

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.

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SUPREME COURT
FILED

JUL 25 2007

Frederick K. Ohlrich Clerk
[Signature]
Deputy

REPLY TO ANSWER TO PETITION FOR REVIEW

After a Decision By the Court of Appeal, First Appellate District, Division
Five, Case No. A109755, San Francisco County Superior Court,
Case No. 419929

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**TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND
ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:**

This Court should accept review to decide a question of first impression – whether a trial before a federal administrative law judge constitutes a “suit” under *Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998). This Court never decided that question in *Foster-Gardner*. The issue troubled the Court of Appeal. Clearly this is an issue of state-wide importance to all policyholders in California.

Surely this Court should clarify whether its decision in *Foster-Gardner* was intended to preclude insurance coverage for an actual trial held before a federal administrative law judge with the exact same authority as a federal district court judge to award damages. The U.S. Congress specifically provided that a federal contractor could litigate the same case either before or federal administrative law judge in the Board of Contract Appeals or before a federal judge in the U.S. Court of Federal Claims. Congress specifically made available a trial before an administrative law judge as a means of providing a more expeditious and less expensive forum for the government contractor.

At the very least, this Court should clarify whether federal contractors will forfeit insurance coverage if they choose to have a trial before an administrative law judge. Such a ruling will affect not only federal contractors, but every policyholder faced with a trial before an administrative agency. There are countless local, state and federal statutes which provide for trials before administrative agencies in virtually every area of the law where there is governmental regulation of one sort or another. It is therefore vitally important that policyholders in California understand whether there is insurance coverage for such trials.

We respectfully submit that this Court, in *Foster-Gardner*, did not rule, or intend to rule, that an actual trial before an administrative agency is not a “suit”. This Court is indeed a court of last resort, the only court that can clarify the scope of that decision.

The Joint Answer to Petition for Review on behalf of the insurance companies contains several egregious misstatements of fact, concerning the procedural history of this case. Contrary to the brief at page 6, the United States Department of Interior, Bureau of Reclamation never filed suit in federal court against Ameron. The confusion here is that a state agency in Arizona – the Central Arizona Water District – filed a lawsuit in federal court for alleged construction defects which Ameron opposed and the which the federal court dismissed, for lack of jurisdiction. Slip Opinion at 4-5. That lawsuit has nothing to do with the action by the United States Department of Interior in this case, seeking damages for construction defects. *Id.* at 5, fn. 7.

Once the Department of Interior began administrative proceedings against Ameron, Ameron had the choice of forum in litigating the matter – either in federal court or in the Board of Contract Appeals. Ameron chose to litigate before the Board, exercising a choice which Congress provided by statute in 41 U.S.C. sections 605 and 609.

Contrary to the insurance company brief at 6, Ameron exercised its choice pursuant to the Contract Disputes Act, of which these statutes are a part. Having exercised that election, Ameron was given yet another choice under the Contract Disputes Act; and that choice was whether to apply pre-existing law or not in the trial before the administrative law judge, under which the contractor could appeal, but the government could not. Ameron chose pre-existing law to prevent the government from taking an appeal

from the decision of the administrative law judge. That choice is what the insurance companies refer to on page 7, out of context and without explanation.

The undisputable fact remains that Ameron chose a trial before a federal administrative law judge, pursuant to a choice provided by federal statutes. That choice of forum should not determine whether the actual trial was a “suit” – or was not a “suit” – for insurance purposes. The reasonable policyholder would expect that a twenty-two day trial is a “suit”, regardless of whether the trial took place in one forum or the other.

This Court should accept review to clarify this important point of interest to litigants in all forums who have purchased insurance coverage.

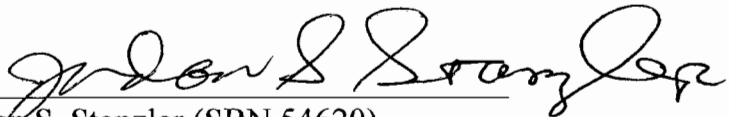
July 25, 2007

Respectfully submitted,

STANZLER FUNDERBURK & CASTELLON

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By: _____


Jordan S. Stanzler (SBN 54620)

Attorneys for Petitioner Ameron International
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**CERTIFICATE OF WORD COUNT
(Rule 8.504(d), Cal. Rules of Court)**

I certify that this Petition for Review is proportionately spaced and is prepared in "Times New Roman" 13 point font. The brief contains 783 words.

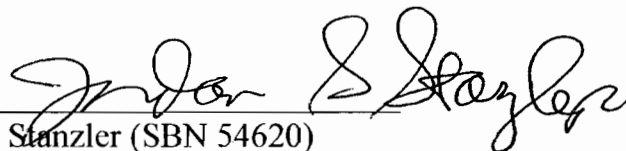
Respectfully submitted,

July 25, 2007

STANZLER FUNDERBURK & CASTELLON LLP

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PROOF OF SERVICE

[C.C.P. § 1013, C.R.C. § 2008, F.R.C.P. Rule 5]

I, Sharran L. Rodd, state:

I am a citizen of the United States. My business address is 180 Montgomery Street, Suite 1700, San Francisco, CA 94104-4205. I am employed in the City and County of San Francisco where this mailing occurs. I am over the age of eighteen years and not a party to this action. On the date set forth below, I caused to be served the foregoing document(s) described as:

REPLY TO ANSWER TO PETITION FOR REVIEW

on the following person(s) in this action by FIRST CLASS MAIL addressed as follows:

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- X : BY FIRST CLASS MAIL - I am readily familiar with my firm's practice for collection and processing of correspondence for mailing with the United States Postal Service, to-wit, that correspondence will be deposited with the United States Postal Service this same day in the ordinary course of business. I sealed said envelope and placed it for collection and mailing this date, following ordinary business practices.
- : BY PERSONAL SERVICE - I caused said documents to be hand delivered to the indicated addresses above.
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed this date at San Francisco, California.

Dated: July 25, 2007



Sharran L. Rodd