

## California Supreme Court Holds That Insurers May Be Required to Cover Administrative Actions

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In an important decision, the California Supreme Court held recently in *Ameron Intern. Corp. v. Ins. Co. of the State of Pennsylvania (Ameron)*<sup>1</sup> that a subcontractor's insurers were required to defend and indemnify the company against its administrative appeal of a governmental agency order requiring it to pay damages for supplying defective products. The insurance coverage question of what constitutes a "suit" under a general liability insurance policy is of continuing importance to policyholders across the United States. *Ameron* is the latest in a series of decisions that favor policyholders in these disputes, recognizing that the term "suit" does not only involve the filing of a lawsuit in a court of law.

### Background

General liability insurance policies frequently state that the insurers will defend and indemnify policyholders against "suits." Insurers typically assert that a "suit" is a lawsuit filed in a court of law seeking the recovery of money damages.

The recovery of money, however, can be pursued by means other than filing a lawsuit in court. Arbitration is not pursued in court. Governmental entities can use their administrative powers to require that costly actions be undertaken. And governmental agencies can hold hearings or employ other trial-like proceedings that seek to compel the payment of money to resolve a claim.

Given the wide range of circumstances under which a policyholder might find itself facing a demand that it take costly action or pay monetary damages, "[t]he vast majority of courts around the United States . . . have found that all kinds of coercive administrative actions are 'suits' covered by general liability insurance policies."<sup>2</sup> California courts, however, have adopted what the state's Supreme Court called a "literal" or "bright line" rule under which *only* a lawsuit filed in court and seeking the recovery of money damages against the policyholder is a "suit" that is covered under liability insurance policies.<sup>3</sup> The court held that coverage was unavailable in those cases because

<sup>1</sup> 2010 WL 4643779 (Nov. 10, 2010).

<sup>2</sup> *Governmental Interinsurance Exch. v. City of Angola*, 8 F. Supp. 2d 1120, 1130 (N.D. Ind.1998).

<sup>3</sup> See, e.g., *Foster-Gardner, Inc. v. National Union Fire Ins. Co.*, 18 Cal. 4th 857 (1998); *Certain Underwriters at Lloyd's of London v. Superior Court*, 24 Cal. 4th 945, 960-961 (2001).

environmental investigation and clean-up orders issued by government agencies were not lawsuits filed in court, even if the property damage at issue otherwise was potentially covered under the policies.

### **The *Ameron* Decision**

California’s “bright line” rule might, however, be dimming, as evidenced by its recent decision in *Ameron*. In *Ameron*, the policyholder entered into a subcontract to manufacture concrete siphons used in an aqueduct in the U.S. Department of the Interior’s Central Arizona Project, operated by the Bureau of Reclamation (Bureau). The contractor was covered as an additional insured under the subcontractor’s liability insurance policies. The Bureau issued an order finding the contractor responsible for defects in the siphons, and sought to recover almost \$40 million in damages. The contractor and subcontractor challenged the order before the U.S. Department of Interior Board of Contract Appeals (IBCA). Insurance coverage was sought but was not provided, and litigation ensued.

After discussing the procedural history of the case, the California Supreme Court stated that the “petition for review . . . focused on the narrow but fundamental question whether an adjudicative administrative action like the IBCA action is a ‘suit’ for purposes of coverage under a liability policy.”<sup>4</sup> The court began its discussion by noting that the IBCA action was markedly different than an environmental clean-up order. It noted that the IBCA was authorized by Congress to “conduct trials, determine liability, and award money damages.”<sup>5</sup> The legislative history showed that Congress intended the IBCA “to serve as an alternative means to resolve contract disputes in an informal, expeditious, and inexpensive way.”<sup>6</sup> An IBCA action begins by the filing of a “complaint” describing the nature of the case and the amount of money in dispute. These requirements generally satisfy the requirements for filing a complaint in a court of law.<sup>7</sup>

The court concluded by stating that the legislative history also indicated that “the IBCA proceeding provides contractors with their ‘day in court.’”<sup>8</sup> Indeed, the court noted, the hearing concerning responsibility for the damaged siphons lasted 22 days and involved the examination and cross-examination of witnesses. It was, in the court’s words, “an administrative adjudicative action” that required its “departure” from the bright-line rule that coverage is only available when a lawsuit is filed in a court of law: “A reasonable policyholder would recognize such proceedings as a suit and would expect to be defended and, if necessary, indemnified by its insurer.”<sup>9</sup>

### **Potential Impact**

*Ameron* is the latest in a long line of decisions emphasizing that the form of an action seeking to recover money against a policyholder, or the forum in which the action proceeds, does not necessarily determine whether the claim is covered under a general liability insurance policy. Statutory intent must

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<sup>4</sup> *Ameron, supra*, at \*7.

<sup>5</sup> *Id.* at \*8.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at \*8–\*9.

<sup>8</sup> *Id.* at \*10.

<sup>9</sup> *Id.* at \*10.

