Filed 6/13/07

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

AMERON INTERNATIONAL CORPORATION, **Plaintiff and Appellant,** **v.** **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA et al.,** **Defendants and Respondents.**	**A109755** **San Francisco County Super. Ct. No. 419929)**
AMERON INTERNATIONAL CORPORATION, **Plaintiff and Appellant** **v.** **HARBOR INSURANCE COMPANY,** **Defendant and Respondent.**	**A112856** **San Francisco County Super. Ct. No. 419929)** **ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the opinion filed herein on May 15, 2007, be modified as follows:

1. On page 4, first complete sentence of the first partial paragraph, beginning "However," the phrase "there is a duty" is changed to "there may be a duty" so that the sentence reads:

---

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, any modifications to parts VII., VIII., IX., X. and XI. of this opinion are not certified for publication.

> However, as to the policies before us that contain a definition of the term "suit,"[4] and/or provide indemnity for "loss," not damages, there may be a duty on the insurer to indemnify and/or defend.

2. At the end of the first partial paragraph on page 4, after the sentence ending "the trial court erred," add as footnote 5 the following footnote, which will require renumbering of all subsequent footnotes:

> [5] In granting Harbor's motion for judgment on the pleadings and sustaining the other respondents' demurrers, the trial court concluded Ameron could not prevail against the respondents as a matter of law. To the extent we reverse, we conclude only that a particular insurance company *may* have a duty to defend and/or indemnify. Nothing we say in this opinion is intended to express any view regarding additional coverage defenses that were not raised in the trial court or on appeal.

3. On page 20, second sentence of the second full paragraph, beginning "The final three," the phrase "assumed a duty" is changed to "may have assumed a duty" so that the sentence reads:

> The final three policies, from August 1, 1989 to August 1, 1992, contain definitions of the term "suit" that compel the conclusion that INA may have assumed a duty to indemnify and to defend Ameron.

4. On page 25, the first full paragraph beginning "INA responds" and footnote 26 are deleted and the following two paragraphs and new footnote 27 (renumbered) are inserted in their place:

> INA responds that the definition of "suit" contained within its defense provision is limited to a civil proceeding alleging "damages" and its indemnity obligation is also limited to "damages." INA argues that *Powerine I* and its progeny have "unequivocally determined" that as a matter of law, "damages" can only be awarded by a court of law, and, therefore, INA had no obligation to defend or indemnify Ameron for the settlement reached in connection with the administrative IBCA proceeding. INA also asserts that since its policies' deductible endorsements also refer to the insurer's obligation to pay "damages," the endorsements bolster the parties' mutual understanding that INA's defense and indemnity obligations are limited to the payment of damages awarded by a court of law. With minor nonmaterial

> differences, the deductible endorsements provide that INA's "obligation to pay damages on behalf of the insured under this policy applies only to damages in excess of the amount of the deductibles . . . ."[27]
>
> Because the INA policies are distinct contractual insurance policies whose wording and provisions were not before the Supreme Court in *Foster-Gardner, Powerine I* and *II*, and *Ace,* we examine the policies de novo, and consider the definition of "suit" and "damages" in the context of each policy as a whole to determine whether the policy provides coverage for the IBCA proceeding that the parties agree was not a proceeding in a court of law.
>
> [27] INA argues that the deductible endorsement in these policies eliminates any duty to defend contained within the policies' insuring agreements and replaces it with a duty to reimburse Ameron for its defense costs under certain circumstances. Even assuming this is correct, we note that Ameron has alleged in its complaint that INA has failed to perform its obligation to reimburse. Moreover, it would be premature at this time to decide whether or not the duty to reimburse Ameron for its defense costs exists. INA, in fact, concedes this. Thus, we conclude that nothing in the deductible endorsement in these policies justifies the demurrer sustained by the trial court.

5. On page 31, last sentence of the first full paragraph, beginning "Consequently," the word "triggering" is changed to "which may trigger" so that the sentence reads:

> Consequently, an insured could reasonably expect that the IBCA proceeding was a covered suit under the International policies' defense settlement provision, which may trigger International's duty to defend.

6. On page 32, last sentence of the first full paragraph, beginning "Having determined," the phrase "policy imposes" is changed to "policy may impose" so that the sentence reads:

> Having determined that this policy may impose both a duty to defend and to indemnify upon International, we conclude the trial court erred in sustaining the demurrer to causes of action for breach of the duty to investigate and defend, breach of the duty to settle, breach of the duty to indemnify, breach of the duty of good faith and fair dealing, and declaratory relief (causes of action 40, 42, 43, 44 and 45).

7. On page 33, second sentence of the first full paragraph, beginning "As we noted," the word "provide" is changed to "may provide" so that the sentence reads:

> As we noted in part I.B., *ante,* the 1989-1991 INA policies may provide a duty of indemnity for any damages awarded in the IBCA proceeding.

8. On page 35, sixth sentence of the last partial paragraph, beginning "And, as a consequence," the word "provides" is changed to "may provide" so that the sentence reads:

> And, as a consequence, we conclude this Twin City policy may provide coverage to Ameron for both duties.

9. On page 39, last sentence of the first full paragraph, beginning "As we concluded," the word "triggering" is changed to "which may trigger" so that the sentence reads:

> As we concluded in part II.A., a reasonable insured would expect that the IBCA proceeding was a covered "suit" under the defense settlement provision, which may trigger ICSOP's duty to defend.

10. On page 39, second sentence of the second full paragraph, beginning "In that discussion," is deleted and replaced with the following so that the sentence reads:

> In that discussion, we concluded that the 1990-1991 INA policy may provide a duty of indemnity for any damages awarded in the IBCA proceeding, and the insured could reasonably expect that Coverage A of the International policy may provide excess indemnity coverage for such damages.

11. On page 42, last sentence of footnote 36, beginning "Arguably," the word "provided" is changed to "may have provided" so that the sentence reads:

> Arguably, the Zurich policies' language may have provided Ameron defense and indemnity coverage for settlement of the IBCA proceeding.

12. On page 44, second sentence of the second full paragraph, beginning "We conclude," the word "provides" is changed to "may provide" so that the sentence reads:

> We conclude that the 1988-1989 policy (No. LC05519681) may provide indemnity coverage to Ameron, and the trial court erred in sustaining the demurrer without leave to amend to Ameron's causes of action for breach of the duty to settle, breach of the duty to indemnify, breach of the duty of good faith and fair dealing, and declaratory relief (causes of action 47, 48, 49 & 50).

13. On page 53, first complete sentence of first partial paragraph, beginning "As we discussed," the word "provides" is changed to "may provide" so that the sentence reads:

> As we discussed in part II.B.2., *ante*, Coverage A of the underlying International policy incorporates the underlying INA policy, and the INA policy may provide indemnity coverage for the IBCA proceedings.

There is no change in the judgment.

The petitions for rehearing from respondents Insurance Company of North America, Harbor Insurance Company, Transcontinental Insurance Company, International Insurance Company, Twin City Fire Insurance Company and St. Paul's Surplus Lines Insurance Company are denied.

Dated:_____ _____, P. J.