Bullivant | Houser | Bailey PC
Attorneys at Law

Andrew B. Downs
San Francisco,
Shareholder

Direct Dial: 415.352.2716
Fax: 415.352.2701
Email Attorney

California Supreme Court Steps Away from *Foster-Gardner* Doctrine

By Andrew B. Downs

In a retreat from its 1998 decision in *Foster-Gardner, Inc. v. National Union Fire Ins. Co.*, 18 Cal.4th 857, the California Supreme Court has held that an administrative adjudicative proceeding before a federal Administrative Law Judge is a "suit" for purposes of certain Commercial General Liability policies. *Ameron, Int'l. v. Insurance Co. of the State of Pennsylvania*,--- Cal.4th ---, 2010 WL 4643779 (11/18/2010).

Ameron supplied various concrete components, which were used on the Central Arizona Project, a massive irrigation project sponsored by the Bureau of Reclamation of the United States Department of the Interior. The components were defective. Ameron challenged an adverse decision by the Bureau of Reclamation on the government's damages claim before the Department of the Interior's Board of Contract Appeals. Ameron sought a defense and indemnity from a number of liability insurers for the claims made against it in the administrative proceeding. The insurers refused to defend Ameron. After a 22-day hearing before an Administrative Law Judge, Ameron and the government settled their dispute.

Ameron sued its insurers, arguing that the proceeding before the Administrative Law Judge of the Board of Contract Appeals was a "suit" for purposes of the coverage grants in the policies. The California Supreme Court agreed. In reaching its conclusion, the Supreme Court limited its *Foster-Gardner* decision and subsequent *Powerine I* decision, 24 Cal.4th 945 (2001), which extended *Foster-Gardner*. In *Foster-Gardner*, the court had held that an administrative order requiring the insured to monitor and remediate environmental contamination was not a "suit" for the purposes of General Liability policies. In reaching that conclusion, the *Foster-Gardner* court had held that a suit is a civil action initiated by filing a complaint.

In *Ameron*, the Supreme Court applied a different standard. It found that the administrative proceeding had characteristics similar to those of a civil suit, such as a complaint, pleading requirements, fact finding, and adjudication. Under these circumstances, the court concluded that a reasonable policyholder would expect the administrative proceeding to be a suit for coverage purposes. The court explained, "it is reasonable for all parties to a liability insurance policy that does not define the term 'suit' to expect a federal adjudicative administrative agency board proceeding to trigger the defense and indemnity provisions in the policy."

For the past 12 years, the bright line *Foster-Gardner* rule — that a suit meant a proceeding filed in court — has been the standard in California. While the Supreme Court did not overrule *Foster-Gardner* and *Powerine I*, it abandoned the bright line standard. Now, insurers and policyholders must evaluate the "action" at issue and determine whether it has sufficient pleading and adjudicative hallmarks of a lawsuit to fit within the *Ameron* formulation.