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California Supreme Court Extends CGL Insurer's Duty to Defend "Suits" To An Administrative Proceeding

In a closely watched case the California Supreme Court recently expanded the scope of a comprehensive general liability insurer's (CGL) duty to defend "suits" to an adjudicative proceeding before the former United States Department of Interior Board of Contract Appeals (now the Civilian Board of Contract Appeals). *Ameron International Corp. v. Insurance Company of Pennsylvania, et al.*, 2010 Cal. LEXIS 11679 (November 18, 2010). Many insurance industry analysts and counsel had expected the Court to continue to limit the duty to defend to court proceedings, as it had done in *Foster-Gardner, Inc. v. National Union Fire Ins. Co.*, 18 Cal.4th 857, 887, 77 Cal.Rptr.2d 107, 959 P.2d 265 (1998)(*Foster-Gardner*). In *Foster-Gardner* the Court held that the term "suit" in a CGL policy means "a court proceeding initiated by the filing of a complaint," and declined to extend the duty to defend to an environmental agency's pollution remediation order against a CGL policyholder. The *Foster-Gardner* rule has since been applied to bar a CGL insurer's duty to defend other administrative proceedings.

In *Ameron* the U.S. Department of the Interior discovered defects in concrete siphons manufactured by Ameron for use in one of Arizona's aqueducts. The Interior Department sought $40 million in damages against Ameron in a proceeding before the Department of Interior Board of Contract Appeals (IBCA). The proceeding took place before an administrative law judge over the course of 22 days. Ameron's CGL insurer, Insurance Company of the State of Pennsylvania (ICSP), refused to pay for the cost of defending or indemnifying Ameron.

The question on appeal was whether a federal administrative proceeding before an administrative law judge would be considered a "suit" for purposes of the duty to defend. ICSP, relying on the *Foster-Gardner* rule, argued that since no complaint was filed, the proceeding before the IBCA was not a "suit." Although initially upheld on appeal, Ameron sought review before the California Supreme Court.

Ameron drew a distinction between the environmental cleanup orders discussed in *Foster-Gardner* and the IBCA proceeding. In a unanimous decision the Court ruled that the IBCA proceeding was a "quasi-judicial" action. Since the proceeding took place in front of an administrative law judge, the Court reasoned, it was significantly different from the environmental cleanup orders discussed in *Foster-Gardner.* The proceedings before the IBCA involved witnesses under oath, cross examination, and the admission of evidence subject to generally accepted federal rules of admissibility. Since Congress enacted the IBCA as an alternative means to

resolve contractual disputes, Ameron had a choice of forums for appealing the liability decision, which arguably included litigation in federal court. Accordingly, the Court found a duty to defend the IBCA proceeding.

Ameron effectively limits the applicability of the *Foster-Gardner* rule, and gives CGL policyholders a leg up on securing a defense in adjudicative-type administrative proceedings.

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