first layer commercial excess/umbrella policies between April 15, 1987 and August 1, 1991. The three policies issued for the period August 1, 1988 to August 1, 1991 (Policy Nos. 531-000923-4, 531-001236-6 & 531-001679-4), follow form to the underlying INA policies issued for

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30 Of course, the no action clause may well be determinative at some later stage of the proceedings if there was no valid judgment or settlement.

31 Ameron asserts that under federal law, i.e., the Act, proceedings before the IBCA and the Court of Federal Claims are both defined as "suits." Because the determination of what constitutes a covered "suit" is made pursuant to California law (see *AIU, supra,* 51 Cal.3d at p. 831), we disregard any assertion by Ameron that the determination of "suit" under federal law is controlling.

that period, and, as we discuss, provide coverage to Ameron, requiring us to reverse the trial court's rulings as to the causes of action against International.[32]

The "Coverage" section of these International policies provides:

Coverage A: "We will pay those sums that the 'insured' becomes legally obligated to pay as damages arising out of an 'occurrence' which are in excess of the underlying [INA] insurance . . . . The coverage provisions of the scheduled underlying [INA] policies are incorporated as part of this policy except for . . . (c) any duty to investigate or defend any claim, or to pay for any investigation or defense, (d) the limits of insurance or (e) any other provision that is not consistent with a provision in this policy."

Coverage B: "With respect to any loss covered by the terms and conditions of this policy, but not covered as warranted by the underlying [INA] policies . . . , or any other underlying insurance, we will pay on your behalf for loss caused by an 'occurrence' which is in excess of the 'retained limit' for liability imposed on you by law or assumed by you under contract for . . . Property Damage . . . ." "Loss" is not defined in the policies.

The defense settlement section of the International policies is identical to the parallel provision in the three INA policies discussed in part I.B., *ante*:

"For damages covered by this policy, but not covered by any other insurance or underlying insurance, we have these obligations: [¶] A. We will defend any 'suit' seeking damages covered by this policy; but we may investigate, negotiate, and settle any claim or 'suit' at our discretion." "Suit" is defined in the definitions section as a "civil proceeding in which damages because of 'bodily injury,' 'property damage,' 'personal injury' or 'advertising injury' to which this insurance applies are alleged. 'Suit' includes an arbitration proceeding alleging such damages to which you must submit or submit with our consent." "Damages" is not defined in the policy.

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[32] Because it is unnecessary to our decision, we do not examine the 1987-1988 International policies (Nos. 531-000426-6 & 531-000481-5).

A. *The Duty to Defend*

International relies on *Powerine I* and *Ace* to fashion an argument similar to the one advanced by INA in part I.B., *ante*. International notes the defense settlement provision is limited to "damages" covered by its policies and refers to the duty to defend "any suit seeking damages." International argues that since "damages" is limited to money ordered by a court, the IBCA administrative agency litigation is not a covered suit. However, for the same reasons we rejected INA's argument, we conclude that the International policies' definition of "suit" is not limited to an action filed in a court of law, but may include an administrative proceeding. And, as we discussed in part I.B, since the International policies do not limit the definition of "suit" to an action filed in court, the term "damages" cannot be limited to money ordered by a court. As with the INA policies, we construe the term "damages" in the International policies to mean money recovered by a party for loss or detriment suffered through the acts of another. Neither that definition nor the terms of these International policies limit such damages to money ordered by a court. Consequently, an insured could reasonably expect that the IBCA proceeding was a covered suit under the International policies' defense settlement provision, triggering International's duty to defend.

B. *The Duty to Indemnify*

1. *The 1988-1989 International Policy*

Ameron argues that since the underlying 1988-1989 INA primary policy provides indemnity coverage for the IBCA litigation, Coverage A of the International policy applies, because it incorporates the indemnity coverage terms of the INA policy. The argument rests on a false premise. As we noted in part I.A., *ante,* the coverage language of that INA policy provides that "[INA] will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages . . . and [INA] shall have the right and duty to defend any suit against the Insured seeking damages . . . ." "Suit" and "damages" are not defined in that INA policy. As we discussed previously, no duty of defense or indemnity was owed to Ameron under the 1988-1989 INA policy.

Consequently, Coverage A in the overlying 1988-1989 International policy provides no indemnity coverage.

Coverage B of the 1988-1989 International policy provides that as to any loss covered by the policy, but not covered by the underlying INA policy, "we will pay on your behalf for *loss* caused by an 'occurrence' . . . ." (Italics added.) Thus, Coverage B provides umbrella coverage that serves as primary indemnity coverage for claims not covered by the underlying INA policy. (See Croskey et al., Cal. Practice Guide: Insurance Litigation, *supra*, ¶ 8:210, at p. 8-50.) This indemnity obligation is limited by the term "loss." Since "loss" is not defined in the policy, we look to its common usage. In the insurance context, "loss" is defined as "[t]he amount of financial detriment caused by an insured person's death or an insured property's damage, for which the insurer becomes liable." (Black's Law Dict., *supra,* at p. 963, col. 2.) This definition of "loss" is arguably broader than the common meaning of "damages," and is not limited to money ordered by a court. Moreover, as we discussed in part I.B., *ante*, it would be inconsistent with the duty to defend, in general, and the International policy language, in particular, to interpret the policy to provide a defense in extrajudicial civil proceedings, but no indemnity for those same proceedings. Construing the ambiguous term "loss" in the International policy language in favor of the insured, as we must, we conclude that the policy does not limit the insurer's indemnity obligations to court actions. An insured could reasonably expect that the financial detriment suffered as a result of the IBCA proceeding would be reimbursed under the International policy's Coverage B indemnity provision. Having determined that this policy imposes both a duty to defend and to indemnify upon International, we conclude the trial court erred in sustaining the demurrer to causes of action for breach of the duty to investigate and defend, breach of the duty to settle, breach of the duty to indemnify, breach of the duty of good faith and fair dealing, and declaratory relief (causes of action 40, 42, 43, 44 and 45).

2. *The 1989-1991 International Policies*

The coverage language of the 1989-1991 International policies is identical to that of the 1988-1989 International policy.

Coverage A of the 1989-1991 International policies incorporates the indemnity coverage of the underlying 1989-1991 INA policies and provides indemnity coverage in excess of the underlying INA policies. As we noted in part I.B., *ante,* the 1989-1991 INA policies provide a duty of indemnity for any damages awarded in the IBCA proceeding. Thus, the insured could reasonably expect that Coverage A of the International policy would apply to provide excess indemnity coverage for such damages. This provides an additional basis for our conclusion that the trial court erred in sustaining International's demurrer to causes of action for breach of the duty to investigate and defend, breach of the duty to settle, breach of the duty to indemnify, breach of the duty of good faith and fair dealing, and declaratory relief (causes of action 40, 42, 43, 44 & 45).

III. *Causes of Action Against Twin City*

Twin City issued Ameron three successive first layer excess/umbrella liability policies for the period July 1, 1982 to July 1, 1985. Each of the Twin City policies overlies a Truck primary policy.[33]

The 1984-1985 Twin City umbrella policy provides under Coverage: "The company will pay on behalf of the insured ultimate net loss in excess of the total applicable limit . . . of underlying [Truck] insurance or the amount of the self-insured retention when no underlying insurance applies, because of bodily injury, personal injury, property damage or advertising injury to which this insurance applies, caused by an occurrence." (Fn. & boldface type omitted.) "[U]ltimate net loss" is defined as "all sums which the insured and his or her insurers shall become legally obligated to pay as damages, whether by final adjudication or settlement with the company's written consent, after making proper deduction for all recoveries and salvage collectible." (Boldface type omitted.)

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[33] Because we conclude the 1984-1985 Twin City policy (No. TXU-111849) provides coverage to Ameron, and this conclusion requires us to reverse the trial court's ruling on causes of action 24, 25, 26 and 29, we need not discuss the Twin City 1982-1984 policies (Nos. TXU-103836 & TXU-106532).

Under "Investigation, Defense and Settlement," the Twin City policy provides: "With respect to bodily injury, personal injury, property damage or advertising injury covered under this policy (whether or not the self-insured retention applies) and [¶] (1) for which no coverage is provided under any underlying insurance; or [¶] (2) for which the underlying limits of any underlying insurance policy have been exhausted solely by payments of damages because of occurrences during the period of this policy, [¶] The company will [¶] (a) defend any suit against the insured seeking damages on account thereof . . . ; but the company may make such investigation and settlement of any claim or suit as it deems expedient; [¶] (b) pay all expenses incurred by the company, all costs taxed against the insured in any suit defended by the company . . . ." (Boldface type omitted.)

The "Definitions" section of the Twin City policy provides, " 'suit' includes an arbitration proceeding to which the insured is required to submit or to which the insured has submitted with the company's consent." (Boldface type omitted.)

In relevant part, the Twin City policy contains a "Broad as Underlying Endorsement," which provides: "In the event the insured suffers a loss which is covered under the [Truck] policies of underlying insurance as set out in the schedule attached to this policy, the excess of which would be payable under this policy except for terms and conditions of this policy which are not consistent with the underlying insurance, then notwithstanding anything contained in this policy to the contrary, this policy shall be amended to follow and be subject to the terms and conditions of such underlying [Truck] insurance in respect of such paid loss." "The foregoing shall not, however, apply to: [¶] 1. Any coverage given under the underlying [Truck] insurance for limits less than the full limit of the said underlying policy as stated in the schedule hereto."

A broad as primary endorsement obligates the excess or umbrella insurer to pay for any loss within the scope of the primary policy, despite applicable exclusions in the excess or umbrella policy. (*Housing Group v. California Ins. Guarantee Assn.* (1996) 47 Cal.App.4th 528, 532-533; Cornblum, Cal. Ins. Law Dict. and Desk Reference (West Group 2006) § B21, p. 384.) Thus, we interpret the Twin City broad as primary

endorsement to mean that if the insured's loss is covered under the Truck primary policy but not under the Twin City policy, the Twin City policy will be amended to follow form to and incorporate the terms of the Truck policy which cover the loss.

The Truck primary policy is not appended to the complaint. In an action based on a written insurance contract, a plaintiff may plead the legal effect of the contract, rather than its precise language, by alleging the substance of its relevant terms. (*Construction Protective Services, Inc. v. TIG Specialty Ins. Company* (2002) 29 Cal.4th 189, 198-199 (*CPS*); 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 480, p. 573.) However, here, the complaint does not contain an allegation as to whether or not the Truck primary policy provided Ameron indemnity and/or defense coverage for the IBCA litigation. However, the Twin City policy language provides indemnity and defense coverage to Ameron whether or not the Truck policy provides coverage. Thus, as both parties have agreed, we may properly define the scope of the Twin City policy's coverage, though we lack information about the scope of the Truck policy's coverage.

Though the insuring agreement in this policy is not identical to the INA policies discussed in part I.B., *ante*, the analysis adopted in part I.B. is instructive. Like those INA policies, this Twin City policy requires the insurer to defend the insured against "any suit . . . seeking damages" and provides that " 'suit' includes an arbitration proceeding." Thus, like INA, Twin City has agreed to defend an arbitration proceeding seeking damages, which requires a broader definition of damages than simply "money ordered by a court." Further, Twin City has undertaken a duty to indemnify for "ultimate net loss" and defined that term as "all sums which the insured . . . shall become legally obligated to pay as damages, whether by final adjudication or settlement." As we explained in our discussion in part I.B., we apply the same broad definition of "damages" to the duty to indemnify as to the duty to defend. And, as a consequence, we conclude this Twin City policy provides coverage to Ameron for both duties. Therefore, the trial court erred in sustaining the demurrer in favor of Twin City on the causes of action for breach of the duty to investigate and defend, breach of the duty to settle, breach of the

duty to indemnify, breach of the duty of good faith and fair dealing, and declaratory relief (causes of action 24, 26, 27, 28 & 29).

IV. *Causes of Action Against Transcontinental*

The complaint alleges that the April 15, 1985 to April 15, 1986 Transcontinental policy is a first layer excess/umbrella policy over an underlying Truck primary policy. The complaint alleges the following as to the 1985-1986 Transcontinental policy (No. UMB 1693937):[34] "Under Coverage A, excess liability over underlying [Truck] insurance, the policy [provides that Transcontinental] 'will pay on your behalf loss in excess of the total applicable limits of liability of the underlying [Truck] insurance stated in the schedule. The provisions of the immediate underlying [Truck] insurance are, with respect to Coverage A, incorporated as part of this policy except for the duty to investigate and defend or to pay any costs resulting from such activities. . . .' [¶] . . . Under Coverage B, 'excess liability over retained limit,' the policy states in part: '[w]ith respect to loss which is not covered in whole or in part by underlying [Truck] insurance, but which arises out of an occurrence covered by this policy, we will pay on your behalf for loss which is in excess of the greater of either your retained limit or the underlying limit of liability and which you may become obligated to pay as damages as a result of liability imposed upon you by law or assumed by you under a contract because of personal injury, property damage, or advertising injury caused by an occurrence.' [¶] . . . The term 'loss' is defined as 'sums which you are legally obligated to pay as damages. . . . .' "

The complaint does not contain an allegation as to whether or not the Truck primary policy provided Ameron indemnity and/or defense coverage for the IBCA litigation. Instead, it alleges, "Under Coverage A and B [of the Transcontinental policy] it must be determined whether there is coverage or not under the underlying [Truck] policy. Assuming, arguendo, there is no coverage under the Truck policy, then Transcontinental must pay for the settlement with the Government, since the settlement

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[34] The Transcontinental policy is not appended to the complaint.

represents a 'loss.' [¶] The Transcontinental policy arguably provides under Coverage B broader coverage than the Truck policy."

Ameron concedes that the complaint does not specifically allege the terms of the Truck policy for the 1985-1986 period, but argues that "the Truck policies remained the same in all applicable years—Truck provided a duty to defend a 'suit,' but did not define the term 'suit.' " However, on appeal from the sustaining of a demurrer, we review the adequacy of allegations of Ameron's complaint, not assertions in its appellate briefs.

From the terms of the Transcontinental policy alleged in the complaint, it *appears* that the term "loss" in Coverage B is defined, while that same term in Coverage A is not. If this is correct, the extent of Transcontinental's duty to indemnify *may* depend upon whether the excess or umbrella provisions apply. However, the complaint's allegations do not sufficiently plead the legal effect of the Truck policy to make this determination. Thus, an opinion as to Transcontinental's coverage duties would be an impermissible advisory opinion. (See *Younger v. Superior Court* (1978) 21 Cal.3d 102, 119-120.)

Because it cannot be determined whether Transcontinental's policy provides coverage for the IBCA litigation, we conclude the trial court correctly sustained the demurrer in favor of Transcontinental on the causes of action for breach of the duty to settle, breach of the duty to indemnify, breach of the covenant of good faith and fair dealing, and declaratory relief (causes of action 30, 31, 33 & 34), but erred by denying Ameron leave to amend to properly plead the Transcontinental policy or the underlying Truck policy.

V. *Causes of Action Against ICSOP*

ICSOP issued Ameron five successive excess/umbrella policies between August 1, 1990 and December 1, 1995.

A. *1990-1991 ICSOP Policy (No. 4290-2705)*

The August 1, 1990 to August 1, 1991 ICSOP excess policy is a second layer excess policy that follows form to the underlying International first layer excess/umbrella policy. The central insuring provision of the 1990-1991 ICSOP policy provides: "As respects accidents or occurrences, whichever is applicable, . . . [ICSOP] agrees to afford

the Insured such additional insurance as the issuers of the Underlying Coverage [International] . . . would afford the insured by increasing the underlying limit combined provided that it is expressly agreed that liability shall attach to [ICSOP]: [¶] (a) only after the issuers of the Underlying Coverage have paid or have been held liable to pay the full amount of the said underlying limit, and [¶] (b) only as respects such additional amounts in excess thereof as would be payable by the issuers of the Underlying Coverage if the said underlying limit were amended as aforesaid, and [¶] (c) in no greater amount than the limit(s) set forth under the Declarations ultimate net loss as respects each accident or occurrence, which is applicable, taking place during the period of this policy—Subject to the limit(s) set forth under the Declarations ultimate net loss in the aggregate where applicable for each annual period during the currency of this Policy."

The central insuring language of the incorporated underlying 1990-1991 International policy states, "Coverage A. [¶] We will pay those sums that the 'insured' becomes legally obligated to pay as damages arising out of an 'occurrence' which are in excess of the [INA] underlying insurance . . . . The coverage provisions of the scheduled underlying policies are incorporated as a part of this policy except for . . . (c) any duty to investigate or defend any claim, or to pay for any investigation or defense . . . ." "Coverage B. [¶] With respect to any loss covered by the terms and conditions of this policy, but not covered as warranted by the underlying policies listed on Schedule A, or any other underlying insurance, we will pay on your behalf for loss caused by an 'occurrence' which is in excess of the 'retained limit' for liability imposed on you by law . . . ." The "Defense Settlement" section provides: "We will defend any 'suit' seeking damages covered by this policy; but we may investigate, negotiate, and settle any claim or 'suit' at our discretion." "Suit" is defined as "a civil proceeding in which damages because of 'bodily injury,' 'property damage,' 'personal injury' or 'advertising injury' to which this insurance applies are alleged. 'Suit' includes an arbitration proceeding alleging such damages to which you must submit or submit with our consent."

The "Limits of Insurance" of the incorporated underlying International policy states, "B. We will pay only that amount of the 'Net Final Loss' that is in excess of the

greater of [¶] (1) The total applicable limits of the underlying policies listed in Schedule A hereof, and any other collectible insurance . . . ." "Net Final Loss" is defined as the total of: "(1) All sums that the 'insured' is legally obligated to pay as damages. This legal obligation may be the decision of a court or the result of a settlement . . . ; plus [¶] (2) All expenses not covered by underlying insurance incurred by or for the 'insured' to investigate, negotiate, settle or defend any claim or 'suit' seeking damages covered by this policy. . . ."

The defense settlement provision in the 1990-1991 ICSOP policy is identical to that provision in the International policies discussed in part II., *ante*. As we concluded in part II.A., a reasonable insured would expect that the IBCA proceeding was a covered "suit" under the defense settlement provision, triggering ICSOP's duty to defend.

As we discussed in part II.B.2., Coverage A of the 1990-1991 International policy incorporates the indemnity coverage of the underlying 1990-1991 INA policy and provides indemnity coverage in excess of the underlying INA policy. In that discussion, we concluded that the 1990-1991 INA policy provides a duty of indemnity for any damages awarded in the IBCA proceeding, and the insured could reasonably expect that Coverage A of the International policy would apply to provide excess indemnity coverage for such damages. Because the 1990-1991 ICSOP policy follows form to the underlying International policy, a reasonable insured would expect that this ICSOP policy provides the same coverage, with higher limits. We conclude, therefore, the trial court erred in sustaining the demurrer to causes of action for breach of the duty to investigate and defend, breach of the duty to settle, breach of the duty to indemnify, breach of the duty of good faith and fair dealing, and declaratory relief (causes of action 56, 57, 58, 60 & 61).

B. *1991-1992 ICSOP Policy* (*No. 4291-6624*)

The insuring agreement of the August 1, 1991 to August 1, 1992 ICSOP umbrella policy provides: "Coverage. The Company hereby agrees . . . to indemnify the insured for all sums which the insured shall be legally obligated to pay by reason of the liability . . . imposed upon the insured by law . . . 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 . . . ." "Supplemental Defense: It is agreed that with respect to any occurrence covered only by the terms and conditions of this policy except for the amount of the self-insured retention . . . [ICSOP] shall . . . defend any suit against the insured alleging liability insured under the provisions of this policy and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but [ICSOP] shall have the right to make such investigation, negotiation and settlement of any claim or suit as it deems expedient. . . ."

The "Limit of Liability" section provides: "[ICSOP] shall be liable only for that portion of the ultimate net loss, excess of the insured's retained limit defined as . . . [t]he total of the applicable limits of the underlying policies listed on the schedule of underlying insurance hereof and the applicable limits of any other underlying insurance providing coverage to the insured . . . ."

The policy defines "Ultimate Net Loss" as "the amount payable in settlement of the liability of the insured after making deductions for all recoveries for other valid and collectible insurances, excepting however the policy(ies) of the primary insurer(s), and shall exclude all costs, which are paid by [ICSOP] in addition to the ultimate net loss." "Costs" is defined as "interest accruing after entry of judgment, investigation, adjustment and legal expenses (excluding, however, all office expenses of the insured, all expenses for salaried employees of the insured, and general retainer fees for counsel normally paid by the insured)." "Claim" and "suit" are not defined in the policy.

The defense obligation contained within the insuring agreement of this ICSOP policy is substantively the same as the policy language interpreted by the Supreme Court in *Foster-Gardner*, essentially providing for a duty to defend a suit seeking damages, where "suit" and "damages" are not defined within the policy. Since "suit" and "claim" are not defined within the ICSOP policy, " 'suit' in the policies means a civil action commenced by filing a complaint," and "[a]nything short of this is a 'claim.' " (*Foster-Gardner, supra,* 18 Cal.4th at p. 878.) Consequently, the trial court correctly ruled that Ameron was not entitled to defense coverage under the 1990-1991 ICSOP policy.

ICSOP concedes that the indemnity language in the insuring agreement in this policy is identical to that in *Powerine II.* However, it argues that the definition of "ultimate net loss" contained in the ICSOP policy differs from that in *Powerine II.*[35] ICSOP asserts that while the ultimate net loss definition in *Powerine II* was construed to broaden the insurer's indemnity obligation, the ultimate net loss definition in the ICSOP policy narrows that obligation and compels affirmance of the trial court's conclusion that ICSOP owes no duty to indemnify Ameron for the IBCA settlement. We disagree.

Powerine II first concluded that, "the addition of the term 'expenses' in the central insuring clause . . . extends [indemnity] coverage beyond the limitation imposed were the term 'damages' used alone, and thereby enlarges the scope of coverage beyond 'money ordered by a court.' " (*Powerine II, supra,* 37 Cal.4th at p. 397.) Since the central insuring clause of the ICSOP policy is identical to that in *Powerine II,* the term "expenses" in that clause enlarges the scope of coverage beyond money ordered by a court.

Powerine II also concluded that the definition of ultimate net loss in the policies before it, which included sums the insured becomes "legally 'obligated to pay' through 'compromise' or the 'settlement, adjustment and investigation of claims,' " did not necessarily reflect an underlying court suit. (*Powerine II, supra,* 37 Cal.4th at p. 397.) Thus, the court determined that under a literal reading of the policies before it, the indemnification obligation extended beyond court-ordered money damages to include expenses incurred responding to government agency environmental cleanup costs. (*Id.* at p. 398.) Like *Powerine II,* the definition of ultimate net loss in the ICSOP policy includes amounts payable in settlement of the insured's legal liability, and therefore does not necessarily reflect an underlying court suit.

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[35] In the *Powerine II* policy, "ultimate net loss" was defined as, " 'the total sum which the Insured, or any company as his insurer, or both, become obligated to pay by reason of . . . property damage . . . either through adjudication or compromise, and shall also include . . . expenses . . . for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder . . . .' " (*Powerine II, supra,* 37 Cal.4th at p. 386.)

However, unlike the policies in *Powerine II,* the definition of ultimate net loss in the ICSOP policies excludes "costs" paid by ICSOP, and "costs" is defined to include "legal expenses." ICSOP construes these policy terms to mean that "costs" are not included within the policy's indemnity obligation, and any "expenses" related to a "claim" ICSOP pays, are within its discretionary right to settle a "claim." Again, we disagree. We interpret the definitions of "ultimate net loss" and "costs" to mean that legal expenses paid by the company are excluded from "ultimate net loss," but legal expenses paid by the insured are included within "ultimate net loss." Thus, nothing in the definition of "ultimate net loss" narrows the scope of indemnity coverage so as to preclude coverage for Ameron's IBCA settlement or for the expenses it incurred. Our interpretation of this ICSOP policy provides an additional reason to conclude the trial court erred in sustaining ICSOP's demurrer to causes of action 56, 57, 58, 60 and 61.

C. *1992-1995 ICSOP Policies* (*Nos. 4292-7425, 4293-7722 & 4294-8226*)

Given our determination the trial court erred in sustaining ICSOP's demurrer, it is not strictly necessary to our resolution of Ameron's appeal of the trial court's ruling in favor of ICSOP to examine the 1992-1995 ICSOP excess/umbrella policies. But we do so for the benefit of the parties and the trial court.[36] Each of these ICSOP policies contains an insuring agreement which provides: "Coverage. To 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 for liability imposed upon the insured by law . . . ." The insuring agreement also

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[36] Each of these ICSOP excess/umbrella policies overlies a Zurich primary policy. The Zurich policies are not appended to the complaint. However, the complaint alleges: "The Zurich policies provide that Zurich 'will pay those sums that the insured becomes legally obligated to pay as damages because of . . . "property damage" '; and that Zurich 'will have the right and duty to defend any "suit" ' seeking those damages. [¶] The Zurich policies define 'suit' as follows: ' "suit' " means a civil proceeding in which damages because of "bodily injury," "property damage," "personal injury" or "advertising injury" to which this insurance applies are alleged. "Suit" includes an arbitration proceeding alleging such damages to which you must submit or submit with our consent.' " Arguably, the Zurich policies' language provided Ameron defense and indemnity coverage for settlement of the IBCA proceeding.

contains the following "Defense, Settlement and Supplementary Payments" provisions: "Should applicable underlying insurance(s) become exhausted by payment of covered claims, this insurance will continue in force as underlying insurance and shall defend any suit arising out of a covered occurrence. . . . As respects occurrences not covered under the underlying insurance(s), but covered by this policy, [ICSOP] shall likewise defend any suit . . . and will make indemnity payments, including the insured's retained limit. . . . [¶] In addition, [ICSOP] shall have the right to investigate, negotiate and settle any claim or suit as it may deem expedient. . . ." "Suit" and "claim" are not defined in the policy.

The "Limit of Liability" section provides: "(A) [ICSOP] shall be liable only for that portion of the ultimate net loss, excess of the insured's retained limit defined as . . . the total of the applicable limits of the underlying policies listed on the schedule of underlying insurance hereof and the applicable limits of any other underlying insurance providing coverage to the insured . . . ."

"Ultimate Net Loss" is defined as "the amount payable in settlement of the liability of the insured after making deductions for all recoveries for other valid and collectible insurances, excepting however the policy(ies) of the primary insurer(s), and shall exclude all costs, which are paid by [ICSOP] in addition to ultimate net loss." "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 [the Defense, Settlement and Supplementary Payments section]."

Ameron contends that the 1992-1995 ICSOP policies provide the company will indemnify for "ultimate net loss," and define ultimate net loss to include payment for settlement and "expenses." Therefore, Ameron argues the ICSOP policies are similar to the policies at issue in *Powerine II,* in that indemnity coverage is not restricted to an action filed in court. Thus, Ameron argues these policies cover the IBCA settlement at issue here.

We conclude, however, the indemnity language contained within the 1992-1995 ICSOP policies' central insuring clause is substantially the same as that construed in *CDM, supra,* 139 Cal.App.4th 1251. The term "damages" in the insuring clause is the

trigger of ICSOP's indemnity obligation, not the phrase "ultimate net loss," which appears only in the Limits of Liability section. Therefore, the trial court correctly ruled that Ameron was not entitled to indemnity coverage under the 1992-1995 ICSOP policies.

In addition, the defense obligation contained within the insuring clause of the 1992-1995 ICSOP policies is substantively the same as the policy language interpreted by the Supreme Court in *Foster-Gardner*. Thus, where as here, "suit" and "claim" are not defined within the policy, " 'suit' in the policies means a civil action commenced by filing a complaint," and "[a]nything short of this is a 'claim.' " (*Foster-Gardner, supra,* 18 Cal.4th at p. 878.) Consequently, the trial court correctly ruled that Ameron could not reasonably expect defense coverage under the 1992-1995 ICSOP policies, since the IBCA litigation is not a suit filed in court.

VI. *Causes of Action Against St. Paul*

St. Paul issued Ameron second layer excess liability policies for the period July 1, 1987 to July 1, 1988, and August 1, 1988 to August 1, 1989, which overlie International's first layer excess/umbrella policies for the same period.[37] We conclude that the 1988-1989 policy (No. LC05519681) provides indemnity coverage to Ameron, and the trial court erred in sustaining the demurrer without leave to amend to Ameron's causes of action for breach of the duty to settle, breach of the duty to indemnify, breach of the duty of good faith and fair dealing, and declaratory relief (causes of action 47, 48, 49 & 50).

The insuring agreement of the 1988-1989 St. Paul policy provides: "Coverage [¶] To indemnify the Insured, in accordance with the applicable provisions of the 'immediate underlying [International] policy' for the amount of 'loss' which is in excess

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[37] The 1988-1989 International policy, in turn, overlies an INA primary policy. However, the 1987-1988 International policy overlies and incorporates a primary policy issued by Truck. The Truck policy is not attached to the complaint and the complaint does not allege whether or not Truck provided Ameron indemnity and/or defense coverage for the IBCA litigation. If it had been necessary to resolve coverage under this St. Paul policy, we would have followed the analysis in parts III. and IV., *ante*. Our resolution of the 1988-1989 St. Paul policy renders that unnecessary.

of the applicable Limits of the 'underlying [International] insurance' . . . . [¶] The provisions of the 'immediate underlying [International] policy' are incorporated as part of this Policy except for any obligation to investigate or defend and pay for costs and expenses incident to the same, the amount of the limits of liability, any 'other insurance' provision and any other provisions therein which are inconsistent with the provisions of this Policy."

The St. Paul policy defines "claim" as "a demand in which damages are alleged," and defines "suit" as "a civil proceeding in which damages are alleged, including but not limited to an arbitration proceeding for such damages to which the Insured must submit or submit with [St. Paul's] consent." In an amendatory endorsement to the policy, "loss" is defined as, "the sums paid as damages in settlement of a claim or in satisfaction of a judgment for which the Insured is legally liable, after making deductions for all recoveries, salvages and other insurances (whether recoverable or not) other than the 'underlying insurance' and excess insurance purchased specifically to be in excess of this Policy. 'Loss' also includes investigation, adjustment, defense or appeal costs and expenses incident to any of the foregoing." "Damages" is not defined in the policy.

In part II.B.1., *ante*, we concluded the Coverage A indemnity provision in the 1988-1989 International policy does not apply in this case, but the policy's Coverage B indemnity provision does apply, because it provides umbrella coverage for the underlying INA policy and does not limit the insurer's indemnity obligations to "damages" but to "loss." Since the term "loss" does not require a court action, the insured could reasonably expect that any damages awarded in the IBCA proceeding would be reimbursed under the International policy.[38]

St. Paul relies on its policy's "Action Against Company" condition which provides: "No action shall lie against [St. Paul] unless, as a condition precedent thereto,

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[38] As we noted previously, Coverage B of the International policy provides: "With respect to any loss covered by the terms and conditions of this policy, but not covered as warranted by the underlying [INA] policies . . . , or any other underlying insurance, we will pay on your behalf for loss caused by an 'occurrence' . . . ." "Loss" is not defined in the International policy.

the Insured shall have fully complied with all the terms of this Policy. [¶] Any person or organization or the legal representative thereof who has secured a judgment against the Insured shall thereafter be entitled to recover under this Policy to the extent of the insurance afforded by this Policy. Nothing contained in this Policy shall give any person or organization any right to join [St. Paul] as a co-defendant in any action against the Insured to determine the Insured's liability. . . ."

In reliance on *Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, St. Paul then asserts that indemnity payments can only be pursued by a judgment creditor, and since there is no judgment creditor, neither Ameron nor anyone else can enforce the IBCA settlement. St. Paul contends that as a matter of law, "[a]bsent a litigated excess judgment, a refusal by an excess carrier to pay a negotiated settlement entered into by the insured without participation of the excess insurer is not actionable against the excess carrier."

The simple answer to St. Paul's contention is that it raises a factual issue—whether it consented to Ameron's settlement—which is outside the face of the complaint and the policies appended thereto, and therefore is not appropriately considered in reviewing the court's ruling on demurrer. *Hamilton,* relied upon by St. Paul, is inapposite because it was an appeal from a summary judgment where the insurer's lack of participation in the insured's settlement was an undisputed fact. (*Hamilton v. Maryland Casualty Co., supra,* 27 Cal.4th at p. 723.) In addition, nothing in the "Action Against Company" condition provides that coverage is limited to claims reduced to a judgment. And the insuring agreement expressly provides indemnity for "loss" which is defined as "sums paid as damages in settlement of a claim *or* in satisfaction of a judgment." (Italics added.) Since the St. Paul policy defines "claim" as "a demand in which damages are alleged," it clearly envisions paying an insured damages to settle a matter which has not yet ripened into a lawsuit. Consequently, the trial court erroneously sustained without leave to amend the causes of action for breach of the duty to settle, breach of the duty to indemnify, breach of the covenant of good faith and fair dealing, and declaratory relief (causes of action 47, 48, 49 & 50).

VII. *Causes of Action Against Puritan and Old Republic**

Puritan issued Ameron two successive excess/umbrella policies for the period July 1, 1979 to July 1, 1981 (Nos. UL-67-27-62 & UL-67-37-91). Old Republic issued Ameron an excess/umbrella policy for the period July 1, 1981 to July 1, 1982 (No. ORZU-4242).

The "Coverage" section of the Puritan and Old Republic policies provides that the company will "indemnify the Assured 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 by the Named Assured . . . for *damages* on account of: [¶] (i) Personal Injuries [¶] (ii) Property Damage [¶] (iii) Advertising liability, caused by or arising out of each occurrence happening anywhere in the world." (Italics added.)

The "Limit of Liability" section of the Puritan and Old Republic policies provides: "The Company hereon shall only be liable for the ultimate net loss the excess of either [¶] (a) the limits of the underlying insurances . . . , [¶] or (b) the . . . ultimate net loss in respect of each occurrence not covered by said underlying insurances . . . ." "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 personal injuries, property damage or advertising liability claims, either through adjudication or compromise, . . . and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder . . . . [¶] The Company shall not be liable for expenses as aforesaid when such expenses are included in other valid and collectible insurance."[39]

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* See footnote, *ante*, page 1.

[39] These policies overlie Truck primary policies that are not appended to the complaint, and the allegations in the complaint do not clarify the risks covered by Truck. We agree with the parties, however, that coverage under the Puritan and Old Republic policies does not depend upon whether Truck's policies cover Ameron's settlement.

Ameron relies on *Powerine II* to contend that the Puritan and Old Republic policies "explicitly provide coverage for the adjudication and settlement of claims, by [tying] the definition of 'ultimate net loss' into the grant of coverage." We conclude, however, that *Ace* and *Powerine I,* not *Powerine II*, govern the extent of coverage in these policies. The central insuring provision in the Ace policy, like the Puritan and Old Republic policies, obligated the insurer to indemnify the insured for sums the insured was obligated to pay for "damages." Thus, "damages" was the sole term of limitation in the indemnity agreement. (*Ace, supra,* 37 Cal.4th at pp. 416-417.) The Supreme Court explained that including the definition of "ultimate net loss" in the limits of liability provision "merely serves to define the insured's total loss that will count toward such policy limits." (*Id.* at p. 420.) "Nothing in the 'limits of liability' provision of the Ace policy purports to expand Ace's indemnification obligation, once triggered, to anything other than 'damages.' " (*Ibid.*)

Since the Puritan and Old Republic policies do not define "damages," we apply the analysis in *Powerine I* and conclude that the duty to indemnify "for all sums which the Assured shall be obligated to pay . . . for *damages*" is limited to money ordered by a court. (*Powerine I, supra,* 24 Cal.4th at p. 961.) Since the policies do not define "suit" or "claim" and the IBCA proceeding was not a civil action filed in a court of law, it was a "claim" to which no duty of indemnity was owed to Ameron. (See *Foster-Gardner, supra,* 18 Cal.4th at p. 878.)

For the first time on appeal, Ameron argues that the reference to "claims" in the policies' "cross liability" condition confirms that Puritan and Old Republic will pay for claims as well as suits.[40] The policies' cross liability condition provides, in part: "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

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[40] In general, theories not raised in the trial court may not be raised for the first time on appeal. (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 28-29; *Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 874.) However, because the issue involves a question of law on undisputed facts we address it on the merits. (See *Ward v. Taggart* (1959) 51 Cal.2d 736, 742.)

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."

The cross liability condition, like the loss payable provision discussed in *CDM*, "is a condition of coverage, not a limitation thereof, and cannot be read to limit or expand the coverage obligation." (*CDM, supra,* 139 Cal.App.4th at p. 1264; Croskey et al., Cal. Practice Guide: Insurance Litigation, *supra*, ¶ 3:158, p. 3-46 ["As a general rule, conditions neither confer nor exclude coverage for a particular risk, but rather, impose certain duties on the insured in order to obtain the coverage provided by the policy."].) *Powerine II* and *Ace* make it clear that coverage is determined by focusing on the literal language of the policy's central insuring clause, not on the policy's limits of liability or conditions. (See *Ace, supra,* 37 Cal.4th at pp. 420-421; *Powerine II, supra,* 37 Cal.4th at pp. 400-401.)

We conclude the trial court properly sustained without leave to amend the demurrers in favor of Puritan and Old Republic on the causes of action for breach of the duty to settle, breach of the duty to indemnify, breach of the covenant of good faith and fair dealing, and declaratory relief (causes of action 14, 15, 17, 18, 19, 20, 22 & 23).

VIII. *Causes of Action Against Pacific and Great American**

Pacific issued Ameron an excess blanket catastrophe liability policy for the period July 15, 1978 to July 1, 1979 (No. XMO-00-19-15). Great American issued Ameron a manuscript excess blanket catastrophe liability policy for the period April 15, 1986 to April 15, 1987 (No. 6CM07739). Each of the policies' insuring agreements provides: "[The insurer] 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 [¶] A. personal injury or [¶] B. property damage or [¶] C. advertising injury [¶] to which this insurance applies, caused by an occurrence, and [¶] (1) With respect to any personal injury, property damage or advertising injury not within the terms of the coverage of underlying insurance but within the terms of coverage of this

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* See footnote, *ante*, page 1.

insurance; or [¶] 2. If limits of liability of the underlying insurance are exhausted because of personal injury, property damage or advertising injury during the period of this policy [¶] [The insurer] will [¶] (a) have the right and duty to defend any suit against the Insured seeking damages on account of such personal injury, property damage or advertising injury, 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 . . . ." "Suit" and "claim" are not defined in the policies.

The policies' definitions section 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 insurer] . . . but excludes all loss expenses and legal expenses (including attorneys' fees, court costs and interest on any judgment or award) and all salaries of employees and office expenses of the Insured, [insurer] or any underlying insurer so incurred."

The policies contain the following no action clause: "No action shall lie against [the insurer] unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and [the insurer]. . . ."[41]

Once again, Ameron argues that since the Pacific and Great American policies provide that the insurer will indemnify for "ultimate net loss," *Powerine II* governs and indemnity coverage is not restricted to an action filed in court. Ameron also argues again that a reasonable policyholder would expect defense coverage under these policies because the IBCA litigation is defined as a "suit" under federal law and the IBCA acts in a "judicial capacity" when conducting hearings and deciding cases.

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41 These policies overlie Truck primary policies that are not appended to the complaint, and the allegations in the complaint do not clarify the risks covered by Truck. We agree with the parties, however, that coverage under the Pacific and Great American policies does not depend upon whether Truck's policies cover Ameron's settlement.

The indemnity language contained within the policies' central insuring clause was construed in *CDM*. The court concluded that the phrase " 'will pay . . . the ultimate net loss in excess . . . which the insured shall become legally obligated to pay . . . *as damages*' " limits the duty to indemnify to "damages." (*Id.* at p. 1263.) The "coverage clause reads that the insurer will pay ultimate net loss when that loss ripens into damages." (*Ibid.*) Because the central insuring clause contained only the "damages" limitation standing alone, and did not further define the scope of indemnity coverage by reference to "ultimate net loss" (*id.* at pp. 1265-1266), *CDM* concluded that, pursuant to *Powerine I,* the duty to indemnify was limited to "damages," that is money ordered by a court (*CDM*, at pp. 1265-1266). *CDM*'s reasoning and result apply to the Pacific and Great American policies and, therefore, the trial court correctly ruled that Ameron could not reasonably expect indemnity coverage under the Pacific and Great American policies.

In addition, the defense obligation contained within the insuring clause of the Pacific and Great American policies is substantively the same as the policy language interpreted by the Supreme Court in *Foster-Gardner*. Since "suit" and "claim" are not defined in the policy, " 'suit' in the policies means a civil action commenced by filing a complaint," and "[a]nything short of this is a 'claim.' " (*Foster-Gardner, supra,* 18 Cal.4th at p. 878.) Consequently, the trial court correctly ruled that Ameron could not reasonably expect defense coverage under the Pacific and Great American policies.

For these reasons the trial court correctly sustained without leave to amend the demurrers by Pacific and Great American to the causes of action for breach of the duty to settle, breach of the duty to indemnify, breach of the duty of good faith and fair dealing, and declaratory relief (causes of action 9, 10, 12, 13, 35, 36, 38 & 39.)

IX. *Causes of Action Against Harbor**

The Harbor policy is a second layer excess/umbrella policy issued to Ameron for the period August 1, 1989 to August 1, 1990. It overlies a first layer excess/umbrella policy issued by International and a primary policy issued by INA for that period.

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* See footnote, *ante*, page 1.

The insuring agreements of the Harbor policy provide:

"1. COVERAGE. [¶] [Harbor] hereby agrees, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of the liability: [¶] (a) imposed upon the Insured by law; [¶] or (b) assumed under contract or agreement by the Named insured . . . [¶] for *damages* on account of : [¶] (i) Personal Injuries . . . ; [¶] (ii) Property Damage; [¶] (iii) Advertising Liability, [¶] caused by or arising out of each occurrence happening anywhere in the world, during the policy period and arising out of the hazards covered by and as defined in the Underlying Umbrella Policies stated in Item 2 of the Declarations and issued by certain Insurance Companies, (hereinafter called the 'Underlying Umbrella Insurers.')[42] [(Italics added.)]

"2. LIMITS OF LIABILITY—UNDERLYING LIMITS. [¶] It is expressly agreed that liability shall attach to [Harbor] only after the Underlying Umbrella Insurers have paid or have been held liable to pay the full amount of their respective Ultimate Net Loss Liability as follows: [¶] [$5 million] Ultimate Net Loss in respect of each occurrence, but [¶] [$5 million] in the aggregate for each annual period during the currency of this Policy . . . ."

One of the Harbor policy's "Conditions" states, in relevant part: "MAINTENANCE OF UNDERLYING UMBRELLA INSURANCE [¶] This Policy is subject to the same terms, definitions,[43] exclusions and conditions (except as regards the premium, the amount and limits of liability and except as otherwise provided herein) as are contained in or as may be added to the Underlying [International] Umbrella Polic[y] stated in Item 2 of the Declarations prior the happening [*sic*] of an occurrence for which claim is made hereunder."

The parties appear to agree that the Harbor policy "follows form" to the underlying 1989-1990 International umbrella policy, and the International policy follows

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42 Item 2 of the Declarations solely lists the 1989-1990 International policy as the underlying policy.

43 The Harbor policy contains no definitions.

form to the underlying 1989-1990 INA primary policy. As we discussed in part II.B.2., *ante*, Coverage A of the underlying International policy incorporates the underlying INA policy, and the INA policy provides indemnity coverage for the IBCA proceedings. Therefore, a reasonable insured would expect that the Harbor policy would also provide indemnity coverage for those proceedings.

Although Harbor acknowledges that its policy is a following form policy, it relies on a clause in the Maintenance of Underlying Umbrella Insurance condition that states its policy is subject to the underlying policies "except as otherwise provided" in its policy. Harbor argues that the central insuring provision of its policy is controlling over the inconsistent underlying International and INA policies. Since the central insuring provision of the Harbor policy uses the language "imposed upon the Insured by law," and "damages" as the sole limitation on its indemnity obligation, Harbor asserts its policy language falls squarely within the Supreme Court's holding in *Powerine I* and *Ace*, limiting its indemnity obligation to money awarded by a court. Despite Harbor's assertion that the coverage terms of its policy are controlling because it is subject to the terms of the underlying policies "except as otherwise provided," Harbor fails to assert any such exceptions in its policy. And, based on our reading of the Harbor policy, no language in its coverage terms conflicts with that in the underlying policies. Consequently, as the Harbor policy provides, the terms, conditions and definitions of the underlying policies are incorporated because they are not in conflict with any provisions in the Harbor policy.

In a companion argument, Harbor asserts that Ameron's focus on the terms in the underlying International and INA policies related to the duty to defend has "no relevance to [the] scope of the central insuring agreement in the Harbor excess policy." Again, we disagree. The definition of "suit" in the duty to defend provision in the incorporated underlying INA policy helps define the term "damages" broadly, to include more than "money ordered by a court." This definition is then incorporated into the Harbor policy and used to define damages in that policy's central insuring agreement.

We conclude the trial court erred in granting judgment on the pleadings on the causes of action for breach of the duty to indemnify, breach of the duty to settle and breach of the covenant of good faith and fair dealing, and declaratory relief (causes of action 51, 53, 54 & 55).

X. *Waiver and Estoppel Causes of Action**

The waiver and estoppel causes of action allege that respondents knowingly and intentionally failed to inform Ameron that there was no coverage for the IBCA proceeding because IBCA proceedings are not a "suit." Ameron alleged that had it been informed by respondents that IBCA proceedings are not covered under respondents' policies, Ameron "could have" proceeded against the Bureau in federal court rather than before the IBCA.

"An insurer may be estopped to assert a policy right or defense where, by words or conduct, the insurer has caused the insured reasonably to change its position to its detriment. [Citations.] [¶] An insurer may be estopped to deny that coverage exists where the insurer's conduct has caused either (1) a reasonable belief that the insurer was providing coverage or (2) any detrimental reliance on such conduct. [Citation.]" (Croskey et. al, Cal. Practice Guide: Insurance Litigation, *supra*, ¶ 6:149, p. 6A-46.) It need not be shown that the insurer intended to mislead the insured, only that the insured reasonably and detrimentally relied on the insurer's action. (*Chase v. Blue Cross of California* (1996) 42 Cal.App.4th 1142, 1151.)

" ' "Four elements must ordinarily be proved to establish an equitable estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." ' [Citation.]" (*Spray, Gould & Bowers v. Associated Internat. Ins. Co.* (1999) 71 Cal.App.4th 1260, 1268 (*Spray*).)

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* See footnote, *ante*, page 1.

In reliance on *Spray*, Ameron argues that respondents had a duty to disclose their position on coverage, thus had a "duty to speak," and their failure to do so estops them from raising coverage defenses, even if there is no coverage for the IBCA proceeding.[44] In *Spray,* the appellate court reversed a summary judgment in favor of the insurers after finding that the insurer's violation of the California Insurance Commissioner administrative regulations regarding disclosure of time limits pertaining to claims imposed a "duty to speak" on the insurer, raising a triable issue of fact as to whether the insurer was estopped to assert a statute of limitations defense. (*Spray, supra,* 71 Cal.App.4th at pp. 1267-1269.)

Here, the trial court distinguished *Spray*, since no regulation imposed an affirmative duty to speak on respondents. Instead, the court relied on *Lawrence v. Western Mutual Ins. Co.* (1988) 204 Cal.App.3d 565, 574 [no estoppel for insurer's failure to explain that earth movement exclusion not applicable to third party negligence], for the proposition that "an insurer's failure to explain legal remedies available to the insured and the insured's ignorance of those remedies does not constitute waiver or estoppel. The insurer has no duty to explain such matters to its insured." The court ruled that as a matter of law, respondents had no duty to speak and their actions could not constitute waiver or estoppel.

The trial court's ruling was correct. Respondents had no duty to inform Ameron of legal theories that may have entitled Ameron to coverage. Ameron is charged with knowledge of the terms of its policies (*Hackenthal v. National Casualty Co.* (1987) 189 Cal.App.3d 1102, 1112), and it does not allege that respondent misrepresented any terms of its policies. Quite simply, respondents had no obligation to inform Ameron of the holdings of various courts on the meaning of the terms "suit" and "damages," and how those decisions might affect Ameron's coverage as a result of its choice of forum.

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[44] In support of its waiver and estoppel argument, Ameron refers to its May 2004 motion to estop INA and the declaration of its counsel in support of that motion. Since the motion to estop and supporting declaration are outside the complaint and documents appended thereto, they will not be considered on appeal.

Harbor's motion for judgment on the pleadings on the waiver and estoppel cause of action was properly granted, and the other respondents' demurrers to the causes of action for waiver and estoppel (causes of action 3, 11, 16, 21, 25, 32, 37, 41, 46, 52 & 59) were properly sustained without leave to amend.

XI. *Exhaustion of Primary Insurance**

As we noted, *ante,* the complaint's declaratory relief causes of action alleged that a present and justiciable controversy exists between Ameron and the respondent excess insurers regarding coverage under the respondents' policies, and that the controversy exists whether or not the underlying primary insurance is exhausted. The declaratory relief cause of action also alleged, "Alternatively, the underlying insurance will be deemed exhausted if Ameron is permitted to select a single year of coverage for the settlement with the Bureau. [¶] . . . Alternatively, the underlying insurance may be deemed inapplicable at some point in this litigation, if the court should determine that certain underlying insurance does not provide coverage, but [respondent excess insurer] does so. [¶] . . . The court is therefore requested to issue a declaratory judgment which will resolve these disputed issues and determine which policies are liable to provide coverage, and in which order."

In sustaining the demurrer to the declaratory relief causes of action without leave to amend, the court ruled that Ameron could not allege an actual, present and justiciable controversy exists between respondents and Ameron. However, the court did not specify whether it relied on the exhaustion issue as a basis for its ruling.

The complaint alleges that the limits of Ameron's underlying primary policies exceed its $10 million settlement. Many of the excess insurer respondents contend that Ameron's failure to allege exhaustion of the limits of the underlying primary policies mandates dismissal of all Ameron's claims against them. Ameron relies primarily on *Ludgate Ins. Co. v. Lockheed Martin Corporation* (2000) 82 Cal.App.4th 592 (*Ludgate*) to argue it did not have to allege exhaustion of the primary policies, and the

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* See footnote, *ante*, page 1.

determination of which primary policies have been exhausted involves the resolution of factual issues not suitable at the demurrer or judgment on the pleadings stage. In particular, Ameron asserts: (1) it sufficiently pled that it was seeking a declaration that it may select a single year in which to pay for the settlement, thereby triggering excess coverage in that year; (2) it cannot allege exhaustion of the primary insurance since primary insurers INA and Zurich paid nothing toward the settlement; and (3) the question of whether horizontal or vertical exhaustion applies in this case must be decided after it has been determined which policies provide coverage for the settlement.

A. *Ludgate*

In *Ludgate*, an insurer (Ludgate) filed a declaratory relief action against its insured seeking a determination of the rights and duties of the parties under primary and excess policies and a declaration that the insurer owed no coverage obligation for underlying claims against the insured. (*Ludgate, supra,* 82 Cal.App.4th at pp. 597-598.) Thereafter, the insured cross-complained against the insurer for declaratory relief, also seeking a determination of the parties' rights, duties and obligations under the policies as to the underlying claims. (*Id.* at pp. 598-599.) The insurer moved for judgment on the pleadings on the ground that the cross-complaint failed to state a cause of action because it did not allege actual exhaustion of the primary insurance, and failed to demonstrate a reasonable probability of exhaustion. (*Id.* at pp. 600-601.) The trial court granted the insurer's motion for judgment on the pleadings on the ground that the insured had not adequately pled actual exhaustion of the primary coverage or an exception to the exhaustion requirement. (*Id.* at pp. 601-602.)

In reversing the judgment on the pleadings, the Sixth District first noted that the insurer had initiated the action by filing a complaint against the insured that alleged the existence of an actual and justiciable controversy. (*Ludgate, supra,* 82 Cal.App.4th at p. 603.) It held that by doing so, the insurer waived the need for specific allegations demonstrating exhaustion of primary coverage. In addition, by moving for judgment on the pleadings, the insurer admitted the allegation in the insured's pleading that an actual

controversy existed between the parties as to their rights and duties under the policies. (*Id.* at p. 605.)

The *Ludgate* court next held that Code of Civil Procedure section 1060[45] does not require any insured to show a reasonable probability of exhaustion of primary coverage before it may state a cause of action for declaratory relief against an excess insurer. "All that . . . section 1060 requires is that there be 'actual controversy relating to the legal rights and duties of the respective parties.' Exhaustion of underlying limits, while necessary to entitle the insured to recover on the excess policy, is not necessary to create actual controversy. Exhaustion is merely an issue of proof and entitlement to recovery, not of pleading. . . . Facts showing exhaustion of the underlying limits merely establish the insured's right to recovery, not whether an actual controversy exists between the parties." (*Ludgate, supra,* 82 Cal.App.4th at p. 606.)

Ludgate rejected the insurer's reliance on *Community Redevelopment Agency v. Aetna Casualty & Surety Co.* (1996) 50 Cal.App.4th 329 and *Iolab Corp. v. Seaboard Sur. Co.* (9th Cir. 1994) 15 F.3d 1500 because neither case involved a judgment on the pleadings. (*Ludgate, supra,* 82 Cal.App.4th at p. 609.) *Community Redevelopment Agency* involved a declaratory judgment reached after a trial on the merits, and held that an excess insurer had no duty to defend until all the primary insurance has been exhausted. (*Ludgate*, at p. 609.) *Iolab* involved a summary judgment that did not address the sufficiency of the pleadings, and similarly held that under California law, all primary insurance must be exhausted before liability may attach to an excess or secondary policy. (*Ludgate*, at p. 610.)

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[45] Code of Civil Procedure section 1060 provides, in relevant part: "Any person interested under a written instrument, . . . or under a contract, or who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property, . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract. . . ."

B. *Lockheed*

In *Lockheed*, the Sixth District applied its earlier ruling in *Ludgate* to excess insurers who were named in the *Ludgate* insured's cross-complaint for declaratory relief, but who did not obtain a judgment of dismissal at the time the trial court dismissed Ludgate. (*Lockheed, supra,* 134 Cal.App.4th at pp. 219, 221.) The insured appealed the trial court's determination on the pleadings that the *Ludgate* holding did not apply to the demurrers of the other excess insurers. (*Lockheed*, at pp. 219-220.)

The excess insurers asserted that they were positioned differently than the excess insurers in *Ludgate* because they did not file the original action for declaratory relief and, therefore, had not made the admission Ludgate made in its pleading. (*Lockheed, supra,* 134 Cal.App.4th at p. 220.) In rejecting the assertion, the court stated, "Although that may be so, they each filed a demurrer, which, like a motion for judgment on the pleadings, admits all material factual allegations in the pleading. [Citation.] Moreover, by insisting upon allegations of exhaustion, [e]xcess [i]nsurers confuse the substance of the declaration [the insured] seeks with its right to a declaratory judgment of some kind. [¶] To be entitled to declaratory relief the party need not establish a right to a favorable declaration. 'A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the parties under a written instrument or with respect to property and requests that the rights and duties of the parties be adjudged by the court. [Citations.] If these requirements are met and no basis for declining declaratory relief appears, the court should declare the rights of the parties whether or not the facts alleged establish that the plaintiff is entitled to favorable declaration. [Citations.]' [Citation.] . . . [¶] Strictly speaking, a demurrer is a procedurally inappropriate method for disposing of a complaint for declaratory relief." (*Id.* at pp. 220-221.) The court noted that " 'the object of declaratory "relief" is not necessarily a beneficial judgment; rather, it is a determination, favorable or unfavorable, that enables the plaintiff to act with safety. This theory has prevailed, and the rule is now established that the defendant cannot, on demurrer, attack the merits of the plaintiff's claim. The complaint is sufficient if it shows an actual

controversy; it need not show that plaintiff is in the right' " (*Id.* at p. 221, quoting 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 831, p. 289.) *Lockheed* concluded this rationale applied both to the excess insurers in that case as well as to the excess insurers in *Ludgate.* (*Lockheed*, at p. 221.)

Together, *Ludgate* and *Lockheed* stand for the proposition that where an excess or umbrella insurer has denied coverage of a claim, the insured may sue for declaratory relief without alleging that its primary coverage limits have been exhausted. The plaintiff need only show an actual controversy. (Croskey et al., Cal. Practice Guide: Insurance Litigation, *supra*, ¶ 15:157, p. 15-22.5.)

Because the Court of Appeal in *Lockheed* affirmed the trial court's ruling in favor of the primary insurer on each of the coverage issues, there was no possibility that the insured would exhaust its primary coverage and reach the excess policies. Thus, despite concluding that the trial court erroneously sustained the excess insurers' demurrer, reversal was unnecessary and the judgment was modified to include an appropriate declaration in favor of the insurers. (*Lockheed, supra,* 134 Cal.App.4th at pp. 221-223.) ICSOP[46] argues that the same reasoning applies here because the record establishes that Ameron "can never exhaust its primary coverage, because that coverage exceeds Ameron's settlement of its claim by $4 million." ICSOP asserts that in light of *Ludgate* and *Lockheed*, "at best," the order sustaining the demurrer should be affirmed as to all of the causes of action except the declaratory relief cause of action, which the court should modify, to grant declaratory relief in ICSOP's favor. We disagree.

"Unless the provisions of an excess policy provide otherwise, an excess insurer has no obligation to provide a defense to its insured before the primary coverage is exhausted. [Citation.]" (*Community Redevelopment Agency v. Aetna Casualty & Surety Co., supra,* 50 Cal.App.4th at p. 338.) "Primary coverage is 'exhausted' when the primary insurers pay their policy limits in settlement or to satisfy a judgment against the insured. [Citations.]" (Croskey et al., Cal. Practice Guide: Insurance Litigation, *supra,*

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46 ICSOP's argument on this issue has been joined by International, Puritan, Old Republic and Harbor.

¶ 8:220, pp. 8-50 to 8-51.) Here, the umbrella/excess respondents' exhaustion argument assumes that all of the underlying primary policies provided coverage, and that Ameron's $10 million settlement is to be prorated equally over all of the primary policies. However, based on the record before us, that assumption cannot be made. Based on the coverage chart in the appendix, Truck issued Ameron $7 million in primary coverage between July 1, 1978 and July 1, 1988. However, as we have noted previously, the Truck policies are not appended to the complaint, and the terms of those policies are not sufficiently pled for us to determine whether those policies provide coverage for Ameron's IBCA settlement. While the complaint alleges that Truck "paid to Ameron certain sums with respect to the [Central Arizona Project] litigation," it is not clear what that means, and neither Ameron's complaint nor its appellate briefs take a position as to whether the Truck policy provided Ameron primary coverage for the IBCA settlement. Quite simply, a determination of the exhaustion issue at this demurrer stage is premature. We therefore reject respondents' assertion that Ameron's failure to allege exhaustion of its primary insurance is fatal to its claims.

DISPOSITION

For the reasons stated, the judgments are affirmed in part and reversed in part, and the case is remanded for further proceedings not inconsistent with this opinion. Each party shall bear its own costs on appeal.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

AMERON COVERAGE CHART[47]

1978-1979	1979-1980	1980-1981	1981-1982
Pacific XMO-00-19-15 07/15/78-07/01/79 $1 million excess of $1 million	**Puritan** UL-67-27-62 07/01/79-07/01/80 $9.5 million excess of $500,000	**Puritan** UL-67-37-91 07/01/80-07/01/81 $9.5 million excess of $500,000	**Old Republic** ORZU-4242 07/01/81-07/01/82 $9.5 million excess of $500,000
Truck 350-41-46 07/01/78-07/01/79 $1 million	**Truck** 07/01/79-07/01/80 $500,000	**Truck** 07/01/80-07/01/81 $500,000	**Truck** 07/01/81-07/01/82 $500,000

1982-1983	1983-1984	1984-1985	1985-1986
Twin City TXU-103836 07/01/82-07/01/83 $14.5 million excess of $500,000	**Twin City** TXU-106532 07/01/83-07/01/84 $24.5 million excess of $500,000	**Twin City** TXU-111849 07/01/84-07/01/85 $24.5 million excess of $500,000	**Transcontinental** UMB 1693937 04/15/85-04/15/86 $1 million excess of $1 million
Truck N00-03-4136 07/01/82-07/01/83 $500,000	**Truck** 07/01/83-07/01/84 $500,000	**Truck** 07/01/84-07/01/85 $500,000	**Truck** 07/01/85-07/01/86 $1 million

[47] The information contained in this chart was obtained from the complaint and from the copies of insurance policies appended thereto or provided in the record on appeal.

AMERON COVERAGE CHART (continued)

1986-1987	1987-1988	1988-1989	1989-1990
	St. Paul LCO-55-18326 07/01/87-07/01/88 $5 million excess of $6 million	**St. Paul** LCO-55-19681 08/01/88-08/01/89 $5 million excess of $6 million	**Harbor** HI 239376 08/01/89-08/01/90 $10 million excess of $6 million
Great American 6CM07739 04/15/86-04/15/87 $2 million excess of $1 million	**International** 531-000426-6 04/15/87-07/01/87 $5 million excess of $1 million 531-000481-5 07/01/87-07/01/88 $5 million excess of $1 million	**International** 531-000923-4 08/01/88-08/01/89 $5 million excess of $1 million	**International** 531-001236-6 08/01/89-08/01/90 $5 million excess of $1 million
Truck N0003-41-36 07/01/86-07/01/87 $1 million	**Truck** N0003-41-36 07/01/87-07/01/88 $1 million	**INA** 10777665 08/01/88-08/01/89 $1 million	**INA** HDOG 10778414 08/01/89-08/01/90 $1 million

1990-1991	1991-1992	1992-1993	1993-1994
ICSOP 4290-2705 08/01/90-08/01/91 $5 million excess of $6 million			
International 531-001679-4 08/01/90-08/01/91 $5 million excess of $1 million	**ICSOP** 4291-6624 08/01/91-08/01/92 $10 million excess of $1 million	**ICSOP** 4292-7425 09/01/92-09/01/93 $10 million excess of $1 million	**ICSOP** 4293-7722 09/01/93-09/01/94 $10 million excess of $1 million
INA HDOG 14420757 08/01/90-08/01/91 $1 million	**INA** HDOG 15190413 08/01/91-08/01/92 $1 million	**Zurich** 68-53-703-00 9/1/92-09/01/93 $1 million	**Zurich** 68-53-703-01 9/1/93-09/01/94 $1 million

AMERON COVERAGE CHART (continued)

1994-1995	1996-1997
ICSOP 4294-8226 12/1/94-12/01/95 $10 million excess of $1 million	
Zurich 68-53-703-03 12/01/94-12/01/95 $1 million	**Zurich** 68-53-703-05 03/01/96-03/01/97 $1 million

Filed 06/13/07

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

AMERON INTERNATIONAL CORPORATION, **Plaintiff and Appellant,** **v.** **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA et al.,** **Defendants and Respondents.**	**A109755** **San Francisco County Super. Ct. No. 419929)**
AMERON INTERNATIONAL CORPORATION, **Plaintiff and Appellant** **v.** **HARBOR INSURANCE COMPANY,** **Defendant and Respondent.**	**A112856** **San Francisco County Super. Ct. No. 419929)** **ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the opinion filed herein on May 15, 2007, be modified as follows:

1. On page 4, first complete sentence of the first partial paragraph, beginning "However," the phrase "there is a duty" is changed to "there may be a duty" so that the sentence reads:

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, any modifications to parts VII., VIII., IX., X. and XI. of this opinion are not certified for publication.

However, as to the policies before us that contain a definition of the term "suit,"[4] and/or provide indemnity for "loss," not damages, there may be a duty on the insurer to indemnify and/or defend.

2. At the end of the first partial paragraph on page 4, after the sentence ending "the trial court erred," add as footnote 5 the following footnote, which will require renumbering of all subsequent footnotes:

> [5] In granting Harbor's motion for judgment on the pleadings and sustaining the other respondents' demurrers, the trial court concluded Ameron could not prevail against the respondents as a matter of law. To the extent we reverse, we conclude only that a particular insurance company *may* have a duty to defend and/or indemnify. Nothing we say in this opinion is intended to express any view regarding additional coverage defenses that were not raised in the trial court or on appeal.

3. On page 20, second sentence of the second full paragraph, beginning "The final three," the phrase "assumed a duty" is changed to "may have assumed a duty" so that the sentence reads:

> The final three policies, from August 1, 1989 to August 1, 1992, contain definitions of the term "suit" that compel the conclusion that INA may have assumed a duty to indemnify and to defend Ameron.

4. On page 25, the first full paragraph beginning "INA responds" and footnote 26 are deleted and the following two paragraphs and new footnote 27 (renumbered) are inserted in their place:

> INA responds that the definition of "suit" contained within its defense provision is limited to a civil proceeding alleging "damages" and its indemnity obligation is also limited to "damages." INA argues that *Powerine I* and its progeny have "unequivocally determined" that as a matter of law, "damages" can only be awarded by a court of law, and, therefore, INA had no obligation to defend or indemnify Ameron for the settlement reached in connection with the administrative IBCA proceeding. INA also asserts that since its policies' deductible endorsements also refer to the insurer's obligation to pay "damages," the endorsements bolster the parties' mutual understanding that INA's defense and indemnity obligations are limited to the payment of damages awarded by a court of law. With minor nonmaterial

differences, the deductible endorsements provide that INA's "obligation to pay damages on behalf of the insured under this policy applies only to damages in excess of the amount of the deductibles . . . ."[27]

Because the INA policies are distinct contractual insurance policies whose wording and provisions were not before the Supreme Court in *Foster-Gardner, Powerine I* and *II*, and *Ace,* we examine the policies de novo, and consider the definition of "suit" and "damages" in the context of each policy as a whole to determine whether the policy provides coverage for the IBCA proceeding that the parties agree was not a proceeding in a court of law.

[27] INA argues that the deductible endorsement in these policies eliminates any duty to defend contained within the policies' insuring agreements and replaces it with a duty to reimburse Ameron for its defense costs under certain circumstances. Even assuming this is correct, we note that Ameron has alleged in its complaint that INA has failed to perform its obligation to reimburse. Moreover, it would be premature at this time to decide whether or not the duty to reimburse Ameron for its defense costs exists. INA, in fact, concedes this. Thus, we conclude that nothing in the deductible endorsement in these policies justifies the demurrer sustained by the trial court.

5. On page 31, last sentence of the first full paragraph, beginning "Consequently," the word "triggering" is changed to "which may trigger" so that the sentence reads:

Consequently, an insured could reasonably expect that the IBCA proceeding was a covered suit under the International policies' defense settlement provision, which may trigger International's duty to defend.

6. On page 32, last sentence of the first full paragraph, beginning "Having determined," the phrase "policy imposes" is changed to "policy may impose" so that the sentence reads:

Having determined that this policy may impose both a duty to defend and to indemnify upon International, we conclude the trial court erred in sustaining the demurrer to causes of action for breach of the duty to investigate and defend, breach of the duty to settle, breach of the duty to indemnify, breach of the duty of good faith and fair dealing, and declaratory relief (causes of action 40, 42, 43, 44 and 45).

7. On page 33, second sentence of the first full paragraph, beginning "As we noted," the word "provide" is changed to "may provide" so that the sentence reads:

> As we noted in part I.B., *ante,* the 1989-1991 INA policies may provide a duty of indemnity for any damages awarded in the IBCA proceeding.

8. On page 35, sixth sentence of the last partial paragraph, beginning "And, as a consequence," the word "provides" is changed to "may provide" so that the sentence reads:

> And, as a consequence, we conclude this Twin City policy may provide coverage to Ameron for both duties.

9. On page 39, last sentence of the first full paragraph, beginning "As we concluded," the word "triggering" is changed to "which may trigger" so that the sentence reads:

> As we concluded in part II.A., a reasonable insured would expect that the IBCA proceeding was a covered "suit" under the defense settlement provision, which may trigger ICSOP's duty to defend.

10. On page 39, second sentence of the second full paragraph, beginning "In that discussion," is deleted and replaced with the following so that the sentence reads:

> In that discussion, we concluded that the 1990-1991 INA policy may provide a duty of indemnity for any damages awarded in the IBCA proceeding, and the insured could reasonably expect that Coverage A of the International policy may provide excess indemnity coverage for such damages.

11. On page 42, last sentence of footnote 36, beginning "Arguably," the word "provided" is changed to "may have provided" so that the sentence reads:

> Arguably, the Zurich policies' language may have provided Ameron defense and indemnity coverage for settlement of the IBCA proceeding.

12. On page 44, second sentence of the second full paragraph, beginning "We conclude," the word "provides" is changed to "may provide" so that the sentence reads:

> We conclude that the 1988-1989 policy (No. LC05519681) may provide indemnity coverage to Ameron, and the trial court erred in sustaining the demurrer without leave to amend to Ameron's causes of action for breach of the duty to settle, breach of the duty to indemnify, breach of the duty of good faith and fair dealing, and declaratory relief (causes of action 47, 48, 49 & 50).

13. On page 53, first complete sentence of first partial paragraph, beginning "As we discussed," the word "provides" is changed to "may provide" so that the sentence reads:

> As we discussed in part II.B.2., *ante*, Coverage A of the underlying International policy incorporates the underlying INA policy, and the INA policy may provide indemnity coverage for the IBCA proceedings.

There is no change in the judgment.

The petitions for rehearing from respondents Insurance Company of North America, Harbor Insurance Company, Transcontinental Insurance Company, International Insurance Company, Twin City Fire Insurance Company and St. Paul's Surplus Lines Insurance Company are denied.

Dated: MAY 13 2007 JONES, P.J., P. J.

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

I, Sharran L. Rodd, state:

I am a citizen of the United States. My business address is 180 Montgomery Street, Suite 1700, San Francisco, CA 94104-4205. I am employed in the City and County of San Francisco where this mailing occurs. I am over the age of eighteen years and not a party to this action. On the date set forth below, I caused to be served the foregoing documents described as:

PETITION FOR REVIEW

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X : BY FIRST CLASS MAIL - I am readily familiar with my firm's practice for collection and processing of correspondence for mailing with the United States Postal Service, to-wit, that correspondence will be deposited with the United States Postal Service this same day in the ordinary course of business. I sealed said envelope and placed it for collection and mailing this date, following ordinary business practices.

: BY PERSONAL SERVICE - I caused said documents to be hand delivered to the indicated addresses above.

: BY FED EX- I caused to be served each envelope(s) by FED EX to the offices of the addressee(s)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed this date at San Francisco, California.

Dated: June 25, 2007

Sharran L. Rodd