

SUPREME COURT COPY

CASE NO. S153852

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

AMERON INTERNATIONAL CORPORATION

*Plaintiff/Appellant*

v.

INSURANCE COMPANY OF THE  
STATE OF PENNSYLVANIA, ET AL.

*Defendants/Respondents*

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

**JOINT ANSWER TO PETITION FOR REVIEW ON BEHALF OF  
INSURANCE COMPANY OF NORTH AMERICA, PACIFIC  
EMPLOYERS INSURANCE COMPANY, ST. PAUL SURPLUS  
LINES INSURANCE COMPANY, INSURANCE COMPANY OF  
THE STATE OF PENNSYLVANIA, GREAT AMERICAN SURPLUS  
LINES INSURANCE COMPANY, HARBOR INSURANCE  
COMPANY and TRANSCONTINENTAL INSURANCE COMPANY**

ROBERT J. ROMERO SBN 136539  
PAUL E. VALLONE SBN 168395  
JOSEPH J. DE HOPE, JR. SBN 79271  
jdehope@hinshawlaw.com  
Hinshaw & Culbertson, LLP  
One California Street, 18th Floor  
San Francisco, CA 94111  
Telephone: (415) 362-6000  
Facsimile: (415) 834-9070

*Attorneys for Defendant/Respondent*

INSURANCE COMPANY OF NORTH AMERICA,  
PACIFIC EMPLOYERS INSURANCE COMPANY and  
ST. PAUL SURPLUS LINES INSURANCE COMPANY

SUPREME COURT  
**FILED**

JUL 16 2007

Frederick K. Ohlrich Clerk

*[Signature]*  
DEPUTY

CASE NO. S153852

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

**AMERON INTERNATIONAL CORPORATION**

*Plaintiff/Appellant*

v.

**INSURANCE COMPANY OF THE  
STATE OF PENNSYLVANIA, ET AL.**

*Defendants/Respondents*

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

**JOINT ANSWER TO PETITION FOR REVIEW ON BEHALF OF  
INSURANCE COMPANY OF NORTH AMERICA, PACIFIC  
EMPLOYERS INSURANCE COMPANY, ST. PAUL SURPLUS  
LINES INSURANCE COMPANY, INSURANCE COMPANY OF  
THE STATE OF PENNSYLVANIA, GREAT AMERICAN SURPLUS  
LINES INSURANCE COMPANY, HARBOR INSURANCE  
COMPANY and TRANSCONTINENTAL INSURANCE COMPANY**

ROBERT J. ROMERO SBN 136539  
PAUL E. VALLONE SBN 168395  
JOSEPH J. DE HOPE, JR. SBN 79271  
jdehope@hinshawlaw.com  
Hinshaw & Culbertson, LLP  
One California Street, 18th Floor  
San Francisco, CA 94111  
Telephone: (415) 362-6000  
Facsimile: (415) 834-9070

*Attorneys for Defendant/Respondent*

**INSURANCE COMPANY OF NORTH AMERICA,  
PACIFIC EMPLOYERS INSURANCE COMPANY and  
ST. PAUL SURPLUS LINES INSURANCE COMPANY**

**TABLE OF CONTENTS**

	<b>Page</b>
INTRODUCTION.....	1
THERE ARE NO GROUNDS FOR SUPREME COURT REVIEW .....	1
THE PETITION IS AN UNSUITABLE VEHICLE FOR DISCRETIONARY REVIEW BECAUSE IT IS NOT SUPPORTED BY THE FACTS OR THE LAW .....	6
CONCLUSION.....	7
CERTIFICATION OF WORD COUNT .....	9

## TABLE OF AUTHORITIES

	<b>Page</b>
<b>Cases</b>	
<i>A.Y. McDonald Indus. v. Insurance Co. of N. Am.</i> (Iowa 1991) 475 N.W. 2d 607 .....	4
<i>Aetna Cas. &amp; Sur. Co. Inc. v. Pintlar Corp.</i> (9th Cir. 1991) 948 F.2d 1507.....	4
<i>Aetna Cas. &amp; Surety Co. v. Commonwealth of Kentucky</i> (2005) 179 S.W.3d 830.....	4
<i>Avondale Industries, Inc. v. Travelers Indem. Co.</i> (2d Cir. 1989) 887 F.2d 1200.....	4
<i>Bausch &amp; Lomb, Inc. v. Utica Mut. Ins. Co.</i> (Md. 1993) 625 A.2d 1021 .....	4
<i>C. D. Spangler Constr. Co. v. Industrial Crankshaft &amp; Engineering Co.</i> (N.C. 1990) 388 S.E.2.d 557 .....	4
<i>CDM Investors v. American National Fire Insurance Company</i> (2006) 139 Cal. App. 4th 1251 .....	3, 5, 7
<i>Certain Underwriters at Lloyd's of London v. Superior Court</i> ( <i>Powerine I</i> ) (2001) 24 Cal. 4th 945 .....	passim
<i>Coakley v. Maine Bonding &amp; Casualty Co.</i> (N.H. 1992) 618 A.2d 777 .....	4
<i>Compass Ins. Co. v. City of Littleton</i> (Colo. 1999) 984 P.2d 606.....	4
<i>County of San Diego v. Ace Property &amp; Casualty Insurance Company</i> (2005) 37 Cal. 4th 406 .....	3, 5, 6, 7
<i>Fireman's Fund Ins. Co. v. Superior Court</i> (1997) 65 Cal.App.4th 120 .....	3, 4
<i>Foster-Gardner, Inc. v. National Union Fire Ins. Co.</i> (1998) 18 Cal.4th 857 .....	passim
<i>Hartford Accident &amp; Indem. Co. v. Dana Corp.</i> (Ind. Ct. App. 1997) 690 N.E.2d 285 .....	4
<i>Hazen Paper Co. v. United States Fidelity &amp; Guar. Co.</i> (Ma. 1990) 555 N.E.2d 576 .....	4
<i>Johnson Controls, Inc. v. Empls. Ins. of Wausau</i> (Wis. 2003) 665 N.W.2d 257 .....	4

<i>Michigan Millers Mut. Ins. Co. v. Bronson Plating Co.</i> (Mich. 1994) 445 Mich. 550, 519 N.W.2d 864.....	4
<i>Morrisville Water &amp; Light Dep't v. United States Fidelity &amp; Guaranty Co.</i> (D. Vt. 1991)775 F. Supp. 718 .....	4
<i>Ortega Rock Quarry v. Golden Eagle Insurance Company</i> (2006) 141 Cal. App. 4th 969 .....	3, 5, 7
<i>R.T. Vanderbilt Co., Inc. v. Continental Casualty Co.</i> (Ct. 2005) 870 A.2d 1048 .....	4
<i>Ryan v. Royal Ins. Co.</i> (1st Cir. 1990) 916 F.2d 731.....	4
<i>San Diego Housing Com'n v. Industrial Indemnity Company</i> (1998) 68 Cal. App. 4th 526 .....	5
<i>Schnitzer Investment Corp. v. Certain Underwriters at Lloyd's of London</i> (2005) 197 Ore. App. 147 (affirmed on other grounds at 341 Ore. 128 (2006)).....	4
<i>SCSC Corp. v. Allied Mut. Ins. Co.</i> (Minn. 1995) 536 N.W.2d 305 .....	4
<i>Sierra Club v. San Joaquin Local Agency Formation Com.</i> (1999) 21 Cal.4th 489 .....	5
<b>Statutes</b>	
41 U.S.C.	
§ 601 .....	7
§ 609(d) .....	6
<b>Rules</b>	
Cal. Rules of Court	
Rule 8.500(b).....	2
Rule 8.500(b)(1).....	2
Rule 8.504(b)(2).....	2

## **ANSWER TO PETITION FOR REVIEW**

### **INTRODUCTION**

The petition of Ameron International Corporation ("Ameron") in this case fails to meet any of the established criteria governing Supreme Court review. Ameron presents an appeal from a partially published decision in a case that is still at the pleading stage. Because Ameron prevailed on several issues, this case is set to return to the trial court for further proceedings. The petition seeks not to clarify settled Supreme Court case law, but to revisit and overturn decisions issued as recently as two years ago. Even Ameron's arguments for overturning settled precedents are fatally flawed, because they are based on an incorrect premise.

This court has for several years, and across many decisions, invoked and applied the bright-line rule Ameron seeks to revisit here. This court should decline the opportunity to engage yet again on a settled question, particularly in such an unsuitable vehicle for additional review as this case.<sup>1</sup>

### **THERE ARE NO GROUNDS FOR SUPREME COURT REVIEW**

The Supreme Court's function is to preside over the orderly and consistent development of California case law. In light of this mandate, a

---

<sup>1</sup> To avoid burdening this court with repetitive answers to Ameron's petition, the following Defendants/Respondents have filed this joint answer: Insurance Company of North America, Pacific Employers Insurance Company, St. Paul Surplus Lines Insurance Company, Insurance Company of the State of Pennsylvania, Great American Surplus Lines Insurance Company,

petition must “explain how the case presents a ground for review” as prescribed by California Rules of Court, rule 8.500(b). Cal. Rules of Court, rule 8.504(b)(2). Review of an appellate decision should be granted only “[w]hen necessary to secure uniformity of decision or to settle an important question of law.” Cal. Rules of Court, rule 8.500(b)(1). Ameron’s petition demonstrates neither an unsettled question of law nor a lack of uniformity in the decisional authority.

In *Foster-Gardner*, this court firmly established, for the purpose of analyzing an insurer's duty to defend, a bright-line rule that “a ‘suit’ is a court proceeding initiated by the filing of a complaint.” *Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 887. As this court explained, by clearly delineating the scope of risk, a bright-line rule reduces the need for future litigation.

Indeed, it is the position taken by [other jurisdictions] that will open the flood gates of litigation by inviting, and requiring, a case-by-case determination whether each new and different letter presenting the claim of an administrative agency is to be deemed the “functional equivalent of a suit brought in a court of law.” (*Ibid.*)

The Court of Appeal in this case applied the bright-line rule established nearly a decade ago in *Foster-Gardner*. Since its adoption, and in subsequent cases applying and further elaborating on the rule, the rule

has accomplished the Court's stated desire to promote predictability in this area of insurance law and to discourage unnecessary litigation. See, e.g., *Certain Underwriters at Lloyd's of London v. Superior Court (Powerine I)* (2001) 24 Cal.4th 945; *County of San Diego v. Ace Property & Casualty Insurance Company* (2005) 37 Cal.4th 406.

Ameron's petition for review is remarkably candid in its request: it seeks to undo the *Foster-Gardner* analysis that has been applied consistently for nearly a decade and repeatedly reaffirmed by this Court and the lower courts. Ameron argues, directly contrary to *Foster-Gardner* and its many progeny, that certain administrative proceedings with certain characteristics could possibly qualify as "suits." The petition thus does not even attempt to identify a "conflict" among the courts on an issue; for there is no conflict. Instead, Ameron's petition instead seeks to *defeat* the uniformity and clarity in the law that has flowed from *Foster-Gardner* to *Powerine I* to *County of San Diego* to *CDM Investors v. Travelers Casualty and Surety Company* (2006) 139 Cal.App.4th 1251 to *Ortega Rock Quarry v. Golden Eagle Insurance Company* (2006) 141 Cal.App.4th 969 and to the appellate decision in this case.

Ameron's argument that the Court of Appeal should have followed the "simple logic" of the concurring opinion in *Fireman's Fund Ins. Co. v. Superior Court* (1997) 65 Cal.App.4th 1205, 1221-22 is without merit. This Court held Fireman's Fund in abeyance while it considered *Foster-*



*Gardner*, and the views of the concurring justice in *Fireman's Fund* were not borne out in the majority opinion. Further revealing that this petition is nothing more than an attack on settled law, Ameron refers the Court to sixteen out-of-state decisions -- twelve of which were considered and rejected in either *Foster-Gardner*, *Powerine I*, or both.<sup>2</sup>

The remaining four out-of-state cases serve Ameron no better. The Kentucky court in *Aetna Cas. & Surety Co. v. Commonwealth of Kentucky* (2005) 179 S.W.3d 830, specifically refused to follow this Court's settled rule as set forth in *Foster-Gardner* and *Powerine I*, instead choosing to follow *Aetna Cas. & Sur. Co. Inc. v. Pintlar Corp.* (9th Cir. 1991) 948 F.2d 1507 – a case considered and rejected in *Foster-Gardner*. The other three cases<sup>3</sup> similarly adopted the approach this Court specifically rejected in *Foster-Gardner*.

---

<sup>2</sup> *R.T. Vanderbilt Co., Inc. v. Continental Casualty Co.* (Ct. 2005) 870 A.2d 1048, 1061; *Hartford Accident & Indem. Co. v. Dana Corp.* (Ind. Ct. App. 1997) 690 N.E.2d 285; *A.Y. McDonald Indus. v. Insurance Co. of N. Am.* (Iowa 1991) 475 N.W. 2d 607, 830; *Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.* (Md. 1993) 625 A.2d 1021; *Hazen Paper Co. v. United States Fidelity & Guar. Co.* (Ma. 1990) 555 N.E.2d 576; *Michigan Millers Mut. Ins. Co. v. Bronson Plating Co.* (Mich. 1994) 519 N.W.2d 864; *SCSC Corp. v. Allied Mut. Ins. Co.* (Minn. 1995) 536 N.W.2d 305; *Coakley v. Maine Bonding & Casualty Co.* (N.H. 1992) 618 A.2d 777; *Avondale Industries, Inc. v. Travelers Indem. Co.* (2d Cir. 1989) 887 F.2d 1200; *Ryan v. Royal Ins. Co.* (1st Cir. 1990) 916 F.2d 731; *C. D. Spangler Constr. Co. v. Industrial Crankshaft & Engineering Co.* (N.C. 1990) 388 S.E.2d 557; *Morrisville Water & Light Dep't v. United States Fidelity & Guaranty Co.* (D. Vt. 1991) 775 F. Supp. 718.

<sup>3</sup> *Compass Ins. Co. v. City of Littleton* (Colo. 1999) 984 P.2d 606, *Johnson Controls, Inc. v. Emplrs. Ins. of Wausau* (Wis. 2003) 665 N.W.2d 257, and *Schnitzer Investment Corp. v. Certain Underwriters at Lloyd's of London* (2005) 197 Ore. App. 147 (affirmed on other grounds at 341 Ore. 128 (2006)).

The fact that Ameron would rather a different rule apply to its particular case is not sufficient to trigger discretionary review; that is what direct appeals are for. Ameron lost the petitioned aspect of this appeal – but won others. In fact Ameron convinced the Court of Appeal that Ameron is entitled to proceed with its breach of contract and insurance bad faith case regarding certain policies that, in the appellate panel’s view, fell outside the *Foster-Gardner/Powerine II/County of San Diego* analysis. This case thus will continue forward in the trial court without this Court’s review.

As this Court has recognized, bright lines promote judicial consistency. *Foster-Gardner* provided uniform and consistent direction to the lower courts. *CDM Investors* and *Ortega Quarry* reflect that clarity. See also *San Diego Housing Com'n v. Industrial Indemnity Company* (1998) 68 Cal. App. 4th 526, 543 (finding *Foster-Gardner's* distinction between claims and suits "instructive"). The law is well-settled.<sup>4</sup> Petitioner does not even contend there is a conflict between the courts of appeal on this issue –nor can it. The petition should be denied for these reasons alone.

---

<sup>4</sup> What Ameron hopes to accomplish with the petition also runs afoul of the doctrine of stare decisis, which reflects the fundamental public policy that there is a public benefit to consistency in the application of the law so that parties may rely upon legal precedent in making decisions to contract and otherwise regulate their conduct. (*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 504.)

**THE PETITION IS AN UNSUITABLE VEHICLE FOR  
DISCRETIONARY REVIEW BECAUSE IT IS NOT SUPPORTED  
BY THE FACTS OR THE LAW**

Even if this Court were inclined to revisit yet again the rule laid down in *Foster-Gardner/Powerine II/County of San Diego* and followed in subsequent appellate decisions, this is not the case in which to do so. The case is at a preliminary stage with miles to go in the trial court. Further, Ameron relies on the Contract Disputes Act, 41 U.S.C. §609(d), to argue that the administrative proceeding at issue here should be deemed a “suit.” But the underlying dispute **did not** proceed under the Contract Disputes Act.

The United States Department of Interior, Bureau of Reclamations, sued Ameron in federal court, alleging that one of Ameron’s subcontractors had installed defective pipes in an aqueduct project. AA1053. *Ameron sought and obtained dismissal of that Federal District Court litigation.* Order of Judge Chaitin, AA00007, lines 22 and 23 and AA01607 – AA01608. Ameron then unilaterally elected to proceed *outside the judicial system* to present its position in an administrative proceeding before the Board of Contract Appeals. As Cheryl Scott Rome, the Chief Presiding Officer for the Administrative Hearing, explained on at least three different occasions, that administrative hearing was not based upon the Contract Disputes Act:

BOR awarded the contracts prior to the March 1, 1979, effective date of the Contract Disputes Act of 1978 (CDA.), 41 U.S.C. § 601. Because BOR asserted its claims against Kiewit after the CDA's effective date, the contractor had the option to proceed under the CDA or under the contracts' Disputes clauses without application of the C[D]A . . . *Kiewit elected not to proceed under the CDA.* AA02216.

The entire premise for Ameron's petition – that proceedings under the CDA are sufficiently akin to “suits” as to call into question the application of *Foster-Gardner's* bright-line rule – therefore has nothing to do with this case, in which Ameron affirmatively chose not to proceed under the CDA.

#### CONCLUSION

This Court and the courts of appeal have conclusively determined that the term “suit,” as used in an insurance policy, means a proceeding initiated by a complaint in a court of law. *Foster-Gardner, Powerine I, County of San Diego, CDM Investors* and *Ortega Quarry* uniformly express this settled law. This case does not satisfy the required criteria for review.

For all of the foregoing reasons, the petition for review should be denied.

Dated: July 16, 2007

Respectfully submitted

HINSHAW & CULBERTSON LLP



---

ROBERT J. ROMEKO  
PAUL E. WALLONE  
JOSEPH J. DE HOPE, JR.  
Attorneys for Defendants/Respondents  
INSURANCE COMPANY OF NORTH  
AMERICA, PACIFIC EMPLOYERS  
INSURANCE COMPANY and ST. PAUL  
SURPLUS LINES INSURANCE  
COMPANY

## CERTIFICATION OF WORD COUNT

The text of this brief consists of 1,366 words as counted by the Microsoft Word 2000, the word-processing program used to generate the brief.

Dated: July 16, 2007



---

JOSEPH J. DE HOPE, JR.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Thomas M. Downey, Esq.  
BURNHAM BROWN  
P.O. Box 119  
Oakland, CA 94604

Catherine E. Stetson, Esq.  
HOGAN & HARTSON LLP  
555 Thirteenth Street N.W.  
Washington, D. C. 20004-1109

Andrew P. Sclar, Esq.  
ERICSEN, ARBUTHNOT, KILDUFF, DAY &  
LINDSTROM, INC.  
111 Sutter St., Suite 575  
San Francisco, CA 94104

Blaise S. Curet, Esq.  
SINNOTT, DITO, MOURA & PUEBLA  
555 Montgomery Street, Suite 720  
San Francisco, CA 94111

Rosemary Springer, Esq.  
McCURDY & BROWN  
1080 Marsh Road, Suite 110  
Menlo Park, CA 94025

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on July 16, 2007, at San Francisco, California.



Danielle S. Johnson