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.

JOINT ANSWER BRIEF OF INSURANCE COMPANY OF THE STATE OF PENSYLVANIA, ET AL. ON THE MERITS

FROM THE DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FIVE, CASE NO. A109766

FROM AN ORDER OF THE SAN FRANCISCO COUNTY SUPERIOR COURT, CASE NO. 419929, HONORABLE ELLEN CHAITIN

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INTRODUCTION

Over the past ten years this Court has held—and repeatedly confirmed—that the term "suit" in a standard CGL[1] policy, unless expressly defined otherwise, means an action in a court of law. *Foster-Gardner v. Nat'l Union Fire Ins. Co.* (1998) 18 Cal. 4th 857, 887-88; *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal. 4th 945, 950-51 ("*Powerine I*"); *County of San Diego v. Ace Property & Casualty Ins. Co.* (2005) 37 Cal. 4th 406, 416 ("*Ace*"); *Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal. 4th 377, 384-85 ("*Powerine II*"). This holding created a bright-line rule that was based both on the plain meaning of "suit," (*Foster-Gardner*, 18 Cal. 4th at 879), and settled rules of contract interpretation, which provide that the parties' mutual intent is to be inferred from the express policy language (*AIU v. Superior Court* (1990) 51 Cal. 3d 807, 821-22). Nothing has changed since this Court first decided the meaning of "suit." The rules of contract interpretation are the same, the policy language that contains the insurers' defense obligations is the same, and the plain meaning of "suit" is the same.

Ignoring the Court's repeated and unambiguous pronouncements on the meaning of "suit," Ameron International Corporation ("Ameron") brought this action against its insurers seeking coverage for an administrative proceeding before a federal Board of Contract Appeals (sometimes referred to as the "Board"). The Board proceeding was initiated against the government by Peter Kiewit Sons' Inc. ("Kiewit"), the

[1] "CGL policy" refers to a comprehensive or commercial general liability policy.

general contractor on a government project which had subcontracted some work to Ameron.

Kiewit ultimately settled its claims with the government. Ameron, which had not been a party to the Board proceeding, in turn settled with Kiewit and brought this action. In its complaint, Ameron alleged, in relevant part, that Insurance Company of North America ("INA") and Insurance Company of the State of Pennsylvania ("ICSOP") breached their duties to defend and indemnify Ameron, and that Pacific Employers Insurance Company ("PEIC"), Puritan Insurance Company ("Puritan"), Old Republic Insurance Company ("Old Republic"), and Great American Surplus Lines Insurance Company ("Great American") breached their duties to indemnify Ameron.

The Court of Appeal ruled against Ameron on both its defense and indemnity claims under a number of the policies. It also rejected Ameron's contentions that the insurers waived their right to rely on the policy language because they did not inform Ameron that a Board proceeding is not a "suit" under the policies. Ameron sought review by this Court only on the issue of certain insurers' duty to defend. The issues that Ameron presented for review, as stated by Ameron, are:

> (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*")?

(Ameron's Petition for Review, filed June 25, 2007, at 1.) Both of these questions should be answered "no."

This Court has held—and repeatedly confirmed—that the plain meaning of "suit" dictates a bright-line rule. A "suit" is "a court proceeding." *Foster-Gardner*, 18 Cal. 4th at 887. Anything short of a court proceeding is a "claim." *Id.* With the exception of two policies that do not contain defense obligations, and thus do not use the term "suit," all the policies in this appeal contain the same, or (in the case of ICSOP) substantively the same, language that the Court construed in *Foster-Gardner*. As in *Foster-Gardner*, all these policies limit the companies' duty to defend to "suits." All also make an express distinction between "suits" and "claims," providing that the insurers have an obligation to defend "suits," but discretion whether to investigate or settle "claims." Finally, just as in *Foster-Gardner*, none of these policies defines "suit" or "claim." Under the bright-line rule that this Court has applied for the last decade, an administrative proceeding before the Board is not a "suit."

The Board is not a court of law. The Board is an administrative tribunal that is given power either by statute or, as in this case, by contract, to resolve appeals of certain contractual claims. It is not bound by, nor does it follow, the same rules as a court. Under the plain policy language, because the Board is not a court, a proceeding before it is not a "suit."

As this Court held in Foster-Gardner, the policies do not cover "functional equivalents" of suits. Because Ameron cannot manufacture a court proceeding where none existed, it argues instead that "a trial of twenty-two days is a 'suit'." (Appellant's Opening Brief ("AOB") at 20.) But Ameron confuses a type of proceeding (a "suit") with an event that may, or may not, occur in such a proceeding (a "trial"). Moreover, the essence of Ameron's argument is that the Board proceeding *resembled* a suit. Ameron claims that witnesses were called, the Board acted in a

"judicial capacity," and one provision of the Contracts Disputes Act (which did not even govern the Board proceeding here) refers to appeals to the Board as "suits." (AOB at 4, 20, 24.) But Ameron presents no reason why this case should be exempt from this Court's prior rulings, which hold that "[s]uit denotes court proceedings, not a 'functional equivalent.' . . . Either there is a suit or there is not." *Foster-Gardner*, 18 Cal. 4th at 879. To accept Ameron's position, the Court would have to ignore the plain language of the policies, which covers only "suits," not "trials," Board proceedings, or administrative actions of any kind.

Ameron makes no effort to justify its request that the Court overrule well-reasoned, and clearly applicable, precedent. By asking this Court to overrule *Foster-Gardner*, Ameron seeks to sweep away the only rule that this Court repeatedly and consistently has applied to define "suit," and replace it with no rule at all. Although Ameron argues that the answer to whether there was a suit in this case is "easy," (AOB at 1), it fails to articulate what rule courts should apply in future cases. Different administrative agencies have different rules, hold different proceedings, and are subject to different statutes. And if this is in fact the "easy" case, as Ameron claims, then future cases will be harder. Overruling *Foster-Gardner* would leave lower courts, which have relied upon and applied the bright-line rule for the last decade,[2] with no guidance on whether a particular administrative proceeding is covered.

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[2] The *Foster-Gardner* rule has been cited and relied upon by many courts, including California Courts of Appeal, other state courts, and federal courts. *See Aerojet-Gen. Corp. v. Commercial Union Ins. Co.* (2007) 155 Cal. App. 4th 132, 140-41; *CDM Investors v. Travelers Casualty & Surety Co.* (2006) 139 Cal. App. 4th 1251, 1258; *Lockheed Martin Corp. v. Continental Ins. Co.* (2005) 134 Cal. App. 4th 187, 199; *Mirpad, LLC v. California Ins. Guarantee Ass'n* (2005) 132 Cal. App. 4th 1058, 1071;

Footnote continued on the next page

And overruling *Foster-Gardner* to accommodate Ameron's particular circumstances would produce monumental upheaval in exchange for very little upside, even among policyholders. As evidenced by the spartan authority in Ameron's brief (*see* AOB at 23, 24, citing two federal cases decided in the 1970s), it is rare for an insured to seek insurance coverage for a Board proceeding. One reason for this is because, for reasons that will be addressed in the trial court, CGL policies do not cover the types of purely contractual claims routinely brought before the Board of *Contract* Appeals. Even rarer is the situation presented here, where an insured seeks coverage for a proceeding in which the insured was not even a party.

This Court should uphold its settled precedent, and affirm the Court of Appeal's holding on the policies at issue in this appeal.

STATEMENT OF THE CASE

I. KIEWIT CHOSE TO RESOLVE ITS CONTRACT DISPUTE WITH THE GOVERNMENT IN AN ADMINISTRATIVE FORUM.

In the 1970s, Kiewit entered into two contracts with the U.S. Department of Interior, Bureau of Reclamation ("Bureau") to manufacture and install siphons (large pipes) to carry water from the Colorado River to various cities in Arizona ("Kiewit-U.S. Contracts"). (Appellant's Appendix ("AA"), AA02180-02181.) Ameron entered into subcontracts with Kiewit to manufacture these siphons. (*Id.*) As part of these

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Barratt American, Inc. v. Transcontinental Ins. Co. (2002) 102 Cal. App. 4th 848, 858; *Simon Wrecking Co. v. AIU Ins. Co.* (E.D. Pa. 2004) 350 F. Supp. 2d 624, 638; *CIM Ins. Corp. v. Masamitsu* (D. Haw. 1999) 74 F. Supp. 2d 975, 986; *W.C. Richards Co. v. Hartford Accident & Indem. Co.* (1999) 311 Ill. App. 3d 218, 220.

subcontracts, Ameron agreed to defend and indemnify Kiewit for claims arising from the siphons. (AA01053.)[3]

In the early 1990s, the Bureau discovered that portions of the siphons were built in violation of the contract specifications. (AA02184.) As a result, on October 1, 1992, the Bureau formally revoked its acceptance of the siphons. (*Id.*) It found, among other things, that the steel prestressing wires used on the siphons for circumferential reinforcement failed to meet the contract specifications, and that other nonconformities caused deterioration in the siphons. (*Id.*)

In January 1992, a different entity, the Central Arizona Water Conservation District, filed an action against Ameron in the United States District Court, District of Arizona ("CAWD Action"), alleging that the siphons Ameron constructed were "unusable." (AA01053.) Ameron filed, and won, a motion to dismiss the complaint on the ground that the government had failed to exhaust its administrative remedies. (AA01608.)[4] The Ninth Circuit affirmed the ruling, and the appeal was dismissed in 1996. (AA01053.) The CAWD Action is not at issue in this appeal (or this litigation).

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[3] Ameron alleges that Kiewit was an additional insured under some policies. (AOB at 47.) But Kiewit never sought coverage from any respondent. Kiewit is not now, nor has it ever been, a party to this case.

[4] The CAWD Action order is not a part of the appellate record, but Century Indemnity Company's Memorandum of Points and Authorities in Support of Demurrer to Plaintiff's Third Amended Complaint, (AA001608), quotes *verbatim* the Judge's reasoning for dismissing the action: "The dispute involving defendants, the United States, and the CAWCD stems from defendants' refusal to accept responsibility for fixing the siphons, despite the government's request that Kiewit do so. This dispute is governed by a specific contractual remedy in the Kiewit-United States contracts." (*Id.*)

Meanwhile, in another forum, the Bureau brought administrative claims against Kiewit (not Ameron) for the non-conforming siphons. (AA02184.) In 1995, the Bureau's contracting officer issued two final decisions finding that Kiewit was partially responsible for the siphons' nonconformities, and ordering Kiewit to remit $40 million to the Bureau for the costs of repairing the siphons. (AA02186.)

Kiewit had two choices of forums in which to challenge the contracting officer's decisions: the Board of Contract Appeals or the Court of Federal Claims. Further, because Kiewit entered into the contracts before the enactment of the Contract Disputes Act of 1978 ("CDA"), if Kiewit elected to go before the Board, it could choose which rules would govern the proceeding—the CDA or the Kiewit-U.S. Contracts' dispute resolution provision. If Kiewit proceeded under the Kiewit-U.S. Contracts rather than the CDA, the Board would act as the government's "duly authorized representative," and the Bureau would have "no right to appeal from its own board of contract appeals." (AA02187.) If instead Kiewit appealed to the Board under the CDA, the Board would act as an independent body pursuant to its statutory authority, and the Bureau *would* have a right to appeal. *See* 41 U.S.C. § 609.

Kiewit decided to proceed before the Board rather than the Court of Federal Claims. It also elected to proceed under the Kiewit-U.S. Contracts rather than the CDA. (*See* Board Order denying Motion for Partial Summary Judgment ("Board SJ Order"), AA02216 (noting that "Kiewit elected not to proceed under the CDA").) Kiewit filed notices with the Bureau of its intent to appeal to the Board under its contractual remedy on

October 27, 1995.[5] (AA02186.) On January 21, 2003, after proceedings before the Board were held, Kiewit settled the government's claims for $10 million. (AA01054.)

II. THE PROCEEDINGS BELOW.

Although Kiewit filed notice of its administrative appeal to the Board on October 27, 1995, the first notice Ameron gave to any insurer about the Board proceeding was almost a year later, on September 11, 1996. (AA00958.) Ameron alleges that all the respondent insurers denied Ameron coverage for the Board proceeding. (AA1049.) Three months after Kiewit settled the Board proceeding, on April 29, 2003, Ameron filed this coverage action against its primary and excess insurers, alleging, in relevant part, breach of contract arising from the insurers' refusal to defend and/or indemnify Ameron for the Board proceeding. More specifically, as relevant to the policies and issues raised in this appeal, Ameron alleged that:

(1) INA breached its contractual duty to defend Ameron in the Board proceeding, and breached its duty of good faith and fair dealing by failing to indemnify Ameron (AA01069, AA01071);[6]

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[5] Ameron misstates the facts when it claims that "*Ameron* filed a complaint before the . . . Board of Contract Appeals," (AOB at 3-4), and that "*Ameron* . . . filed a motion for partial summary judgment on liability" (*id.* at 4 (emphasis added)). In fact, *Kiewit* filed these documents before the Board. (*See* AA02180, AA02214.)

[6] Although Ameron alleged that some of the insurers, including those listed above, breached their contractual duty to indemnify, Ameron did not bring this claim against INA. Instead, Ameron alleged that INA failed to indemnify it only in connection with its claim for breach of the duty of good faith and fair dealing. Ameron brought claims for breach of the duty of good faith and fair dealing against all insurers.

(2) PEIC, Puritan, Old Republic, and Great American breached their duties to indemnify Ameron by failing to pay for the settlement and costs of defending the Board proceeding (AA01074; AA01077; AA01080; AA01090); and

(3) ICSOP breached its duty to defend and indemnify Ameron (AA01102).[7]

Ameron also brought waiver and estoppel claims against all the insurers for allegedly failing to inform Ameron that there was no coverage for the Board proceeding because it was not a "suit." (AA01070; AA01074; AA01077; AA01080; AA01090; AA01102.)

Following several rounds of demurrers, motions to strike, and amended pleadings, the trial court sustained the insurers' demurrers to the Third Amended Complaint ("TAC"), in relevant part, on the grounds that (1) there was no duty to defend or indemnify under any of the policies because the Board proceeding was not a "suit," and (2) Ameron's waiver and estoppel claims fail as a matter of law. (AA00003, AA00008-09, AA00013, AA00016-17.)[8]

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[7] Ameron also alleged in its complaint that certain other insurers, whose policies are not the subject of this appeal, breached their defense and/or indemnification duties to Ameron, including: Zurich Insurance Company ("Zurich"), Transcontinental Insurance Company ("Transcontinental"), International Insurance Company ("International"), Harbor Insurance Company ("Harbor") and St. Paul Surplus Lines Insurance Company ("St. Paul"). (AA1048-49.)

[8] Ameron asserts that the trial court "made inconsistent, contradictory rulings, finding both that the litigation before the Board was a claim and was not a claim" (AOB at 9). In fact, the court consistently concluded that a Board proceeding was a "claim" not a "suit." The language Ameron cites, in which the court stated that the Board proceeding "was a suit and not a claim," is plainly a typographical error. The first sentence of that portion of the ruling states that "[t]he action before the Board of Contract

Footnote continued on the next page

The Court of Appeal affirmed in part and reversed in part. The court affirmed the waiver and estoppel rulings,[9] and the rulings on coverage as to those policies that contain similar language to that construed in *Foster-Gardner* and *Powerine I.* (Slip Op. at 3-4.) More specifically, the court concluded that there was no duty to: (1) defend *or* indemnify under the 1988-89 INA policies (*id.* at 21) or the 1992-95 ICSOP policies (*id.* at 43-44); (2) defend under 1991-92 ICSOP policies (*id.* at 40); and (3) indemnify under the Puritan, Old Republic, PEIC or Great American policies (*id.* at 48, 51).

As to those policies that defined the term "suit," and/or provide indemnity for money beyond "damages," the court reversed the trial court's rulings and remanded for further proceedings.[10] (Slip Op. at 29-30 (1989-92 INA policies); *id.* at 31-33 (International policies); *id.* at 35 (addressing one Twin City policy);[11] *id.* at 37-42 (1990-91 ICSOP policy and 1991-92 ICSOP policy (as to duty to indemnify only)); *id.* at 46 (St. Paul policies); *id.* at 53-54 (Harbor policy).)

Appeals is a 'claim' for which the insurance policies vest the insurer with 'discretionary' power to settle." (AA00007.)

[9] In addition to the waiver/estoppel allegations in the TAC, on May 17, 2004, Ameron filed a motion and supporting declaration to estop INA from raising coverage defenses. (AA00911 (Motion); AA00927 (Declaration).) Both the trial court and Court of Appeal refused to consider this motion in their rulings because it was "outside of the complaint and documents appended thereto." (Slip Opinion ("Slip Op.") at 55, fn.44; *see also* trial court's Response to Plaintiff's Motion to Estop [INA], AA01046-47 (explaining that motion is procedurally improper).)

[10] Ameron did not seek review of the court's rulings on the policies that define "suit."

[11] Despite separately examining each policy of every other insurer involved in this case, the Court of Appeal neglected to separately address two other Twin City policies that contain different language. *See* Slip Op. at 33, fn. 33.

Ameron filed a petition for review on June 25, 2007. The Court granted review of the two questions posed in that petition on August 15, 2007.

STANDARD OF REVIEW

On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is *de novo*. *McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal. 4th 412, 415. The Court gives the complaint a reasonable interpretation, and treats the demurrers as admitting all material facts properly pleaded, but does not assume the truth of contentions, deductions or conclusions of law. *Zelig v. County of Los Angeles* (2002) 27 Cal. 4th 1112, 1126. In testing the sufficiency of a complaint, the Court may consider matter that may be judicially noticed, including court records. *Id.*; *see also* CAL. EVID. CODE §452(d). The judgment must be affirmed if any one of the several grounds of demurrer is well taken. *Zelig*, 27 Cal. 4th at 1126. When a demurrer is sustained without leave to amend, the Court must affirm unless there is a reasonable possibility that the defect can be cured by amendment. *Id.* "The burden of proving such reasonable possibility is squarely on the plaintiff." *Id.*

ARGUMENT

I. AMERON'S "FUNCTIONAL EQUIVALENT" ARGUMENTS IGNORE THIS COURT'S REPEATED AND CONSISTENT PRONOUNCEMENTS THAT THE PLAIN MEANING OF "SUIT" IS LIMITED TO AN ACTION IN A COURT OF LAW.

An administrative proceeding, like that before the Board of Contract Appeals, does not trigger defense obligations under the CGL policies at

issue in this appeal.[12] This Court has stated repeatedly that the plain meaning of the term "suit" as used in similar policies dictates a bright-line rule that limits "suits" to actions in a court of law. Because the policies in this case contain the same, or (in the case of ICSOP) substantively the same, language that the Court has considered before, the result here should be the same.

A. This Court Has Stated Repeatedly That A "Suit" Is An Action In A Court Of Law.

1. *Foster-Gardner*

In *Foster-Gardner*, this Court held that the plain meaning of "suit" is an action in a court of law. In that case, appellant argued that its insurers had a duty to defend administrative proceedings commenced by the Department of Toxic Substances Control ("DTSC") under an insuring agreement that stated: "[T]he 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." *Foster-Gardner*, 18 Cal. 4th at 863.[13] This Court disagreed.

Because the policies did not define the term "suit," the Court considered at length whether to apply the literal meaning of "suit," or instead adopt a "functional equivalent" approach. The Court was aided by extensive briefing by the parties and *amici*, California case law, the laws of

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[12] The Court of Appeal concluded that a duty to defend Board proceedings may exist under the policies that *do* define the term "suit." This issue is beyond the scope of this appeal, and Ameron's request that the Court "affirm the Court of Appeal" on these issues (AOB at 49) is improper. *See* CAL. R. CT. 8.516(b)(1).

[13] In this brief, emphasis is supplied throughout, except where otherwise stated, and internal quotations, citations and alterations are omitted.

other jurisdictions, and even dictionary definitions. Ultimately, applying "ordinary rules of contractual interpretation," (*id.* at 868), the Court held that the plain meaning of "suit" is an action prosecuted in a court of law.[14] *Id.* at 878-79.

The Court also found it significant that "the policies do not treat the terms 'suit' and 'claim' as interchangeable, but consistently treat them separately." *Id.* It concluded that "[t]his careful separation indicates that the insurers' differing rights and obligations with respect to 'suits' and 'claims' were deliberately and intentionally articulated in the policies." *Id.* More specifically, under the express terms of the policies, the insurers owe a *duty* to defend "suits," but have a *discretionary right* to investigate and settle "claims." *Id.*

In holding that a "suit" was an action in a court of law, the Court deemed "not reasonable" Foster-Gardner's argument that "suit" includes the "substantive equivalent of a 'suit.'" *Id. at 879.* Explaining that courts cannot "rewrite unambiguous policy language on a case-by-case basis under the guise of interpretation," (*id.* at 881), the Court held that the plain meaning of "suit" created "an unambiguous line to . . . limit contractual obligation," and gave both sides only what they bargained for. *Id.* at 882, 887-88. The Court concluded that "[e]ither there is a suit or there is not. When there is no suit, there is no duty to defend." *Id.* at 879.

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[14] Ameron suggests in passing that *Foster-Gardner's* holding—that a suit is an action in a court of law—is *dicta*. (AOB at 2.) The contention is meritless. *Dictum* is "[t]he discussion or determination of a point not necessary to the disposition of a question that is decisive of the appeal. . . ." *Stockton Theatres, Inc. v. Palermo* (1956) 47 Cal. 2d 469, 474. Where, as in *Foster-Gardner*, the Court announces a standard upon which its specific factual holding is based, that standard is a necessary element of the decision and not *dictum*. *People v. Pope* (1979) 23 Cal. 3d 412, 428, fn. 18.

In reaching this holding, the Court did not dismiss what it called "the significant economic consequences that may flow from" administrative actions. But it concluded that any definition of "suit" other than the definition dictated by the term's plain meaning would "create new coverage and impose risks not assumed or paid for by the contracting parties," and invite a flood of litigation over which administrative proceedings are sufficiently "equivalent to a suit" to merit coverage. *Id.* at 887.

2. *Powerine I*

Three years after deciding *Foster-Gardner*, this Court revisited the scope of an insurer's coverage obligations under a CGL policy in which "suit" is undefined. In another exhaustive opinion, after reviewing precedent from California and other jurisdictions, the Court held that in an insuring agreement that imposed a duty to indemnify "for all sums that the insured becomes *legally obligated to pay as damages*," the term "damages" was limited to money ordered by a court. *Powerine I*, 24 Cal. 4th at 960-64. In other words, the duty to indemnify under the terms of the policy existed only in the context of a "suit."

The Court's reasoning was three-fold. First, the plain meaning of "damages" was limited to "money ordered by a court." *Id.* at 960-69. The Court explained that "within the legal and broader culture, . . . 'harm' exists traditionally outside of [a] court," whereas "'[d]amages' exist traditionally inside [a] court." *Id.* at 962. As in *Foster-Gardner*, the Court specifically rejected any notion of a "functional" approach under which relief that was "equivalent to damages" might be covered:

> We [have] declined to take either a "functional" or a "hybrid" approach, each of which treats the provision as "ambiguous," the former deeming "suit" to reach anything that is equivalent to a suit, apparently without qualification, the latter deeming

> "suit" to reach anything that is equivalent to a suit, but "only if it is sufficiently coercive and threatening." We declined to take either approach because the duty to defend involved a "suit," and not something equivalent to a suit or even something equivalent to a suit that was sufficiently coercive and threatening.

Id. at 959.

Second, the Court noted that the policy language inextricably links the duties to indemnify and defend. Because an insured can only become "legally obligated" to pay "damages" in a "suit," the duty to indemnify was at least implicitly restricted to "suits":

> The provision imposing the duty to defend expressly links "damages" to a "suit," *i.e.*, a civil action prosecuted in a court. For it is in a "suit" that "damages" are sought in some amount through the court's order.
>
> The provision imposing the duty to indemnify impliedly links "damages" to a "suit," *i.e.*, a civil action prosecuted in a court. For it is in a "suit" that "damages" are fixed in their amount through the court's order.

Id. at 962.

Finally, the Court concluded that the inter-relationship between the duties to defend and indemnify supported its holding. Because the duty to defend is broader than the duty to indemnify, the "*Foster-Gardner* syllogism" required that the (narrower) duty to indemnify existed only if there was a "suit," which is an action in a court of law:

> 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.

Id. at 961.

In reaching its conclusion, the Court again rejected the argument that "public policy" favored a different interpretation. The Court again admonished that, even for public policy reasons, a court cannot rewrite the plain language of a contract to impose obligations on insurers that their premiums did not anticipate. *Id.* at 967-68, 970-71. Echoing its reasoning in *Foster-Gardner*, the Court explained that giving the term "damages" its literal and plain meaning would establish a "bright-line rule" that would "promote fairness and efficiency in the judicial sphere" and deter future litigation. *Id.* at 965-66.

3. *Ace* and *Powerine II*

After *Foster-Gardner* and *Powerine I*, the Court twice more repeated the rule that "suit" means an action in a court of law. *Ace*, 37 Cal. 4th at 416; *Powerine II*, 37 Cal. 4th at 384. Although these cases raised questions of indemnity rather than defense obligations, and so did not pose the express issue of the definition of "suit," the Court began its analysis in each case with a restatement of the *Foster-Gardner* rule. *Ace*, 37 Cal. 4th at 416; *Powerine II*, 37 Cal. 4th at 384. And consistent with its prior rulings, the Court decided both cases based on the plain meaning of the policies at issue.

In *Powerine II*, the Court considered an insuring agreement under which the company agreed "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'.*" *Powerine II*, 37 Cal. 4th at 385-86. The policies defined "ultimate net loss" as:

> [T]he total sum which the [i]nsured, or any company as [its] insurer, or both, become legally 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 386.

The Court held that there may be a duty to indemnify for cleanup of contaminated sites under this language because the insuring agreement (1) included a duty to pay for "expenses," not only "damages"; and (2) expressly incorporated the term "ultimate net loss" into its coverage provision, which was defined to include expenses beyond "damages." *Id.* at 396-97.

The Court reached the contrary conclusion in *Ace*, issued on the same day, because the "literal insurance language" of the excess/umbrella policies in that case neither referenced nor incorporated the term "expenses." *Ace*, 37 Cal. 4th at 419-20. The policy stated that the company would indemnify the insured "for all sums which the insured is obligated to pay . . . [arising from] damages resulting from . . . the destruction or loss of use of tangible property." *Id.* at 419. The Court held that, unlike the policy in *Powerine II*, this language did not impose an obligation to indemnify for expenses incurred in responding to an administrative agency environmental order. *Id.*

The Court in *Ace* noted that 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 [sic] to pay the full amount of its respective ultimate loss liabilities," and that the definition of "ultimate net loss" was the same as *Powerine II*. But the Court distinguished the case from *Powerine II* because the term "ultimate net loss" was not included in the insuring agreement. *Id.* at 418-19. The Court

explained that "[i]nsurance policies are written in two parts: an insuring agreement which defines the types of risks being covered, and exclusions, which remove coverage for certain risks which are initially within the insuring clause." *Id.* at 420.

The Court concluded that "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.'" *Id.* Instead, the term "ultimate net loss . . . merely serves to define the insured's total loss that will count toward [the] policy limits." *Id.* In other words, because the term "ultimate net loss" only appeared in the "limits of liability" section, it did not expand coverage but rather limited it.

The Court's treatment of the terms "suit" and "damages" has thus been consistent and definitive: "suit" means an action in a court of law, and "damages" means money ordered by a court. Broader language—such as the "expenses" term that led to *Powerine II's* narrow exception—may warrant broader coverage, depending on the policy's specific language. In each of these cases, however, the Court made clear that the plain meaning of the policy language controls.

B. The INA, PEIC And Great American Policies Contain The Same, And The ICSOP Policies Contain Substantively The Same, Language That This Court Construed In *Foster-Gardner*.

This Court has stated repeatedly that "ordinary rules of contractual interpretation" apply to insurance contracts. *Foster-Gardner*, 18 Cal. 4th at 868. "If contractual language is clear and explicit, it governs." *Id.* In *Foster-Gardner*, the policy language before the Court provided that:

> [T]he 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 863. The terms "suit" and "claim" were not defined. *Id.*

The defense obligations set forth in the INA, PEIC and Great American policies are *exactly* the same as the one considered in *Foster-Gardner*, and the ICSOP policies contain substantively the same language.[15] Just as in *Foster-Gardner*, each of these policies obligates the insurer to defend "suits." As in *Foster-Gardner*, each of these policies makes a distinction between "suit" and "claim." And just as in *Foster-Gardner*, in each policy, neither the term "suit" nor "claim" is defined. More specifically:

The 1988-89 INA primary policy contains language *identical* to the language this Court construed in *Foster-Gardner*. This policy provides:

> [T]he 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 or settlement of any *claim or suit* as it deems expedient.

(AA000294.)

The 1978-79 PEIC and 1986-87 Great American excess policies also contain the same language as the policy in *Foster-Gardner*, except that they also cover "advertising injury," a distinction that has no relevance here. Both the PEIC and Great American policies provide that the companies have:

> [T]he right and duty to defend *any suit against the Insured seeking damages* on account of such personal injury, property damage or advertising injury . . . and may make such

[15] The Puritan and Old Republic policies are not discussed in this section because they do not contain defense obligations.

> investigation and settlement of any *claim or suit* as it deems expedient.

(AA00486 (PEIC); AA00257 (Great American).)

The 1991-95 ICSOP excess policies contain substantively the same language as construed in *Foster-Gardner*. The 1991-92 policy provides:

> [ICSOP] shall . . . defend *any suit against the insured* alleging liability insured under the provisions of this policy and *seeking damages* on account thereof . . . but [ICSOP] shall have the right to make such investigation, and negotiation and settlement of any *claim or suit* it may deems expedient.

(AA00122.)

Similarly, the 1992-95 policies provide:

> [ICSOP] . . . shall defend *any suit* arising out of a covered occurrence . . . [ICSOP] shall have the right to investigate, negotiate and settle any *claim or suit* as it may deem expedient.

(AA00153, AA00191, AA00230.) These policies, like those in *Foster-Gardner*, distinguish between "suits" alleging liability covered by the policy, which must be defended, and "claims," which may be investigated and settled at the insurer's discretion. And, as in *Foster-Gardner*, none of these policies defines "claim" or "suit."

Ameron does not dispute the fact that these policies contain the same language as the Court considered in *Foster-Gardner*. Instead, Ameron contends that other language in some of the policies—which is not part of the insuring agreements—expands coverage to include "claims" as well as "suits." Specifically, it argues that this additional obligation is found in the Deductible Endorsement in the 1988-89 INA policy (AOB at 35) and the "Limit of Liability" provisions in the Puritan and Old Republic policies (*id.* at 37-42).

Ameron's position has no merit. As this Court explained in *Foster-Gardner*, the insuring agreements state that the insurers have a *duty* to defend "suits," and a *discretionary right* to investigate "claims." *Foster-Gardner*, 18 Cal. 4th at 880. None of the provisions Ameron cites expands those duties or changes those rights; indeed, both sets of provisions expressly limit the insurers' obligations.

The INA Deductible Endorsement. Ameron argues that in this Endorsement "INA agrees to pay" certain fees and expenses "in connection with *claims* under this policy." (AOB at 35.) In fact, nowhere in this Endorsement does INA "agree" to pay for anything. The language Ameron quotes is from the "definitions" section of the Endorsement, which defines the phrase "Loss Adjustment Expense." (AA00304.) The provision of the Endorsement that addresses "Loss Adjustment Expense" provides that "[a]ll loss adjustment expense . . . shall be apportioned between the Named Insured and Company as follows. . . ." (AA00303.) This provision explains that, *if* INA incurs these expenses, then they will be apportioned as set forth in the Endorsement. It does not obligate INA to incur these expenses, nor expand the coverage obligations set forth in the insuring agreement.

The same is true of the other Endorsement provision that Ameron cites, which states that INA has a "*right* . . . to control and to associate with the Insured in the investigation, defense and settlement of any *claims* or proceedings arising out of any occurrence." (AA00302.) This is consistent with the insuring agreement, which provides that INA has a discretionary "right" to investigate and settle claims. It does not create new duties of any kind. And as explained above, this Court has held that provisions not

contained in the insuring agreement that expressly limit a company's liability do not expand coverage obligations. *Ace*, 37 Cal. 4th at 420.

Ironically, in emphasizing the reference to "claims" in the Deductible Endorsement, Ameron undermines its primary position, *i.e.* that a Board proceeding is a "suit." Ameron argues that "[t]hese provisions all make it clear that coverage is tied to '*claims*.' Since a 'claim' is *not the same thing* as a lawsuit filed in a court, there is coverage for litigation before the Board of Contract Appeals." (AOB at 36, first emphasis in original.) Ameron's statement echoes this Court's reasoning in *Foster-Gardner*, in which the Court held that because the policies treat the terms "suit" and "claim" as separate and distinct concepts, they must mean something different. *Foster-Gardner*, 18 Cal. 4th at 880. If, as Ameron concedes, a Board proceeding is a "claim," then it cannot also be a "suit."

Puritan and Old Republic "Limit of Liability" Provisions. Ameron incorrectly argues that the Puritan and Old Republic policies contain "two Insuring Agreements," and that the second "Insuring Agreement," titled "Limit of Liability," creates additional coverage obligations. (AOB at 37-43.) First, these policies do not contain "two Insuring Agreements." The caption "Insuring Agreements" on the first pages of these policies plainly refers to all the sections that follow, which include a "Coverage" section, a "Limit of Liability" section, a "Definitions" section, and so forth. (AA00544, AA00565 (Puritan); AA00756 (Old Republic).) The caption does not make each of these sections a separate grant of insurance coverage.

Second, the "Limit of Liability" provisions in these policies do not provide additional coverage, but rather *limit* the insurers' coverage obligations. These provisions provide:

> The Company . . . shall only be liable for the ultimate net loss the excess of either (a) the limits of the underlying insurances . . . in respect of each occurrence covered by said underlying insurances, or (b) the amount . . . of ultimate net loss in respect of each occurrence not covered by said underlying insurances.

(AA00544, AA00565 (Puritan); AA00756 (Old Republic).)

This language is virtually identical to the language this Court considered in *Ace*, which provided, also in the "limit of liability" portion of the policy, that "[l]iability under this policy shall attach to the company only after . . . the named insured has paid or has been liable [sic] to pay, the full amount of its respective ultimate loss liabilities." *Ace*, 37 Cal. 4th at 418. The Court concluded that "[n]othing in the 'limits of liability' provision of the Ace policy purports to expand Ace's indemnification obligation, once triggered, to anything other than 'damages.'" *Id.* at 420. Instead, the term "ultimate net loss merely serves to define the insured's total loss that will count toward [the] policy limits." *Id.* The same conclusion applies here.

II. A BOARD PROCEEDING IS NOT A "SUIT."

Under this Court's bright-line rule, which is dictated by the plain meaning of "suit," a "suit" under these policies is a civil proceeding in a *court*. The Board is not a court, and so a proceeding before it cannot be a suit. Faced with outcome-determinative precedent, Ameron argues that the Court did not intend the bright-line rule to apply to these facts, in which there was a "trial" before an administrative tribunal that acted in a "judicial capacity." (AOB at 29.) Ameron is wrong. The thrust of its argument is that a Board proceeding is the "functional equivalent" of a suit. This "functional test" is exactly the same argument that appellants made in *Foster-Gardner* and that the Court expressly rejected: "Suit denotes court

proceedings, not a 'functional equivalent.' . . . Either there is a suit or there is not." *Foster-Gardner*, 18 Cal. 4th at 879. As in *Foster-Gardner*, there was no "suit" here. [16]

A. A Board of Contract Appeals Is Not A Court.

Ameron does not seriously argue—nor can it—that the Board is a court. It is not. It is an administrative tribunal that is designed to offer an "informal, expeditious, and inexpensive resolution of disputes." 41 U.S.C. § 607(e). During the enactment of the CDA, the Board was described as an "alternate forum" to courts, which contractors may choose for resolving their disputes after weighing "the degree of due process desired" against "the time and expense considered appropriate for the case." SEN. REP. 95-1118, 2d Sess. (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News, pp. 5235, 5247. In other words, by electing to bring its dispute before an administrative tribunal, a contractor agrees to give up some of the due process rights that it would receive in a court in exchange for a more expeditious and inexpensive determination of its claims.

Boards themselves acknowledge that they are not courts: "A board of contract appeals is not a court . . . and therefore does not have all the inherent authority of a federal court." *A&B Ltd. Partnership v. Gen. Svcs. Admin.*, G.S.B.C.A. No. 15208, 2005-1 B.C.A. P32, 832. Courts, too, have

[16] Indeed, Ameron was not even a party to the Board proceeding, and as a subcontractor to Kiewit, Ameron was barred by federal law from being a party. *See* 41 U.S.C. §§ 601, 606, 609 (providing that only a "contractor," *i.e.*, "a party to a Government contract," may appeal to either the Board or Court of Claims); *United States v. Johnson Controls, Inc.* (1983) 713 F.2d 1541 (subcontractor has no right to go before the Board); *Universal Fiberglass Corp. v. United States* (Ct. Cl. 1976) 537 F.2d 400, 404 ("A subcontractor has no contractual rights against the government and must seek settlement of his . . . claims against the prime contractor with whom he contracted.")

recognized that a Board's authority is "limited to that power expressly granted by statute and does not include the inherent authority of federal courts." *Sterling Fed. Sys. v. Goldin* (Fed. Cir. 1994) 16 F.3d 1177, 1185-86.

Indeed, a Board is very different from a court. A Board is not bound by, nor does it follow, the rules of evidence. *See* 43 C.F.R. 4.122 (permitting admission of "evidence not ordinarily admissible under the generally accepted rules of evidence").[17] A Board does not have the power of a court to impose monetary sanctions on the government for discovery abuses. *See Mountain Valley Lumber Inc. v. Dept. of Agriculture* (June 21, 2007) C.B.C.A. No. 95, 2007-2 B.C.A. P33, 611. Entities need not be represented by attorneys in hearings before a Board. 43 C.F.R. 1.3. And the administrative law judges that preside over Board hearings are appointed by the agency that established the Board. 41 U.S.C. § 607(b).

The standard of review for Board decisions is also different. A trial court's factual findings are subject to a "clearly erroneous" standard (*Glendale Fed. Bank, FSB v. United States* (Fed. Cir. 2001) 239 F.3d 1374, 1379), while Board findings are reviewed under a "substantial evidence" standard (41 U.S.C. § 609(b)). The notion that courts should give greater

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[17] Ameron quotes only a portion of 43 C.F.R. 4.122 in arguing that "[a]dmissibility of evidence [before the Board] is governed by 'the generally accepted rules of evidence'." (AOB at 27.) The part of section 4.122 that Ameron omits makes clear that the Board has wide discretion in deciding what evidence to admit in a particular proceeding: "***Hearings shall be as informal as may be reasonable and appropriate in the circumstances***. Appellant and respondent may offer at a hearing on the merits of such relevant evidence as they deem appropriate. . . . In general, admissibility will hinge on relevancy and materiality. ***Letters or copies thereof, affidavits, or other evidence not ordinarily admissible under the generally accepted rules of evidence, may be admitted in the discretion of the presiding member or hearing officer***." 43 C.F.R. 4.122.

deference to the conclusions of informal tribunals is not new. *See Advanced Micro Devices v. Intel Corp.* (1994) 9 Cal. 4th 362, 373; *Dickinson v. Zurko* (1999) 527 U.S. 150, 160.

Ignoring these differences, Ameron goes to great lengths to find alleged similarities between Boards and courts. (AOB at 27-28). But those purported similarities are nothing more than "functional equivalents." In deciding *Foster-Gardner*, this Court ruled that DTSC proceedings were not covered *not* because the DTSC did not look enough like a court, but rather, because *it was not a court*. By adopting that bright-line rule, the Court enforced the plain meaning of the policy language, and eliminated the need for endless litigation over whether a particular administrative proceeding is the "functional equivalent" of an action in a court of law.

B. The Court Should Reject Ameron's Argument That A Board Proceeding Is The "Functional Equivalent" Of A Suit.

In adopting the literal approach to defining "suit," the Court explained in *Foster-Gardner* that the functional approach advocated by the appellant in that case was unacceptable because it would (1) require courts "to rewrite unambiguous policy language on a case-by-case basis under the guise of interpretation," and (2) "introduce a significant element of uncertainty into an insurer's ascertainment of its duty to defend." *Foster-Gardner*, 18 Cal. 4th at 881. This case raises the very concerns that caused this Court to reject the functional-equivalent approach in the first place.

1. Ameron Asks This Court To Ignore The Policy Language That This Court Has Held Dictates A Bright-Line Rule.

Just like the insured in *Foster-Gardner*, Ameron asks this Court to rewrite Ameron's CGL contracts to provide coverage for which neither side

bargained. It argues that there was a "suit" because it (or more accurately, its general contractor) was a party to what it calls a "trial." (AOB at 1.) But the word "trial" does not appear in any of the insuring agreements under which Ameron seeks coverage. And the terms "suit" and "trial" are plainly not synonymous. A "trial" is something that may or may not occur in a suit, and suits are often resolved without trials.

In fact, the "trial" that Ameron describes was nothing more than an appeal—by someone other than Ameron—of an administrative order to another administrative body. And Ameron was not even a party to that proceeding. Ameron's argument is really that it was the functional equivalent of a party in the functional equivalent of a suit.

Moreover, by arguing that the existence of a "trial" converts an administrative proceeding into a "suit," Ameron glosses over the fundamental textual distinction the Court recognized in *Foster-Gardner*: the policies consistently treat the terms "suit" and "claim" as different concepts. The Court concluded that "[t]his careful separation indicates that the insurers' differing rights and obligations with respect to 'suits' and 'claims' were deliberately and intentionally articulated in the policies." *Foster-Gardner*, 18 Cal. 4th at 880. "A 'claim' can be any number of things, none of which rise to the formal level of a suit." *Id.* at 879. As explained above, the policies under which Ameron seeks defense coverage contain the same distinction between "suits" and "claims," providing that insurers have a duty to defend "suits," but a discretionary right to investigate and settle "claims." Ameron fails to reconcile this language with its position. Instead, as noted above, it concedes that a proceeding before the Board is a "claim," and a "claim" is not the same thing as a "suit."

Ameron also argues that a duty to defend was triggered because a document called a "complaint" was filed. But, like "trial," the word "complaint" does not appear in these insuring agreements. And although in deciding *Foster-Gardner*, the Court noted that "[an] insurer's duty to defend depends on the allegations in [a] *complaint*," (*Foster-Gardner*, 18 Cal. 4th at 880), this does not mean that an insured can create coverage just by labeling an administrative document a "complaint." Nor does the submission of a document called a "complaint" mean that what follows is a lawsuit. For example, the first step in filing a charge with the Equal Employment Opportunity Commission is to file a "complaint" with the entity that allegedly discriminated against the individual. 29 C.F.R. 1614.106. This does not make that entity a "court," and the filing of this "complaint" does not initiate a "suit."[18]

The Court needs to look no further than the language of the policies to decide this case. The policies do not provide coverage for "trials," "complaints," or Board proceedings. If the Court adopts Ameron's position, it would not be interpreting the policies, but rewriting them. The Court has repeatedly said it would not do so under any circumstances. *See Foster-Gardner*, 18 Cal. 4th at 888; *Powerine I*, 24 Cal. 4th at 967-68. And it should not do so here.

2. Ameron's Approach Would Create Uncertainty In Future Coverage Disputes.

Even if the Court could rewrite the policy language—which it can't—Ameron's approach would create unnecessary uncertainty in future

[18] Also, the "complaint" was filed by Kiewit, not Ameron. Ameron was not a named party in that complaint, and the defendant in the Board proceeding was the government. (AA02180.)

coverage disputes. Ameron argues that "a trial of twenty-two days is a 'suit.'" (AOB at 20.) But future cases will involve different facts. Courts would have to decide, for example, whether a three-day administrative hearing, or a ten-day proceeding where no witnesses were called, was a "suit." The approach Ameron advocates would invite unnecessary litigation over which administrative proceedings are "suits," and leave courts with no guidance on how to decide these issues.

The Court need only consider the arguments that were made—and rejected—in *Foster-Gardner* to recognize the types of problems that Ameron's approach raises, because the same arguments were made ten years ago in that case. For example, a DTSC proceeding arguably includes a type of "discovery" process, during which the DTSC may require a potentially responsible party ("PRP") to furnish information related to a hazardous substance release. (*See* concurrently filed Request for Judicial Notice of Appellant's Petition for Review in *Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co.* ("RJN") at 11, fn. 14 (citing CAL. HEALTH & SAFETY CODE § 25358.1(a)-(b)).) During the process, a "trial-type" proceeding may take place where a PRP presents evidence to rebut allegations of liability. (*Id.*) Yet, despite these arguably "suit-like" qualities, this Court concluded that DTSC proceedings are not "suits."

Ameron also argues that "[t]he ordinary definition of 'suit' includes a trial before an administrative agency acting in a judicial capacity." (AOB at 20.) According to Ameron, the Court in *Foster-Gardner* "carved an adjudicative procedure out of the reach of its decision" (AOB at 29) when the Court noted that "[a] [DTSC] Determination and Order does not commence either a lawsuit in court or an adjudicative procedure before an administrative tribunal." *Foster-Gardner*, 18 Cal. 4th at 878. But the cited

language actually refutes Ameron's position. It shows that, although the Court expressly acknowledged the possibility of "an adjudicative procedure before an administrative tribunal," it nevertheless held that a "suit" is limited to an action in a court of law.

Ameron also fails to explain what it means to act in a "judicial capacity." Once again, the arguments made in *Foster-Gardner* reveal the uncertainty that adoption of Ameron's position would create. For example, as the appellant in *Foster-Gardner* pointed out, the DTSC final remedial plan must contain a preliminary allocation of liability, which will be upheld in a court so long as it is based on substantial evidence. (*See* RJN at 12, fn. 14 (citing CAL. HEALTH & SAFETY CODE § 25356.1(e), (g).) Arguably, by allocating liability, the DTSC acts in a "judicial capacity." But this Court rejected this argument too in *Foster-Gardner*. The fact remains that, regardless of the type of function an administrative agency performs, it is not a court, and a proceeding before it is not a "suit."

Ameron spins a tale of "complaints," "trials," and administrative agencies acting in a "judicial capacity," all in service of the "functional equivalent" argument this Court has expressly rejected. In the end, what is conspicuously absent from Ameron's tale is a "suit."

C. There Is No Support For Ameron's Contention That Administrative Actions Are Suits.

In support of its position that the term "suit" as used in these policies includes administrative actions, Ameron points to a host of irrelevant authorities and public policy arguments, most of which this Court already rejected in deciding *Foster-Gardner* and *Powerine I*. The only "new" authority Ameron cites is the CDA, which, as explained below, does not support Ameron's position, and in any event, is irrelevant to the analysis.

1. Dictionary Definitions And California Case Law Support The Holding In *Foster-Gardner*.

Ignoring this Court's contrary conclusion in *Foster-Gardner*, Ameron argues that the "ordinary" meaning of "suit" includes a "prosecution of a right before any tribunal." (AOB at 21.) In support, it cites dictionary definitions of "suit," as well as one California case decided sixteen years before *Foster-Gardner*—*Taranow v. Brookstein* (1982) 135 Cal. App. 3d 662, 665—in which, Ameron argues, the Court of Appeal suggested that "suit" has a broad meaning. (*Id.*) Ameron's arguments add nothing new to the analysis.

In deciding *Foster-Gardner*, the Court considered both dictionary definitions and the language in *Taranow* that Ameron cites. The Court noted that Webster's New Collegiate Dictionary defined "suit" as "an action or process in a court for the recovery of a right or claim," and that Black's law dictionary echoed this meaning. *Foster-Gardner*, 18 Cal. 4th at 879. Likewise, explaining that the circumstances in *Taranow* involved a partnership agreement and not an insurance policy, the Court rejected the case as inapplicable. *Id.* at 887.

Contrary to Ameron's assertions, *Foster-Gardner's* holding is consistent with California precedent. Over a decade before this Court decided *Foster-Gardner*, the California Court of Appeal held that an insurance policy that promised to reimburse an insured physician for expenses and loss of earned income for each day he was "required to attend trial of civil suit for damages against him" did not provide coverage for hearings before the Board of Medical Quality Assurance. *Hackethal v. National Casualty Co.* (1987) 189 Cal. App. 3d 1102, 1109-10. The court found the policy language "civil suit for damages" to be "clear and

unambiguous with respect to its non-inclusion of coverage for administrative hearings like those before BMQA." *Id.* This is exactly what *Foster-Gardner* concluded in the context of CGL policies.

Ameron also argues that other jurisdictions have decided the issue differently. That contention, too, has been raised, examined, and rejected many times before. *See Powerine I*, 24 Cal. 4th at 964-65 (observing that "other courts are contra," but concluding that "[t]heir number, however, adds nothing to their weight"); *Foster-Gardner*, 18 Cal. 4th at 887 (disagreeing with "cases in other jurisdictions [that] have [determined] that environmental agency activity is the 'functional equivalent' of a 'suit'"). This Court has already considered the *contra* authorities that Ameron cites, and has conclusively decided the meaning of "suit." Because that decision is based on the same rules of contract interpretation and the same contract language, it should apply here as well.[19]

Finally, the two trial court cases Ameron cites to support its claim that "federal courts have ruled that litigation before the Board of Contract Appeals is a 'suit' covered by insurance," (AOB at 23), do not support its position. The case from the District of the Canal Zone, *Aire Frio, S.A. v. United States Fidelity & Guarantee Co.* (D. Canal Zone 1970) 309 F. Supp. 1388, is a one-page opinion that contains no analysis and does not provide

[19] Ameron argues that "[t]he decision by the Supreme Court of Wisconsin to reverse its earlier decision is especially noteworthy, since this Court's decision in *Foster-Gardner* relied upon *Edgerton*, a decision that has now been reversed." (AOB at 31, fn. 9.) But this Court based its ruling on the plain language of the policies, not on the votes of Wisconsin Supreme Court justices. Moreover, the Wisconsin Supreme Court overruled *Edgerton* in July 2003 (*see Johnson Controls, Inc. v. Employers Ins. of Wausau* (2003) 665 N.W.2d 257)—over two years before this Court decided *Ace*.

the policy language on which it bases its holding. Thus, it is impossible to tell whether the case involved the same policy language that is before this Court now. The other case, *Safeway Moving & Storage Corp. v. Aetna Insurance Co.* (E.D. Va. 1970) 317 F. Supp. 238, involved a fire insurance policy. The defense provision is not quoted in full, so there is again no way of knowing whether it reflects the provisions at issue here. *See id.* at 246, fn. 6. Moreover, the insurer in that case did not argue that a Board proceeding is not a "suit," but instead focused on its indemnity obligations and certain policy exclusions, such as the contractual exclusion clause, to justify its denial of coverage. In short, even if these cases were binding on this Court—which they are not—they add no analytical value to this appeal.

2. The Contract Disputes Act Does Not Support Ameron's Position.

Ameron also points out that one section of the CDA, which allows actions to be transferred between the Board and the Court of Federal Claims, uses the word "suit" to refer to both types of proceedings. According to Ameron, this section shows that a Board proceeding is a "suit." (AOB at 24.) Not so.

As a threshold matter, Ameron's reliance on the CDA is misplaced because the Board proceeding here was not subject to the CDA. Kiewit did not proceed under the CDA, but instead appealed the contracting officer's decisions under the Disputes Clause of the Kiewit-U.S. Contracts. (AA002216.) Because Kiewit made this election, the Board heard the appeal as the Bureau's "duly authorized representative" under the Kiewit-U.S. contracts, and not pursuant to authority provided by the CDA. Any mention of "suit" in the CDA, therefore, is irrelevant here.

Even if the CDA was relevant, Congress cannot modify by statute the terms of CGL contracts to which it was not a party. This Court has specifically stated that federal statutes are immaterial to the interpretation of terms used in liability policies:

> [O]ur ultimate conclusion as to whether reimbursement of response costs is "damages" for insurance purposes is . . . predominantly a question how, under state law, insurance policies should be interpreted. We are not bound by distinctions . . . [that] do not reflect the intent of the parties to the CGL policies at the time of their formation.

AIU, 51 Cal. 3d at 831 (concluding that "distinctions and definitions" contained in CERCLA "seem[] immaterial to the interpretation of the question at issue").

Moreover, the CDA provision that Ameron cites does not support its argument that Congress intended the term "suit" to have a "specialized meaning in the field of government contracts." (AOB at 24.) In fact, both the legislative history and the use of "suit" in the rest of the statute reveal that the reference to "suits" in this provision is likely a scrivener's error.

The provision Ameron points to states:

> 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, . . . the United States Court of Federal Claims may order the consolidation [or transfer] of such suits. . . .

41 U.S.C. § 609(d).

The reference to both types of actions as "suits" in this provision is an anomaly. In all the other provisions, the CDA draws a clear distinction between "appeals" (which are held before the Board) and "suits" (which are held in the Court of Federal Claims). *See, e.g.*, 41 U.S.C. § 605(b) (distinguishing between an "appeal" and "suit"). The statute's legislative history helps explain the likely reason for this anomaly. The original

Senate Bill contemplated that both federal district courts and the Court of Claims (now the "Court of Federal Claims") would have jurisdiction over contractors' claims, and included a section that allowed for transfer of "suits" between these two courts.[20] Ultimately, Congress removed jurisdiction from the district court, leaving the Board and the Court of Claims as the only two options. Accordingly, the transfer provision of the Senate Bill had to be amended to reflect this jurisdictional change. SEN. REP. 95-1118, 2nd Sess. (1978), *reprinted* in 1978 U.S. Code Cong. & Admin. News, pp. 5235, 5245, 1978 U.S.C.C.A.N. 5235, 5245 ("With the district courts no longer having jurisdiction over cases under this Act, provisions needed to be made for consolidation between the Court of Claims and the Agency Boards.")

In light of the careful separation of the term "suit" and "appeal" in all other parts of the statute, it is likely that the conflation of the terms in section 609 was the result of an oversight, rather than, as Ameron contends, congressional intent to give "suit" a special meaning in this context.

Nor is there merit to the argument made by Ameron's counsel that, because section 609 fails to distinguish between "suits" and "appeals," Ameron "could reasonably expect" coverage for a Board proceeding when it entered into the CGL contracts. (AOB at 24.) The law in California was then well established that contract claims—the types of claims over which the Board and Court of Federal Claims may exercise jurisdiction—were not

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[20] Sen. No. 3178, Sec. 10(e), as originally drafted, provided: "If two or more *suits* arising from one contract are filed in *different district courts* . . . the district court may order the consolidation of *such suits*. . . . If two or more *suits* arising from one contract *are filed in the Court of Claims and one or more district courts* . . . the Court of Claims may order the consolidation of such suits. . . ."

covered under CGL policies. *Ritchie v. Anchor Casualty Co.* (1955) 135 Cal. App. 2d 245. Thus, Ameron could not have expected coverage for contractual disputes at the time it entered into the CGL contracts.[21] Ameron's counsel cannot invent this alleged expectation by pointing to a scrivener's error in an inapplicable statute.

3. This Court Has Made Clear That Ameron's Public Policy Arguments Are Not Relevant To The Interpretation Of The Contracts At Issue.

This Court repeatedly has admonished that public policy concerns do not control the interpretation of an insurance policy. Rather, "[t]he answer is to be found solely in the language of the [policy], not in public policy considerations." *AIU*, 51 Cal. 3d at 818; *Foster-Gardner*, 18 Cal. 4th at 888. Nevertheless, Ameron argues that *Foster-Gardner's* holding is against public policy because it makes "coverage turn upon the fortuity of the forum chosen" (AOB at 32)[22] and creates a disincentive for insurers to settle disputes early (*id.* at 33).[23] But as this Court explained, "[the Court

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[21] Years after the policies were issued this Court held that there may, in certain circumstances, be coverage under a CGL policy where the plaintiff has pursued contract theories. *Vandenberg v. Superior Court* (*Centennial Ins.*) (1999) 21 Cal. 4th 815.). Of course, the Court decided *Vandenberg* a year *after* it decided *Foster-Gardner*, so Ameron can hardly claim that it has ever had reasonable expectations of coverage for administrative proceedings based upon *Vandenberg*. Moreover, for reasons that will be developed in the trial court, there is no coverage for Ameron's claims even under *Vandenberg*.

[22] In support of its "fortuity of forum" argument, Ameron argues that in some circumstances a court may transfer a CDA action to the Board. This is irrelevant here because, *inter alia*, as a subcontractor Ameron could not have been a party to the CDA action against the government. Instead, were Ameron to have litigated its dispute with Kiewit, it would have had to do so in a court of law. Such an action could not have been transferred to a Board because it would not be subject to the CDA.

[23] Ameron's additional argument that insurers have a "duty to settle a claim even before the claim turns into a lawsuit," (AOB at 34), fails for two

Footnote continued on the next page

does] not rewrite any provision of any contract, including the standard policy underlying any individual policy, for any purpose." 24 Cal. 4th at 967-68.

There also is, of course, a strong public policy reason to uphold the existing rule. As this Court recognized, a definitional bright-line rule assists insureds, insurers, and courts in uniformly and fairly interpreting policies. *See Foster-Gardner*, 18 Cal. 4th at 882; *Powerine I*, 24 Cal. 4th at 965-66.

III. AMERON'S ARGUMENTS DO NOT JUSTIFY A MODIFICATION OR OVERRULING OF PRECEDENT.

Tacitly conceding that a Board proceeding cannot be a "suit" under existing binding precedent, Ameron argues in the alternative that the Court should overrule or modify *Foster-Gardner* so that a Board proceeding is covered as a "suit." (AOB at 30.) This contention should be rejected outright.

Particularly where—as here—the relevant facts and law on which the Court based its prior decision are no different from the facts and law

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reasons. First, this Court already rejected this argument in *Foster-Gardner*, when it recognized that under the policies, insurers have a discretionary right (but no duty) to settle claims. *Foster-Gardner*, 18 Cal. 4th at 878. Second, Ameron misstates California law on an insurer's settlement obligations. The cases hold that when an insurer wrongly rejects a reasonable settlement demand within its policy limit, it risks being held liable for consequential damages in excess of those limits after judgment is entered against the insured. *Isaacson v. California Ins. Guarantee Ass'n* (1988) 44 Cal. 3d 775, 792-94; *Communale v. Traders & Gen. Ins. Co.* (1958) 50 Cal. 2d 654, 659. These cases do not stand for the abstract proposition that insurers must settle, as Ameron claims, and cannot be used to rewrite policy language that expressly limits the duty to defend to "suits."

currently before it, the Court should uphold its precedent. *See City of Los Angeles v. City of San Fernando* (1975) 14 Cal. 3d 199, 235-36, 240-41. This Court decided *Foster-Gardner* based on the rules of contract interpretation, the plain meaning of the policy language, and the bright-line rule dictated by that policy language. The Court considered at length—and expressly rejected—a "functional" approach to defining "suit." In doing so, it enforced the express policy language and introduced certainty into a complex area of law.

Nothing has changed in the mere ten years since this Court decided *Foster-Gardner* that warrants revisiting the core issue in that case. The rules of contract interpretation are the same, the policy language giving rise to defense obligations is the same, and the plain meaning of "suit" is the same. In these circumstances, adhering to precedent is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee* (1991) 501 U.S. 808, 827 (*cited in Board of Supervisors v. Local Agency Formation Comm'n* (1992) 3 Cal. 4th 903, 921).

And contrary to Ameron's arguments, the approach it advocates would not even be good public policy. Overruling *Foster-Gardner* would eliminate the bright-line rule that is dictated by the plain meaning of the policy language, and replace it with no rule at all. This would create endless disputes over whether every *other* kind of imaginable administrative proceeding is a "suit," and leave lower courts without the benefit of this Court's guidance.

Ameron poses the question of whether a twenty-two day "trial" before an administrative board is a "suit," and says that the answer is "easy." (AOB at 1.) Of course, under *Foster-Gardner* and the plain meaning of the policies, the answer *is* easy and the answer is *no*. But even if Ameron's representation is taken at face value, the question for this Court is what happens to the next case, and the next. *See O'Bannon v. Town Court Nursing Center* (1980) 447 U.S. 773, 804 (Blackmun, J. concurring in judgment) (positing that "easy cases make bad law"). There are hundreds of different kinds of administrative tribunals, all of which perform different functions, follow different rules, and are subject to different statutes. The next case may involve a one-day hearing rather than a twenty-two day "trial." The case after that could involve a lengthy proceeding, but one in which no witnesses testified. The case after that could involve some form of "discovery" but no hearing. And so on, *ad infinitum*.

The bright-line rule that this Court held is dictated by the plain meaning of "suit" protects against the very concerns that Ameron's approach raises: (1) unnecessary litigation over whether a particular administrative proceeding sufficiently resembles a suit in a court of law to trigger coverage; (2) inconsistent decisions on coverage issues under policies that contain the same language; and (3) inefficiency in the judicial system. *See Foster-Gardner*, 18 Cal. 4th at 882; *Powerine I*, 24 Cal. 4th at 965-66. Indeed, Ameron's call to overrule *Foster-Gardner* is a call to destabilize an otherwise coherent and predictable body of law upon which courts and parties to insurance disputes have come to rely. *Foster-Gardner* remains a vibrant part of this Court's precedent and should be upheld.

Finally, this is hardly a case that justifies a wholesale abandonment of recent precedent that is grounded in plain policy language. Ameron

would have the Court declare that a Board proceeding is a "suit," but Ameron's policies only cover suits against the insured, and Ameron was not even a party to the proceeding, let alone a defendant. And as evidenced by the authorities cited in Ameron's own brief, this is apparently the first time in thirty years that any court has had to decide whether a Board proceeding constitutes a "suit" under a GCL policy. (*See* AOB at 23, 24.) This is likely because, as its name suggests, the Board of *Contract* Appeals decides disputes arising out of *contract*, and CGL policies do not cover purely contractual claims.

For all these reasons, the Court should uphold its precedent.

IV. AMERON'S OTHER ARGUMENTS ARE BEYOND THE SCOPE OF THIS APPEAL AND, IN ANY EVENT, HAVE NO MERIT.

In its petition for review, Ameron raised only two issues: (1) whether a Board proceeding is a "suit," and (2) whether *Foster-Gardner* should be overruled or modified. Both of these issues address the question of whether an insurer has a duty to *defend* a particular proceeding. Toward the end of its opening brief, however, Ameron introduces a few unexpected contentions: namely, that the Court of Appeal (1) wrongly decided that there was no indemnity coverage under the 1988-89 INA policy, 1992-95 ICSOP policies, 1879-81 Puritan policies, 1981-82 Old Republic policy, 1978-79 PEIC policy and 1986-87 Great American policy, (AOB at 13, 14), and (2) incorrectly ruled that the waiver and estoppel claims fail as a matter of law (*id.* at 14). Because these issues were not "fairly included" in the petition for review, and are not "raised" by the petition, they are not properly before the Court. CAL. RULES OF COURT, RULE 8.516(b)(1); *see also Metcalf v. County of San Joaquin* (Cal., Feb. 21, 2008, 5144831) 2008

Cal. LEXIS 1905 (declining to review fact-specific issue because it "does not present an issue worthy of review"). Even if they were, they have no merit.[24]

A. The Court Of Appeal Correctly Ruled That Insurers Have No Indemnity Obligations Under The Policies Presented In This Appeal.

1. 1988-89 INA Policies.

In *Powerine I*, this Court held that where a policy provided indemnity "for all sums that the insured becomes *legally obligated to pay as damages*," the term "damages" was limited to money ordered by a court. *Powerine I*, 24 Cal. 4th at 960-64. The insuring agreement in the 1988-89 INA policies contains identical language. It provides that, "[t]he Company will pay on behalf of the Insured all sums which the Insured shall become *legally obligated to pay as damages*," (AA00294), and thus expressly limits the duty to indemnify to money ordered by a court.

Ignoring the insuring agreement, Ameron argues that the Deductible Endorsement "defines 'damages' to include 'amounts payable . . . under state No-Fault automobile insurance laws, Uninsured Motorist laws and for Medical Payment benefits.'" (AOB at 36-37 *quoting* AA00304.) Ameron argues that the typical "no fault" automobile insurance law provides for payment of benefits without litigation in court, and that this means the policy "did not limit coverage to lawsuits filed in a court." (*Id.* at 37.)

The argument both misreads the policy, and takes its language out of context. As explained previously, the Endorsement does not impose

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[24] Respondents object to the inclusion of these arguments by Ameron. Because these issues are not properly before the Court, Respondents have not fully briefed them. Instead, Respondents only address these issues sufficiently to show that they do not warrant review.

additional coverage obligations on INA but rather limits them. The complete provision states:

> The Company's obligation to pay damages on behalf of the insured under this policy applies only to damages in excess of the amounts of the deductibles stated below. . . .

(AA00302.)

This provision limits INA's obligation to pay damages only to those damages that are in excess of the deductible Ameron must pay under the policy. This Court has held that an insurer's indemnity obligation cannot be expanded beyond the language of the insuring agreement by later policy provisions that limit coverage. *Ace*, 37 Cal. 4th at 416-17. The INA insuring agreement covers only "damages."

And the fact that the provision states that "[d]amages, *as used in this endorsement*, includes amounts payable . . . for the Insured's liability under state No-Fault automobile insurance laws . . ." (AA00304), only bolsters the conclusion that the term "damages" in the insuring agreement is limited to money ordered by a court. The definition in the Endorsement merely acknowledges that some states have laws that regulate the coverage required for these types of automobile claims (*see, e.g.*, CAL. INS. CODE § 11580.2), and provides that if INA is required to provide coverage, Ameron must still pay the deductible. If "damages" in the insuring agreement had already included these types of costs, there would have been no need to expressly define the term differently for purposes of the Endorsement.

2. 1979-81 Puritan and 1981-82 Old Republic Policies.

The insuring agreements in both the Puritan and Old Republic policies provide that the companies will indemnify the insured "*for all sums* which the Assured shall be obligated to pay . . . *for damages*." (AA00544,

AA00565 (Puritan); AA00756 (Old Republic).) Ameron argues that these policies provide indemnity coverage for Board proceedings under *Powerine II* because their "Limit of Liability" sections state that "[t]he Company . . . shall be liable for the ultimate net loss." (AOB at 38.)

But, as the Court of Appeal correctly concluded, *Ace* and *Powerine I*, not *Powerine II*, govern the extent of coverage in these policies. The insuring agreements contain a duty to indemnify Ameron for sums it becomes obligated to pay as "damages." As this Court explained in *Ace*, 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." *Ace*, 37 Cal. 4th at 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.'" *Id.* The same reasoning applies here.

3. 1978-79 PEIC and 1986-87 Great American Policies.

Both the PEIC and Great American policies provide that the companies "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*." (AA00486 (PEIC); AA00257 (Great American).) The definitions sections define "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 companies] . . . but *excludes all loss expenses and legal expenses*. . . ." (AA00488 (PEIC); AA00263 (Great American).)

Ameron argues that since the PEIC and Great American policies provide indemnification for "ultimate net loss," *Powerine II* governs. But in *Powerine II*, the insuring agreement stated that the company would cover "expenses," and expressly incorporated the term "ultimate net loss" into the coverage provision. *Powerine II*, 37 Cal. 4th at 396. In contrast here, the insuring agreements contain only the "damages" limitation standing alone, and do not further define the scope of indemnity coverage by reference to "ultimate net loss." Moreover, the "ultimate net loss" definition in these policies expressly states that "expenses" are not covered. Under *Powerine I*, the duty to indemnify under these policies is limited to "damages," that is, money ordered by a court.

4. 1992-95 ICSOP Policies.

The insuring agreement in the 1992-95 ICSOP policies states that ICSOP will:

> [P]ay 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*. . . .

(AA00153, AA00191, AA00230.)

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 . . . 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.

(AA00154, AA00192, AA00231.)

Ameron again contends that *Powerine II* should control because these policies provide that the company will indemnify for "ultimate net loss." (AOB at 45.) But, again, the term "damages" in the insuring clause

defines ICSOP's indemnity obligation, not the phrase "ultimate net loss," which appears only in the "limits of liability" section. The Court of Appeal correctly concluded that Ameron was not entitled to indemnity coverage under these policies.

B. The Court Of Appeal Correctly Ruled That Ameron's Waiver And Estoppel Claims Fail As A Matter Of Law.

Ameron argues that the insurers should be estopped from relying on the plain language of the insuring agreements because they never informed Ameron that a Board proceeding is not a "suit." (AA01070; AA01074; AA01080, AA01102.) In the alternative, Ameron claims that the insurers waived their right to rely on this language. (*Id.*) The Court of Appeal correctly ruled that Ameron's waiver and estoppel claims against all insurers fail as a matter of law.[25]

Tellingly, Ameron does not cite a single case to support its contention that insurers had "an affirmative duty to speak." (AOB at 45.) In fact, the law is contrary. There is no fiduciary relationship between an insurer and its insured. *Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal. 4th 1142, 1150-51. An insurer is under no general duty to advise its insured of the terms of an insurance policy. *Malcom v. Farmers New World Life Ins. Co.* (1992) 4 Cal. App. 4th 296, 303-04. And an

[25] In addition to the waiver/estoppel claims set forth in the TAC, Ameron filed a motion to estop INA based on some of the same allegations it now raises on page 48 of its opening brief. As explained in footnote 9, *supra*, neither the trial court nor the Court of Appeal considered or ruled on this motion. Thus, these allegations are not properly before this Court. And ironically, the declaration that Ameron filed in support of its motion reveals that its waiver/estoppel claims against *all insurers* fail as a matter of law for the additional reason that Ameron cannot show detrimental reliance. The declaration and its exhibits show that Ameron did not give notice of the Board proceeding to any insurer until September 11, 1996—almost a year after Kiewit initiated the proceeding. (AA00958.)

insurer is under no obligation to explain to the insured all possible legal theories of recovery. *Lawrence v. Western Mutual Ins. Co.* (1988) 204 Cal. App. 3d 565, 574.

To be clear, Ameron never contended that the insurers misrepresented the terms of the policies. Instead, Ameron claims that insurers waived the right to rely upon the express language of their insurance agreements by failing to notify Ameron of unambiguous policy language, which provides coverage only for "suits." But this Court has held that "an insurer does not impliedly waive coverage defenses it fails to mention when it denies the claims." *Waller v. Truck Ins. Exchange* (1995) 11 Cal. 4th 1, 31. In other words, allegations of waiver or estoppel cannot be used to create coverage where such coverage did not originally exist. *Id.* That is what Ameron tries to do here.

The only authority Ameron cites in support of its estoppel/waiver arguments—the California Fair Claims Settlement Practices Regulations—does not help Ameron. (AOB at 45 (quoting 10 C.C.R. 2695.7).) These regulations do not create a private cause of action in tort against insurers who allegedly committed the "unfair practices" enumerated in them. *See Cates Constr. Inc. v. Talbot Partners* (1999) 21 Cal. 4th 28.

Moreover, *Ameron*—not its insurers—seeks to invoke the language of the insuring agreements. It is one thing to say that an insurer may be barred from relying on policy conditions of which the insured claims ignorance—such as a contractual time limit for submitting claims—if the insurer fails to remind the insured to read the entire contract. *See Spray, Gould & Bowers v. Associated Internat. Ins. Co.* (1999) 71 Cal. App. 4th 1260, 1263 (holding that an insurer that failed to notify the insured of a time limitation contained in the policy was estopped from relying on that

condition to deny coverage.) It is quite another for the insured itself to seek coverage under an insuring agreement, but to posit that the parties and courts should ignore the plain language of that insuring agreement. No court has ever construed California's insurance regulations to allow the insured—under the guise of estoppel or waiver—to re-write the very insuring agreement under which it claims coverage.

Ameron's complaint is premised on the allegation that a Board proceeding is a "suit." Given that Ameron seeks to enforce agreements to defend against suits, it cannot avoid this Court's repeated pronouncements on the plain meaning of "suit."

CONCLUSION

This Court has stated repeatedly and consistently that the plain meaning of "suit" in a standard CGL policy, unless otherwise defined, is an action in a court of law. Nothing has changed since the Court first decided the issue. The policy language that contains the insurers' defense obligations is the same, the rules of contract interpretation are the same, and the plain meaning of "suit" is the same. Under the express policy language, Ameron is not entitled to coverage because the Board is not a court, and administrative proceedings before it are not "suits." Further, Ameron's approach would eliminate a bright-line rule that has worked for the last decade, and replace it with no rule at all. This case, in which an insured seeks coverage for uninsured contract claims that were resolved in an administrative proceeding to which it was not even a party, is not a reason to abandon *stare decisis*.

Dated: February 29, 2008

CERTIFICATE OF WORD COUNT

The text of this brief consists of 13,960 words (including footnotes) as counted by the Microsoft Office Word 2003 word-processing program used to generate this brief.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and employed in Los Angeles County, California, at the office of a member of the bar of this Court at whose direction this service was made. I am over the age of eighteen years and not a party to the within action. I am a resident of or employed in the county where the service described below occurred. My business address is 400 South Hope Street, Los Angeles, California 90071-2899. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence collected from me would be processed on the same day, with postage thereon fully prepaid and placed for deposit that day with the United States Postal Service. On February 29, 2008 I served the following:

JOINT ANSWER BRIEF OF INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, ET AL. ON THE MERITS

by putting a true and correct copy thereof in a sealed envelope, with postage fully prepaid, and placing the envelope for collection and mailing today with the United States Postal Service in accordance with the firm's ordinary business practices, addressed as follows:

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I declare under penalty of perjury under the laws of the United States that the above is true and correct. Executed on February 29, 2008, at Los Angeles, California.

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