In Ameron Int’l Corp. v. Ins. Co. of Pennsylvania, 242 P.3d 1020 (Cal. Nov. 18, 2010), the Supreme Court of California issued its long-awaited reconsideration of Foster-Gardner, Inc. v. National Union Fire Ins. Co, 959 P.2d 265 (Cal. 1998). Foster-Gardner held that a state environmental compliance order commanding the insured to remediate its site was not a “suit” triggering the duty to defend under older comprehensive general liability (CGL) policies that did not define the term “suit.” While many other jurisdictions hold that receipt of an EPA PRP letter (or other similar notice letters from state environmental agencies) is substantially equivalent to the commencement of a lawsuit, the Foster-Gardner court instead followed the “literal meaning” rule that the term “suit” is unambiguous and only means a “civil action commenced by filing a complaint.” Thus, the Foster-Gardner decision placed California squarely within the minority of jurisdictions finding liability insurers had no duty to defend administrative demands or notices. Foster-Gardner represented a marked deviation from previous policyholder-friendly decisions, particularly in the environmental law context.

Rather than entirely overturning Foster-Gardner,” Ameron retreated from Foster-Gardner by holding it does not apply to administrative agency adjudicative proceedings. This expansion of the duty to defend has been widely hailed as an important new development for California policyholders facing administrative liability.

Ameron impacts not only California policyholders; it also may impact those in the minority of jurisdictions with Foster-Gardner-like precedent. In light of Ameron, this precedent may be open to reinterpretation in favor of policyholders with claims arising from administrative proceedings. This article surveys the current law, Ameron, and Ameron’s possible impact in the minority rule jurisdictions.

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THE MAJORITY RULE: CGL INSURERS HAVE A DUTY TO DEFEND PRP LETTERS AND COMPLIANCE ORDERS

A majority of courts hold that PRP letters and/or compliance orders are “suits”—even where that term is left undefined by insurers. Under the “functional equivalent” approach, any receipt of a PRP letter or other pre-complaint environmental agency activity constitutes a “suit.” In a slight variation, other courts have determined that PRP letters or compliance orders are “suits” only where they are sufficiently coercive and threatening. Whatever the exact rationale, these courts reject the notion that “suits” are limited to proceedings in court. This is the majority rule, and includes pronouncements by the Supreme Courts of Colorado, Connecticut, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, New Hampshire, North Carolina, Vermont, and Wisconsin.

AMERON AND ITS APPLICATION TO ADMINISTRATIVE ENVIRONMENTAL PROCEEDINGS

Ameron, the insured, was a contractor on a job for the Department of the Interior’s Bureau of Reclamation that went wrong. This led to a 22-day administrative law proceeding before the Department of Interior Board of Contract Appeals (IBCA). The court agreed that the IBCA action—a quasi-judicial administrative agency board hearing conducted by an administrative law judge—was significantly different from the environmental cleanup order in Foster-Gardner. The court noted that Congress authorized the IBCA to conduct trials, determine liability, and award money damages, and that Congress intended the IBCA to serve as an alternative means to resolve contract disputes outside of court. The court found that a reasonable policyholder would expect a 22-day IBCA hearing, in which witnesses testified and were cross-examined, would be a “suit” that should be defended by its insurer. In addition, the court particularly noted the IBCA requirement that it file a complaint in order to initiate a proceeding. The requirement of an administrative complaint was significant because a complaint informs the insurer of the nature of the dispute such that it can determine its coverage obligations.

EPA enforcement actions share many of the same qualities with the ICBA proceedings in Ameron. Since 1980, EPA enforcement actions have been governed by the Consolidated Rules of Practice (“CROP”). The CROP apply to EPA’s assessment of administrative penalties under several statutory regimes, as well as to its more limited authority to apply additional remedies under those statutes.

Like the IBCA proceedings discussed in Ameron, CROP proceedings begin with the issuance of a complaint. The Ameron court noted that IBCA complaints must “fulfill the generally recognized requirements of a complaint.” The CROP have similarly been interpreted to establish a notice pleading standard, or at least a requirement that factual allegations establishing a prima facie case be set forth. Thus, the CROP have been construed in a way that should satisfy a court focused on Ameron’s concern that an insurer be put on notice of the allegations against its insured, so that it may determine whether there is a potential for coverage under its policy and a corresponding duty to defend.

If a CROP respondent files an answer requesting one and a proceeding presents genuine issues of material fact, a CROP hearing is held. As in the IBCA hearing discussed in Ameron, witnesses testify and are cross-examined. An administrative law judge with a role comparable to that of a trial judge presides over the hearing as Presiding Officer. 40 C.F.R. §22.19(e)(4) provides that a Presiding Officer may issue a subpoena for discovery purposes and 40 C.F.R. §22.22(a)(1) establishes the Officer’s authority to rule on proffers of evidence.
Finally, unlike the insured in *Ameron*, CROP respondents do not have a choice of forum. Rather, it is the EPA's decision to choose an administrative proceeding over a judicial one. In this respect, the CROP proceedings are even more akin to a lawsuit than the IBCA proceedings addressed in *Ameron*.

**ILLINOIS**

Illinois courts could be open to an *Ameron*-type retreat from the minority rule. In *Lapham-Hickey Steel Corp. v. Protection Mutual Ins. Co.*, 655 N.E.2d 842 (Ill. 1995), the Illinois Supreme Court concluded that the word "suit" as used in liability policies was clear and unambiguous and that "the issuance of a PRP letter does not invoke the duty to defend." The court supported its conclusion by arguing that a formal complaint, as opposed to "allegations, accusations or claims which have not been embodied within the context of a complaint," is necessary to put the insurer on notice as to whether the claim potentially falls within policy coverage, because "whether an insurer's duty to defend has arisen is determined by looking to the allegations in the underlying complaint to determine whether the claim potentially falls within policy coverage." Thus, *Ameron* could readily provide a basis for an Illinois court to limit *Lapham-Hickey*.

**PENNSYLVANIA**

The Pennsylvania Supreme Court has yet to rule on the definition of "suit" in the context of administrative claims, but federal decisions applying Pennsylvania law have found California precedent persuasive in their adoption of a restrictive definition. In *Simon Wrecking Co., Inc. v. AIU Ins. Co.*, 350 F.Supp.2d 624 (E.D. Pa. 2004), it was held that a PRP letter did not constitute a "suit." The court reasoned that "in order to give the policies' distinction between 'claim' and 'suit' any meaning, the word 'suit' must be given its common meaning, that of a civil action filed in a court of law, whereas a claim would be anything falling short of a suit." The court noted that "California law on the interpretation of insurance contracts is … similar to Pennsylvania's law," and cited *Foster-Gardner* in support of its decision to adopt a strict definition of "suit." The Pennsylvania Supreme Court could choose to follow the majority rule, or it could take an *Ameron*-type approach.

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The Louisiana state court has not yet ruled on the issue of whether a PRP letter or an administrative complaint may constitute a "suit." Meanwhile, a federal district court in *Joslyn Mfg. Co. v. Liberty Mut. Ins. Co.*, 836 F.Supp. 1273 (W.D. La. 1993), held that a PRP letter did not constitute a "suit." The court concluded that the compliance order did not rise to the level of a "suit" because (1) the order of a lawsuit differentiated a civil action by saying that refusal to comply could put the insured at risk of a lawsuit, whereas a claim would be anything falling short of a suit; (2) the general and traditional definition of a suit refers to a formal proceeding in a court of law; and (3) the policies specifically differentiate between the words "claim," "suit," and "complaint." The court noted that "California law on the interpretation of insurance contracts is … similar to Pennsylvania's law," and cited *Foster-Gardner* in support of its decision to adopt a strict definition of "suit." The Pennsylvania Supreme Court could choose to follow the majority rule, or it could take an *Ameron*-type approach.

Finally, unlike the insured in *Ameron*, CROP respondents do not have a choice of forum. Rather, it is the EPA's decision to choose an administrative proceeding over a judicial one. In this respect, the CROP proceedings are even more akin to a lawsuit than the IBCA proceedings addressed in *Ameron*.
NEW YORK

The New York Court of Appeals has not yet ruled on the issue of whether a PRP letter or an administrative proceeding may constitute a “suit.” Currently there is a split among the lower courts. The high court could certainly follow the majority rule. In doing so, it would necessarily reject Technicon Electronics Corp. v. American Home Assur. Co., 141 A.D.2d 124 (N.Y. App. Div. 1988) which held that a PRP letter was not a “suit.” Citing cases from Ohio and Michigan, the court noted that a “suit” is not brought in the CERCLA context until the EPA resorts to a court injunction or to a mandatory court order to enforce an administrative order, or until it seeks cleanup costs in district court.30

If the Court of Appeals did follow the majority rule, it could look to several other New York cases which find administrative demands can constitute “suits” depending on their coerciveness and the gravity of the consequences to the insured stemming from noncompliance. For example, in Carpentier v. Hanover Ins. Co., 248 A.D.2d 579 (N.Y. App. Div. 1998), the court did not consider a letter requesting that the policyholders provide various information and a letter informing them of their potential liability and seeking voluntary action on their part to be “suits.” On the other hand, a letter demanding payment of a large, specified sum of money, threatening to file a notice of lien, and giving the policyholders the opportunity to be heard at a conference with the EPA’s regional counsel, and to attend with an attorney, was coercive enough to constitute a “suit.”31

Similarly, in Burt Rigid Box Inc. v. Travelers Property Cas. Corp., 126 F.Supp.2d 596 (W.D.N.Y. 2001),32 the court held that a letter from the New York Department of Conservation (“DEC”) was a “suit” due to its coercive nature.33 The court explained that the letter did not merely inform the insured of its potential liability and express the DEC’s interest in discussing the situation. Instead, the letter unequivocally stated that the insured was liable for cleanup and that the DEC would take legal action to recover the costs of cleanup and to impose fines and penalties against the insured if it did not voluntarily cooperate with the cleanup.34

As is evident from Carpentier, and Burt Rigid Box, an Ameron-type proceeding would likely already be considered a “suit” under certain New York precedent.

OTHER MINORITY RULE JURISDICTIONS

The California Supreme Court’s retreat from Foster-Gardner might not be persuasive in all minority jurisdictions. For example, Harleysville Mut. Ins. Co., Inc. v. Sussex County, Del., 831 F.Supp. 1111 (D. Del. 1993) held that under Delaware law, a PRP letter is not a “suit” triggering the duty to defend, using language even stronger than Foster-Gardner. Where Foster-Gardner had noted that the Order at issue in that case did not commence “an adjudicative procedure before an administrative tribunal,”35 the court in Harleysville asserted that it would not “deprive … insurers of the benefit of their bargain by forcing them to defend against an administrative proceeding, no matter how serious the consequences of that proceeding might be to the insured.”36 Thus, where Foster-Gardner specifically reserved the question of an administrative proceeding, Harleysville noted that its holding should apply in any administrative context. The Harleysville court also noted that the EPA could file a lawsuit against a PRP in lieu of issuing a letter, and that CERCLA’s goal of facilitating settlement would not be subverted by a finding of no duty to defend, because an insured would be unlikely to risk greater exposure by refusing a settlement offer by the EPA in order to force it to file suit, thereby triggering insurance coverage.
Given the influence of California insurance jurisprudence generally, and of Foster-Gardner specifically, the Ameron decision is an important development, particularly in minority rule jurisdictions. The Ameron decision should be considered by insurer and policyholder counsel alike when assessing an insurance company’s duty to defend administrative proceedings.

2. Pre-1986 standard CGL forms did not define the term “suit” at all. The current standard CGL forms define “suit” as “a civil proceeding in which damages … to which this insurance applies are alleged …”—including arbitration.

3. 959 P.2d at 279, 287.

4. See, e.g., Aerojet-General Corp. v. Transport Indem. Co., 948 P.2d 909, 922 (1998) (holding that an insured’s site investigation expenses constitute defense costs that the insurer must incur in fulfilling its duty to defend); AIU Ins. Co. v. Superior Court (FMC Corp.), 799 P.2d 1253, 1275 (1990) (governmental response costs, such as CERCLA clean-up costs, are damages).

5. Such a move would not be unprecedented. In Johnson Controls, Inc. v. Employers Ins. of Wausau, supra, 665 N.W.2d 257, the Wisconsin Supreme Court overturned its prior decision in City of Edgerton v. General Cas. Co., 184 Wis.2d 750, 517 N.W.2d 463 (Wis. 1994) that a PRP letter does not trigger an insurer’s duty to defend.

6. 959 P.2d at 275.

7. Id.


9. 242 P.3d at 1022.

10. Id. at 1023.

11. Id. at 1028. It should be noted that in California, like most other jurisdictions, equitable relief (such as that imposed under CERCLA) also constitutes “damages” recoverable under CGL policies. See AIU, supra, at note 4.

12. Id. at 1030.

13. Id. at 1028-29.

14. Id.

15. 40 C.F.R. §22.1 et seq.


17. 40 C.F.R. §22.13(a).

18. 242 P.3d at 1028.


20. 40 C.F.R. § 22.21(b).

21. 40 C.F.R. §22.22(b), (e); Ameron, 242 P.3d at 1030.

23. Lisa, supra note 12, at 11.
25. Id. at 847.
26. 242 P.3d at 1028.
27. 350 F.Supp.2d at 637.
29. 836 F.Supp. at 1279.
30. 141 A.D.2d at 146.
31. 248 A.D.2d at 580.
32. Aff’d in relevant part and rev’d in part, 302 F.3d 83 (2d Cir. 2002).
33. 126 F.Supp.2d at 626-627.
34. Id.
35. 959 P.2d at 280
36. 831 F.Supp. at 1132.