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INSURANCE COVERAGE FOR ADMINISTRATIVE ACTIONS

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INTRODUCTION

Do general liability policies provide coverage for administrative proceedings? The answer to that question depends upon the language of the policy and the jurisdiction. The issue arose in the context of letters issued by environmental enforcement agencies, such as the Environmental Protection Agency, asserting that the recipient is a PRP (potentially responsible person) under the environmental statutes. The vast majority of courts, nationwide, have held that the duty to defend extends to the defends of PRP letters, since the letters commence a quasi-judicial proceeding in which the policyholder can be held strictly liable investigation and cleanup of environmental contamination.

But the Supreme Court of California refused to follow the weight of authority.[1]

In *Foster-Gardner, Inc. v. National Union Fire Insurance Company*, 18 Cal. 4th 857 (1998), the California Supreme Court held that the insurance company had not duty to defend anything but an actual lawsuit filed in a court, under the provisions of an insurance policy which provided that "the company shall have the right and duty to defend any suit 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..." The policy in question contained the standard language of primary policies issued before 1986, which did not define the term "suit". The court determined that a "suit" meant a lawsuit filed in a court. Thus, the duty to defend was limited to lawsuits filed in a court.

The court ruled that the insurance company had no duty to defend a "Determination and Order" issued by an administrative agency (the Regional Water Quality Control Board) which required the policyholder to undertake certain steps to cleanup and abate the discharge of contaminants into groundwater. The determination and order did not commence a lawsuit filed in a court. At most, the determination and order

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[1] See Footnote 9.

was a "claim". Hence, the insurance company had no duty to provide a defense to the policyholder for this administrative action.

The California Supreme Court followed this reasoning in *Certain Underwriters at Lloyd's v. Superior Court*, 24 Cal. 4th 945 (2001), which held that the duty to indemnify, under the same standard policy, was limited to money ordered by a court. Thus, the insurance company had no duty to indemnify a cleanup and abatement order issued by the Regional Water Quality Control Board. The court reasoned that since the duty to defend was limited to lawsuits filed in a court, then the duty to indemnify to indemnify was likewise limited to a lawsuit in a court and not to a "claim" before an administrative agency.

The Court refused to follow the overwhelming majority of courts nationwide, which have ruled that the term "suit", in ordinary usage, as exemplified in dictionary definitions, includes not only a lawsuit filed in court, but any proceeding before any tribunal to obtain redress. These courts have ruled that under the standard policy which does not define "suit", the insurance company must defend proceedings initiated by administrative agencies to cleanup and abate environmental contamination.

LITIGATION BEFORE THE BOARD OF CONTRACT APPEALS

The case of *Ameron International Corp v. Insurance Co. of the State of Pennsylvania*, 150 Cal. App. 4th 1050 92007), review granted by California Supreme Court, May 15, 2007, presented the question of insurance coverage for litigation before the U.S. Department of Interior Board of Contract Appeals. The government alleged that Ameron was responsible for construction defects on a federal project. Under the Contract Disputes Act of 1978, 41 U.S.C. section 601, et seq., Congress provided the federal contractor with the choice of forum – to litigate before the Board of Contract Appeals or before the U.S. Court of Federal Claims. Ameron chose to litigate the Board. That choice resulted in a denial of insurance by Ameron's general liability carriers, who argued that there was no insurance coverage under the *Foster-Gardner* line of cases, since the

litigation took place outside of an actual court.

In this case the Court of Appeal reasoned that litigation before the Board does constitute a "suit" under an insurance policy that does not define the term "suit". Nevertheless, the Court believed that it was bound by "dicta" in *Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal. 4th 857 ("*Foster-Gardner*"), to rule that a trial before an administrative agencies does not constitute a "suit": "Were we writing on a blank slate, we would conclude that a knowledgeable government contractor, like Ameron, would reasonably expect that the IBCA litigation was a 'suit seeking damages' that triggered insurance coverage in a policy worded like the one in *Foster-Gardner*. But we are not...Because the administrative proceedings in *Foster-Gardner* involved a pollution remediation order, we might fairly regard its broad rule as dicta when applied to the very different administrative proceedings in this case... .While we may believe the adjudicatory proceedings of the IBCA at issue here should trigger coverage under the policy language examined in *Foster-Gardner*, we are mindful of our subordinate role in the judicial hierarchy." Slip opinion at 23-24.

AMERON'S ARGUMENT ON APPEAL

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

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

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[2]INA's 1988-89 policy.

[3]ICSOP's 1991-92 policy.

capacity") By any definition, such a trial is a "suit". Indeed, Congress has defined such litigation as a "suit".

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

B. IN ORDINARY USAGE, "SUIT" INCLUDES A TRIAL BEFORE AN ADMINISTRATIVE AGENCY

The ordinary definition of the term "suit" includes a trial before an administrative agency acting in a judicial capacity. But there is also a "special meaning" that applies here as well. Congress has specifically defined litigation before the Board of Contract Appeals as a "suit"; and enacted statutes making a "suit" before the Board the equivalent of a "suit" in federal court. See section B, below.

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

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

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

Language (1964)[6]; Webster's Third New International Dictionary (1993) page 2286.[7]

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

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

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

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

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

> "Civil suit" in the strict sense of a suit filed in a common law court is a term of art in the legal profession, and such specialized and restricted meaning is not the common understanding and meaning of the term. A suit, in common understanding and meaning, is an attempt to gain legal redress or enforce a right. It need not be in a common law court, but may be before administrative or quasi-judicial bodies, such as workmen's compensation boards, police and fire commissions, or the Human Rights Commission. The common meaning of suit does not limit it to legal actions in the common law courts...

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

[7]

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

> We also note that there is nothing in the insurance policy in question that indicates "civil suit" is to have the specialized meaning attributed to it by the insurer.

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

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

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

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

Thus, federal courts have ruled that litigation before the Board of Contract Appeals is a "suit" covered by insurance. In *Safeway Moving & Storage Corp. v. Aetna Insurance Co.* (1970) 317 F. Supp 238 (E.D.Va.), *aff'd* 452 F.2d 79 (1971)(4th Cir.), for example, the court ruled that an insurance company breached its contract when it refused to defend

the policyholder in proceedings before the Armed Services Board of Contract Appeals. The policy provided that it would pay "all sums which the Insured shall become legally obligated to pay as damages" ; and promised to defend "any suit...even if such suit is groundless, false or fraudulent". The court ruled that insurance coverage did not depend upon the forum:

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

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

C. "SUIT"ALSO HAS A SPECIALIZED MEANING HERE, SINCE CONGRESS DEFINED LITIGATION BEFORE THE BOARD AS A "SUIT"

It is particularly significant that a federal statute defines litigation before the Board of Contract Appeals as a "suit". These proceedings therefore have a "specialized meaning" in the field of government contracts – a specialized meaning that the drafters of the insurance policies either knew, or are deemed to have known. At the very least,

Ameron could reasonably expect that coverage for "suits" included these proceedings defined by Congress to be a "suit." *Cf., TRB Invest, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal. 4th 19, 28-29 (to interpret "common meaning" of term "construction," court refers to legislature's definition of term "construction.").

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

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

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

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

had:

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

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

> [T]he Boards [of Contract Appeals] have evolved into *trial courts*...The agency boards of contract appeals as they exist today, and as they would be strengthened by this bill, function as quasi-judicial bodies. Their members serve as administrative law judges in an adversary-type proceeding, make findings of fact, and interpret the law. Their decisions set the bulk of legal precedents in government contract law, and often involve substantial sums of money. *Id.* at 5260. (Emphasis added).
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> The contractor should feel that he is able to obtain his "*day in court*" at the agency boards and at the same time saved time and money through the agency board process. If this is not so, then contractors would elect to go directly to court and bypass the boards since there would be no advantage in choosing the agency board route for appeals. *Id.* at 5259. (Emphasis added).
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> Because of Supreme Court decisions and the Wunderlich Act, contractors and their counsel have become increasingly aware that a hearing before an agency board was often their only opportunity to develop and present their case. As a consequence, the parties pressed for adoption and implementation at the board level of all procedures associated with due process: full discovery, filing of responsive pleadings and briefs, and thorough adversary hearings with cross-examination. *Id.* at 5246.

Virtually identical rules apply to litigation whether filed in the Board or filed in the

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

Furthermore, under the consolidation statute, 41 U.S.C. §609(d), a "suit" filed before the Board can be transferred to the U.S. Court of Federal Claims to be consolidated with a "suit" pending there; or a "suit" filed in federal court can be transferred to the Board, to be consolidated with a "suit" pending there. *See, e.g., Southwest Marine, Inc. v. United States* (1988) 680 F. Supp. 1400, 1404 (N.D.Cal.), reconsideration denied, (1988) 680 F. Supp. 327 (transferring lawsuit filed in federal court to Armed Services Board of Contract Appeals).[8]

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

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

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

D. *FOSTER-GARDNER* DOES NOT APPLY TO AN ADMINISTRATIVE AGENCY THAT ADJUDICATES A DISPUTE

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

> The Order here essentially required Foster-Gardner to continue monitoring hazardous waste levels at the Site, prepare studies documenting the extent of Site contamination, and draft a proposal for remediating the Site. As the Court of Appeal acknowledged, "A Determination and Order *does not*

> *commence either a lawsuit or an adjudicative procedure before an administrative tribunal.* Instead, it is simply an order from an administrative agency. . ." 18 Cal. 4th at 878 (emphasis added)

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

We recognize that this Court established a "bright line rule" in *Foster-Gardner*. But that rule was established to deal with the unique facts presented – whether an order (as opposed to a trial on the merits before an agency acting in a judicial capacity with the authority to award damages) met the definition of a "suit". This Court noted the "bright line rule" was created to foreclose future litigation as to whether "each new and different *letter*" from an environmental agency constituted a "suit". 18 Cal. 4th at 887 (emphasis added). We therefore submit that this Court did not intend the "bright line rule" to apply to the very different facts of this case.

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

E. If *FOSTER-GARDNER* PRECLUDES COVERAGE FOR A TRIAL BEFORE THE BOARD OF CONTRACT APPEALS, THEN *FOSTER-GARDNER* SHOULD BE MODIFIED OR REVERSED

If the "bright-line rule" does apply here, then it creates a manifest injustice, so extreme that the rule should be modified, reversed, or withdrawn. Indeed, the rule is flatly inconsistent with other decisions of this Court on the interpretation of insurance policies. In actuality, the majority opinion of *Foster-Gardner* applies the legal, technical

definition of "suit". To many lawyers and judges, whose profession is litigation, the word "suit" means "lawsuit". But "suit" has a broader meaning as well, as pointed out in the dissenting opinion of Justice Kennard. The insurance policy must be interpreted as a "layman would read it and not as it might be analyzed by an attorney or an insurance expert". *Crane v. State Farm & Cas. Co.* (1971) 5 Cal. 3d 112, 115.

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

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

very term to define that very litigation?

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

F. POLICIES WHICH DEFINE "SUIT" AS A "CIVIL PROCEEDING"

In 1986 the insurance industry adopted a new policy form for the standard general liability policy. This policy form defines "suit" as a "civil proceeding in which damages . . . are alleged; [and] includes an arbitration proceeding alleging such damages to which you must submit or submit with our consent." The appellate court in *Ameron* ruled that this definition was broad enough to cover a proceeding before an administrative agency. 150 Cal. App. 4th at 1074. (This aspect of the *Ameron* decision was not challenged by the insurance companies).

Several other courts have ruled that a "civil proceeding" does not mean a "civil proceeding in a court of law." For example, *Monarch Greenback, L.L.C., v. Monticello Ins. Co.*, 118 F. Supp. 2d 1068, 1074-1075 (D. Idaho 1999)(footnote omitted), found that environmental administrative hearings constitute "civil proceedings":

> According to the policy at issue, in order for a "suit" to exist, there must first be a civil proceeding. Monticello contends that a civil proceeding is one that is filed in a court of law; however, the policy does not specifically require it and the Court has found no case law supporting such an assertion. Accordingly, because the term "civil proceeding" is not defined in the policy, and because it is reasonably subject to conflicting interpretation, the Court finds that the term "civil proceeding" is ambiguous and must be construed in its ordinary meaning, in a light most favorable to the insured.
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> In defining the term "civil proceeding," the Court notes that the term is not defined in any dictionaries reviewed. However, when viewing the definition of the words "civil" and "proceeding", it becomes clear that a "civil proceeding" not only refers to an action filed in court, but includes other non-criminal proceedings conducted by a court, or by persons authorized by the law to do so. This construction is consistent with the policy's definition

> of "suit" which specifically includes "arbitration proceedings" and "any other dispute resolution proceedings". "Suit" is defined as a "civil proceeding", and specifically includes procedures for settling disputes by means other than litigation. If Monticello wanted suit to be limited to one filed in a court of law, they should have specifically stated it.

In footnote 10, the court quoted Black's Law Dictionary's definition of "proceeding" as including an administrative proceeding:

> Proceeding" is defined "[i]n a general sense as the form and manner of conducting judicial business before a court or judicial officer. *The term also refers to administrative proceedings before agencies, tribunals, bureaus, or the like*. [emphasis added].

The court therefore concluded that:

> an administrative proceeding fits squarely into the Court's construction of a "civil proceeding", thus satisfying the first prong of a "suit" according to the policy. Accordingly, the Court finds, as a matter of law, the administrative proceedings initiated by DEQ [Idaho Division of Environmental Quality], USFS [United States Forestry Service] and EPA [Environmental Protection Agency] constituted "civil proceedings". *Id.* at 1076.

Missouri Public Entity Risk Management Fund v. Investors Ins. Co., 338 F. Supp. 2d 1046 (W.D. Mo. 2004) also held that a "civil proceeding" includes an administrative hearing:

> Investors' policy defines a "suit" as a "civil proceeding"....an administrative charge clearly falls within the excess policy's definition of a suit which is a "civil proceeding in which damages because of wrongful act(s) to which this coverage applies are alleged." An administrative charge is a civil proceeding, and while money damages cannot be recovered in all EEOC proceedings, damages can be alleged and were alleged, i.e., humiliation and embarrassment. *Id.* at 1056.

Pierce Associates v. St. Paul Mercury Ins. Co., __F. Supp._ (D.D.C. 2006), 2006 U.S. Dist. LEXIS 9654 reached the same conclusion:

> For starters, the policy plainly is not limited to the defense of formal

> litigation, as the language of the duty-to-defend provision includes "claim[s]" as well as "suit[s]". . .And nothing in the definition of either term–"claim" is defined as a "demand which seeks damages" and "suit" is defined as a "civil proceeding which seeks damages"–specifies or even suggests that the dispute must arise in a particular procedural posture. *Id.*, at 16.

CONCLUSION

Insurance coverage for administrative proceedings is still an open question in California for policies which do not define "suit." In most other jurisdictions, the issue has been decided in favor of coverage. For those policies that define "suit" as a civil proceeding, there is no dispute that administrative proceedings are covered.