Vol. 15, #10 January 16, 2001

Commentary

Foster-Gardner's Impact — Perception Is Not Reality

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Abstract

This article analyzes the California Supreme Court's decision in *Foster-Gardner, Inc. v. National Union Fire Ins.* (*Foster-Gardner*) and describes the impact of the decision in other jurisdictions and in California. In *Foster-Gardner*, the California Supreme Court held that a commercial general liability insurer was not obligated to defend a policyholder against orders from environmental agencies requiring assessment and remediation of environmental contamination because such orders are not covered "suits."

The article concludes that, contrary to expectations, *Foster-Gardner* has had little impact outside California. Courts in other jurisdictions faced with the issue of whether administrative clean-up orders trigger an insurer's duty to defend after *Foster-Gardner* have largely held in favor of policy-holders and have ignored the *Foster-Gardner* decision.

However, *Foster-Gardner* has had a significant impact in California. The California Court of Appeals, relying on *Foster-Gardner*, held in *Certain Underwriters at Lloyd's London v. Superior Court* ("Powerine") that a commercial general liability insurer has no duty to indemnify a policyholder for costs incurred in response to an administrative clean-up order. The article analyzes *Powerine* and argues that it is an unwarranted extension of *Foster-Gardner*.

I. Introduction

It has been over two years since the California Supreme Court in *Foster-Gardner, Inc. v. National Union Fire Ins. Co.*[1] ("Foster-Gardner") stunned the policyholders' bar with its holding that there is no duty to defend under a general liability policy unless a lawsuit is first filed. Commentators predicted that *Foster-Gardner* would greatly influence other jurisdictions. The truth is just the opposite. In California, however, *Foster-Gardner* has seriously affected policyholders' defense rights and now threatens their indemnity coverage. This article reviews the impact of *Foster-Gardner* in other jurisdictions and in California.

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II. The Foster-Gardner Decision

A. Facts

Foster-Gardner, Inc. ("Foster-Gardner") operates a wholesale pesticide and fertilizer business in Coachella, California. For many years, Foster-Gardner stored and handled chemicals at the Coachella site ("Site"), including DDT and anhydrous ammonia.

In August 1992, the Department of Toxic Substances Control of the California Environmental Protection Agency ("DTSC") issued Foster-Gardner an "Imminent and Substantial Endangerment Order and Remedial Action Order" ("Order").

The Order found that Foster-Gardner was liable for cleaning up the Site and commanded that Foster-Gardner take the following steps: (1) within 10 days of the effective date of the Order, submit written notice of its intent to comply with the Order; (2) within 30 days of the effective date of the Order, report on interim measures, including monitoring of groundwater, sampling of surface soil, and complying with earlier remediation orders by the county health department and the Colorado River Basin Regional Water Quality Control Board; and (3) within 180 days of the effective date of the Order, submit a Remedial Investigation and Feasibility Study ("RI/FS") Workplan detailing the activities necessary to complete an investigation of clean-up measures for both the Site itself and off-site areas that were, or could be, contaminated from the Site. The RI/FS Workplan would lead to an RI/FS Report, which would in turn lead to a Remedial Action Plan. Foster-Gardner would then be responsible for implementing the Remedial Action Plan once the plan was approved.

The DTSC threatened Foster-Gardner with severe penalties for refusing to comply with the Order. Foster-Gardner could be fined up to $25,000 per day of noncompliance. Foster-Gardner could also incur penalties of up to three times the amount of costs incurred by the DTSC as a result of Foster-Gardner's failure to comply.

Foster-Gardner tendered defense of the Order to four insurers: National Union Fire Insurance Company of Pittsburgh, PA, Pacific Indemnity Company, Fremont Indemnity Company, and Ranger Insurance Company. These insurers issued commercial general liability ("CGL") insurance policies covering most of the years between 1970 and 1986 with the following language:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury . . . or property damage to which [this] insurance applies, caused by an occurrence, . . . and the company shall have the right and duty to defend *any suit* against the insured 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 but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

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(Omissions in original) (Emphasis added).[2] Neither "suit" nor "claim" is defined in the policies.[3]

The insurers either refused to defend Foster-Gardner or defended under a reservation of rights. Foster-Gardner filed an action for declaratory relief, seeking a declaration that the insurers were required to defend and to reimburse Foster-Gardner for defense costs (including clean-up costs) already incurred. The trial court entered summary judgment for the insurers, in part on the ground that the Order was not a "suit" within the meaning of the CGL policies. The Court of Appeal of California reversed and the Supreme Court of California granted the insurers' petition for review.

B. The Majority Opinion

The Supreme Court of California, in a four to three split, held in favor of the insurers. The Order did not constitute a "suit" and Foster-Gardner was therefore not entitled to a defense from its insurers. After canvassing the procedures of the Hazardous Substances Account Act, relevant principles of insurance contract interpretation, and authority from other jurisdictions, the *Foster-Gardner* court based its conclusion on four arguments.

First, the majority argued that the plain meaning of "suit" cannot encompass administrative actions like the Order. "The primary attribute of a 'suit,' as that term is commonly understood, is that parties to an action are involved in actual court proceedings initiated by the filing of a complaint."[4]

Second, the majority noted that the CGL policies make a "deliberately and intentionally" articulated distinction between "suit" and "claim."[5] The policies require defense of covered *suits*, but leave investigation of *claims* to the discretion of the insurer.

Third, the majority invoked California precedent requiring insurers to "compare the allegations of the complaint with the terms of the policy."[6] The consistent references to "complaints" in previous insurance law decisions indicated that the duty to defend only applies to proceedings in which a complaint is filed — formal court proceedings.

Finally, the majority was concerned about encouraging "stability and efficiency" in the insurance system.[7] According to the majority, accepting Foster-Gardner's view that sufficiently coercive orders should be treated as suits would create uncertainly for insurers as to how to determine whether the coerciveness threshold has been met. The majority also worried that accepting Foster-Gardner's position could logically require insurers to accept defense of numerous types of administrative orders such as Internal Revenue Service audits.

C. The Dissent

Three judges dissented from the majority's holding. The concise dissenting opinion by Justice Kennard raised four points. First, the term "suit" does not unambiguously and exclusively refer to a court proceeding initiated by a complaint.

Second, although acknowledging the distinction in the policies between the terms "suit" and "claim," the dissent criticized the majority's method of beginning with its definition

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of suit and then characterizing the Order as a claim because it did not meet that definition. According to the dissent, it would be equally persuasive to start with the definition of "claim" — the dissent offered "prelitigation demand letter that may be ignored without adverse legal consequences" as a definition — and conclude that the Order is a suit because it did not meet the definition of a claim.[8]

Third, the dissent argued that the Order is more like a suit than a claim because the penalties for noncompliance and the nature of the administrative proceeding initiated by the Order is in substance like a personal injury lawsuit. Even if this is not so, the dissent reasoned, the terms are ambiguous and must therefore be interpreted in favor of coverage.

Finally, the dissent found an inconsistency between the majority's decision and *AIU Insurance Co. v. Superior Court* ("AIU").[9] In *AIU*, the California Supreme Court held that environmental remediation costs sought by the government are sums the insured is "legally obligated to pay" as "damages" so as to be covered by the indemnification provisions of a CGL policy. The Order initiates a proceeding that may determine damages of the sort held to be within the CGL's indemnity coverage in *AIU*. Therefore, the dissent reasoned, the insurer should provide a defense to the Order in accordance with generally accepted principles of insurance law.

III. Impact On Other Jurisdictions

Historically, the California Supreme Court has influenced the development of insurance law in other jurisdictions.[10] Therefore, unsurprisingly, commentators predicted that *Foster-Gardner* would have great repercussions beyond the borders of California. One insurance law expert predicted that "[d]espite the number of pro-policyholder 'suit' rulings in the early 1990s, the contours of the 'suit' debate will likely be dramatically reshaped by the August 1998 ruling of the California Supreme Court in *Foster-Gardner*."[11]

More recently, a commentator suggested:

> California has always been a legal testing ground. As a result, its legislation undergoes exhaustive judicial review, and its Supreme Court decisions are watched with intense interest. But at least for the time being, [*Foster Gardner's*] literalism is on the ascendancy, shining its "bright line" lamp through the brambles of complex insurance litigation.[12]

In truth, however, most jurisdictions have not been illuminated by *Foster-Gardner* and have rejected its so-called "bright line" approach. Only one reported case outside of California, *CIM Insurance Corp. v. Masamitsu*, has cited and relied on *Foster-Gardner*.[13] *Masamitsu* is distinguishable in that it did not involve an administrative action. The court merely ruled that a demand letter from an attorney does not trigger a duty to defend.

On the other hand, since *Foster-Gardner*, at least seven cases rejected the "bright line" approach and recognized that administrative actions can constitute "suits" triggering an insurer's duty to defend.[14]

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The Court in one of these cases, *Commonwealth Lloyds Ins. Co. v. Marshall, Neill & Pauley, Inc.*, actually suggested that the *Foster-Gardner* approach was "foolish":

> An insurance company's duty to defend would only make sense if it were required to defend where legally important proceedings are being litigated, whether that occurs in a court or before an administrative body. Whatever the forum, if the outcome has some consequence, either financial or legal, it would be *foolish* not to require an insurance company to defend from the outset if the insured otherwise is covered under the policy.[15]

These Courts focus on the reasonable expectations of an insured and the coercive nature of administrative proceedings in holding that insurers must defend administrative actions. Moreover, in *In Re St. Johnsbury Trucking Co.*, the court found the term "suit" ambiguous based on the very fact that courts have reached inconsistent results on the issue.[16] Interestingly, none of the above cases discussed or even cited *Foster-Gardner* as courts typically do when confronting significant, contrary case authority. The courts acted as if *Foster-Gardner* did not exist or did not matter.

IV. Developments In California — The Powerine Decision

While being insignificant in other states, *Foster-Gardner* has significantly impacted policyholders' defense rights in California. A little over a year after the California Supreme Court issued its decision in *Foster-Gardner*, the Court of Appeal of California in *Certain Underwriters at Lloyd's London v. Superior Court* ("Powerine") relied on *Foster-Gardner* and held that no duty to *indemnify* exists without a lawsuit.[17]

A. Facts

Powerine refined oil for approximately 60 years at various sites. In 1985, the California Regional Water Quality Control Board for the Los Angeles region issued an order to Powerine requiring it to assess soil and groundwater contamination at a Sante Fe Springs site. A similar order issued regarding Powerine's San Diego storage facility. A third order, again addressing contamination at the Sante Fe Springs site, commanded Powerine to abate contamination originating from its refinery and connected pipelines. In addition to these orders, the federal Environmental Protection Agency issued to Powerine two potentially responsible party notices for two waste disposal sites to which Powerine had sent waste at various times.

Powerine tendered defense of these various orders to the numerous CGL and excess insurers that had provided Powerine with coverage at various times in its many years of operation. Most of these insurers denied any duty to defend or indemnity Powerine and one of them filed an action for declaratory relief. In response, Powerine filed a cross-complaint against the insurers.

Certain underwriters at Lloyd's London ("Underwriters") had insured Powerine under a primary CGL policy for three years and also under various excess policies. In the primary policy, the Underwriters promised:

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> To pay on behalf of the Assured all sums which the Assured shall become *legally obligated to pay as damages* because of injury to or destruction of property . . . irrespective of whether such damages are imposed by law or assumed under contract."[18]

The excess policies contained somewhat different wording.[19]

The Underwriters filed a motion for summary adjudication against Powerine, arguing that they had no duty to defend or indemnity Powerine with respect to the administrative proceedings. In light of *Foster-Gardner,* Powerine conceded that the Underwriters did not owe a defense. However, Powerine continued to assert that the Underwriters owed a duty to indemnity it. The trial court denied the Underwriters' motion, finding the language setting forth the Underwriters' indemnity obligations to be ambiguous.

B. The Majority Opinion

The Court of Appeals reversed the trial court and found in favor of the Underwriters. On the basis of *AIU,*[20] the *Powerine* court was able to confine its inquiry to one question: whether an insured who incurs response costs pursuant to an administrative order is "legally obligated" to pay such costs as "damages." The majority opinion answered that question in the negative and held that the Underwriters had no duty to indemnify Powerine for its response costs. The majority based this conclusion on three arguments.

First, certain language in *Montrose Chemical Corp. v. Admiral Insurance Co.* ("Montrose"), suggested to the majority that a court judgment is required for an insured to be "legally obligated" to pay as that term is used in a CGL policy.[21] In *Montrose,* the California Supreme Court, describing the difference between the duty to defend and the duty to indemnify, stated that "the obligation to indemnify . . . arises when the insured's liability is *established*" and that the insurer "ultimately may have no duty to indemnify, either because no damages were awarded in the *underlying action* against the insured, or because the actual *judgment* was for damages not covered under the policy."[22]

Second, costs incurred in response to an administrative order are not "damages." According to the majority, the plain meaning of damages includes as an essential element that they be imposed by a court of law.

Third, damages is used in other portions of the policy in connection with defense of a "suit." "Suit" had been defined by *Foster-Gardner* to exclude administrative proceedings.

Despite the detailed explication of the reasons supporting its decision, the *Powerine* majority ultimately found that its decision was compelled by *Foster-Gardner.* The majority found no reason to deviate from the principle that the duty to defend is broader than the duty to indemnity to find an indemnity duty where there was no duty to defend. The majority also dismissed the numerous state and federal decisions interpreting "legally obligated to pay as damages" to include response costs, describing these cases as employing a "functional approach" inconsistent with *Foster-Gardner.*[23]

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C. *Analysis Of Powerine*

Powerine is an unwarranted extension of *Foster-Gardner*. First, the plain language of the policy at issue provided that the insurer would pay "all sums" the insured "shall become *legally obligated to pay as damages*." An insured would reasonably expect that an administrative order threatening sanctions for noncompliance "legally obligated" the insured to comply with the order. Furthermore, the California Supreme Court had already held in *AIU Insurance Co., supra,* that costs of remediation could be "damages."

Although purporting to apply a "literal approach" to the interpretation of this language, the *Powerine* court's imposition of a requirement that covered "damages" be the result of a court judgment has little basis in the ordinary definition of the words used in the policy. In fact, one of the definitions of "damages" relied upon by the majority — "the estimated reparation in money for a detriment or injury sustained: compensation or satisfaction imposed by law for a wrong or injury caused by a violation of a legal right" — makes no reference to a court judgment.[24] At the very least, the word "damages" could reasonably be interpreted in a way that does not require a court judgment and therefore should be interpreted in favor of coverage.

Second, the general rule that the duty to defend is broader than the duty to indemnify — a rule intended to protect the reasonable expectations of insureds — provides no justification for reading the policy contrary to its plain language. Although requiring the insurer to indemnify for a claim for which it has no defense obligation may be anomalous, this anomaly is the result of the insurer's own inartful policy drafting. Policyholders should not be penalized for the insurer's errors. Furthermore, as the *Powerine* dissent points out, "there is no reason to prevent the parties from contracting for this result."[25]

Third, the *Powerine* court's reliance on *Montrose* is misplaced. *Montrose* addressed only the duty to defend and explicitly noted that the duty to indemnify must be distinguished from the duty to defend.[26] Although *Montrose* (and other cases cited by the *Powerine* court) does make reference to the indemnity obligation arising after a "judgment," this is not surprising given the fact that most reported insurance disputes arise in the context of lawsuits. Clearly, the plain language of the policy itself should be preferred over dicta from cases that paraphrase policy language in different factual contexts.

Furthermore, the *Montrose* court's holding regarding the "known loss" rule is irrelevant to an interpretation of the insurer's indemnity obligation. In *Montrose,* the California Supreme Court held, *inter alia,* that the known loss rule did not preclude coverage for environmental contamination where the insured purchased a CGL policy after receiving a potentially responsible party letter relating to that same contamination. The court reasoned that the insured continued to have an insurable interest at the time it purchased the policy because the amount of its liability was not yet fixed. The critical fact in *Montrose* that the *Powerine* court failed to note is that the insured in *Montrose* had received only a PRP letter and not a remediation order at the time it purchased its policy.[27]

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Fourth, the *Powerine* court's interpretation of the term "damages" in other parts of the insurance policy is fallacious. The language imposing the defense obligation states that the insurer will defend any *suit* arising out of the "injury to or destruction of property and seeking *damages* on account thereof."[28] The *Powerine* court interprets this language to mean that "damages" must arise from a suit. As the defense obligation reads, the word "damages" is clearly intended to limit the obligation to defend a "suit." There is no reason to believe, however, that the reverse is true and the word "suit" is intended to limit the definition of "damages" with respect to the insured's indemnity obligation.

The *Powerine* court also erroneously relies on the "no action" clause, which limits the insurer's obligation to third parties to those circumstances where the policyholder's obligation to pay "shall finally have been determined either by judgment . . . after actual trial or by written agreement."[29] The insurer's obligation to third parties has no necessary relationship to its obligation to its insured. If anything, the "no action" clause shows that insurers are able to unambiguously limit their indemnity obligation to "judgments" if that is their true intent.

V. Conclusion

Foster-Gardner has had minimal significance outside of California. No state appellate court has cited or relied on it to decide the "suit" issue, and there are a significant number of jurisdictions which have rejected its "bright line" approach. If anything, the judicial trend appears to be in favor of holding that an administrative action can trigger a duty to defend based upon its coercive characteristics, the ambiguity of the term "suit," and policyholders' reasonable expectations.

In California, *Foster-Gardner* has left policyholders on their own in defending significant administrative actions unless and until a lawsuit is filed. It will have also deprived them of any indemnity coverage in similar situations if the Court of Appeal's *Powerine* decision is upheld by the Supreme Court.

ENDNOTES

1. 18 Cal. 4th 857, 77 Cal. Rptr. 2d 107, 959 P.2d 265, 285-86 (1998).

2. *Id.* at 863-4, 959 P.2d at 269, 77 Cal. Rptr. 2d at 111.

3. *Id.*

4. 18 Cal. 4th at 878, 959 P.2d at 280, 77 Cal. Rptr. 2d at 122.

5. *Id.* at 880, 959 P.2d at 280, 77 Cal. Rptr. 2d at 123.

6. *Id.*, 959 P.2d at 281, 77 Cal. Rptr. 2d at 123.

7. *Id.* at 882, 959 P.2d at 282, 77 Cal. Rptr. 2d at 124.

8. 18 Cal.4th at 891, 959 P.2d at 289, 77 Cal. Rptr.2 d at 131 (Kennard, J. dissenting).

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9. 51 Cal. 3d 807, 799 P.2d 1253, 274 Cal. Rptr. 820 (1990).

10. *See, e.g., The Best Place, Inc. v. Penn American Insurance Co.*, 82 Haw. 120, 127-28, 920 P.2d 334, 341-42 (1996) (tracing the origin and development of the cause of action for insurance bad faith in California).

11. M.F. Aylward, COURTING TROUBLE: 1998 UPDATE ON POLLUTION COVERAGE CASE LAW A-14 (DRI Environmental Insurance Litigation Seminar, Boston Massachusetts October 29, 1998).

12. R. Wirick, *No 'Suit' Means No Duty to Defend or Indemnify*, Nat'l. L.J., March 20, 2000, at B10.

13. 74 F. Supp. 2d 975 (D. Haw. 1999) (purporting to apply the law of Hawaii). *W.C. Richard Co., Inc. v. Hartford Accident and Indemnity Co.*, 311 Ill. App. 3d 218, 742 N.E.2d 63 (1999) also cited *Foster-Gardner*. However, the court in *W.C. Richard Co., Inc.* was applying the law of California since the dispute involved an administrative action initiated by the California Regional Water Quality Control Board. *Employers Insurance of Wausau v. EHLCO Liquidating Trust*, 186 Ill. 2d 127, 708 N.E.2d 1122 (1999) was decided after *Foster-Gardner* and does hold under Illinois law that a lawsuit is required before a duty to defend arises. *EHLCO Liquidating Trust* did not rely upon or cite *Foster-Gardner*. It merely found a prior decision dispositive. 186 Ill. 2d at 140, 708 N.E.2d at 1129, *citing Lapham-Hickey Steel Corp. v. Protection Mutual Insurance Co.*, 166 Ill. 2d 520, 655 N.E.2d 842 (1995). In addition to *W.C. Richard Co., Inc.*, federal court cases have relied on *Foster-Gardner* in deciding the issue under California law. *See, e.g., County of Santa Clara v. U.S. Fidelity & Guar. Co.*, 176 F.3d 482 (9th Cir. 1999); *Larkin v. ITT Hartford*, 1999 WL 459351 (N.D. Cal. 1999).

14. *See Commonwealth Lloyds Ins. Co. v. Marshall, Neill & Pauley, Inc.*, 32 F. Supp. 2d 14, 20 (D. D.C. 1998); *In Re St. Johnsbury Trucking Co.*, 1999 WL 240334 (Bankr. D. Vt. 1999); *Compass v. City of Littleton*, 984 P.2d 606 (Colo. 1999) (*en banc*); *Employers Insurance of Wausau v. Recticel Foam Corp.*, 716 N.E.2d 1015 (Ind. App. 1999); *Travelers Indemnity Co. v. Summit Corp. of America*, 715 N.E.2d 926 (Ind. App. 1999); *Arco v. American Motorist Insurance Co.*, 232 Mich. App. 146, 594 N.W.2d 61 (1998); *Jostens, Inc. v. Federated Mutual Insurance Co.*, 612 N.W.2d 878 (Minn. 2000). Some of these cases were decided after *Foster-Gardner* but were based on precedent decided before *Foster-Gardner*.

15. *Commonwealth Lloyds Ins. Co.*, 32 F. Supp. 2d at 20 (emphasis added).

16. *In Re St. Johnsbury Trucking Co.*, 1999 WL 240334 at 5.

17. 75 Cal. App. 4th 1038, 89 Cal. Rptr. 2d 706 (Cal. Ct. App. 1999). On February 16, 2000, the California Supreme Court accepted the petition for review of the *Powerine* decision. 994 P.2d 240, 93 Cal. Rptr. 2d 494. Pursuant to the California Rules of Court, the *Powerine* opinion is superceded and may not be cited as precedent in California.

18. *Powerine*, 89 Cal. Rptr. 2d at 711 (omissions in original) (emphasis added).

19. The *Powerine* majority found the wording of the excess policies to be irrelevant because all the excess policies were conditioned upon exhaustion of coverage under primary policies. Because there was no right to indemnity under the primary policies, the excess policies were not triggered.

20. 51 Cal. 3d 807, 799 P.2d 1253, 274 Cal. Rptr. 820 (1990).

21. 10 Cal. 4th 645, 913 P.2d 878, 42 Cal. Rptr. 2d 324 (1995). In *Montrose*, the California Supreme Court (1) adopted the "continuous injury" trigger of coverage for CCL policies and

(2) held that the "known loss" rule did not preclude coverage for environmental contamination where the insured purchased a CGL policy after receiving a potentially responsible party letter relating to that same contamination.

22. *Id.* at 660, 913 P.2d at 884, 42 Cal. Rptr. 2d at 330 (emphasis added).

23. *Powerine,* 89 Cal. Rptr. 2d at 718-19.

24. *Id.* at 724, *citing* Webster's New Internat. Dict. (3rd ed. 1981) at 581.

25. *Id.* at 732, n. 1 (Aldrich, J., dissenting). If, as the majority states, *Powerine* was predetermined by *Foster-Gardner,* the result in *Powerine* illustrates the error of the *Foster-Gardner* decision. According to the terms of the policy at issue in *Powerine,* the scope of the duty to indemnify should be considered *before* the scope of the duty to defend. The policy first promises to pay "all sums which the assured shall become legally obligated to pay because of injury to or destruction of property." The policy then promises to "[d]efend . . . any suit against the Assured arising out of or alleging . . . *such* injury to or destruction of property." (Emphasis added.) Because, as argued above, the plain language of the indemnity obligation requires indemnity for remediation costs ordered by a government agency, it must necessarily follow that the insurer is obligated to defend a proceeding in which such costs will be established. *See Montrose,* 10 Cal. 4th at 660, n.9, 913 P.2d at 884, 42 Cal. Rptr. 2d at 330 ("The duty to defend arises when there is a potential for indemnity.").

26. *See Montrose,* 10 Cal. 4th at 660, n.9, 913 P.2d at 884, 42 Cal. Rptr. 2d at 330.

27. *Id.* at 693, 913 P.2d at 906, 42 Cal. Rptr. 2d at 352 ("The PRP letter did no more than formally place *Montrose* on notice of the government's asserted position and initiate proceedings that *could* result in subsequent findings and orders.") (emphasis added).

28. *Powerine,* 89 Cal. Rptr. 2d at 726 (emphasis added).

29. *Id.* at 711. ■