



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
COURT OF APPEAL - SECOND DIST.  
SECOND APPELLATE DISTRICT RECEIVED  
APR 28 1997

FOSTER-GARDNER, INC., a corporation,  
JOSEPH A. LANE Clerk

Plaintiff-Appellant

v.

NATIONAL UNION FIRE INSURANCE COMPANY  
OF PITTSBURGH, PA, a corporation, et al.,

Defendants-Respondents.

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Superior Court Case No. BC 110056

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On Appeal From Judgment of the Superior Court of California  
In and For the County of Los Angeles  
The Honorable Edward M. Ross, Judge, Presiding

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**BRIEF OF AMICI CURIAE UNITED POLICYHOLDERS  
IN SUPPORT OF APPELLANT FOSTER-GARDNER INC.**

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United Policyholders

Amici Curiae United Policyholders, through their undersigned counsel, hereby submit this Amicus Curiae brief in support of Foster-Gardner, Inc.'s ("Foster-Gardner") appeal of the Superior Court decision granting summary judgment in favor of Respondents National Union Fire Insurance Company of Pittsburgh, PA, Fremont Indemnity Company, Pacific Indemnity Company and Ranger Indemnity Company (collectively referred to herein as "Respondents").

#### **INTEREST OF AMICUS CURIAE**

Amici Curiae United Policyholders<sup>1</sup> ("Amici") submits this brief on behalf of the numerous California policyholders who, like Foster-Gardner, rely on "Comprehensive General Liability ("CGL") coverage to assist them in meeting their responsibilities where they are adjudged to have strict, joint and several liability for environmental cleanup under federal and state law. Liability has been imposed, or may be imposed in the future, against commercial insureds, represented here by amici, in federal and state environmental administrative enforcement actions ("government administrative enforcement actions") without any proof of negligence or error. This is often done pursuant to the strict liability standards imposed by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq. ("CERCLA"), and equivalent state statutes. These environmental statutes are designed to coerce parties into responding to administrative government enforcement actions without those respective government entities actually filing a complaint in courts of law. To that end, the statutes assess severe penalties upon parties that fail to respond to government

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1. United Policyholders is a non-profit corporation dedicated to educating policyholders about their rights and duties under their insurance policies. Specifically, United Policyholders engages in educational activities to promote greater public understanding of insurance issues and consumer rights. United Policyholders' activities include organizing meetings, distributing written materials, and responding to requests for information from individuals, elected officials, and governmental entities. These activities are limited only to the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds.

administrative enforcement actions, up to and including penalties of three times the cost of the cleanup, and severe fines of up to \$25,000 per day.

For several decades, those represented by Amici and their predecessors have purchased standard-form Comprehensive General Liability insurance policies ("CGL policies") to protect themselves against liability they may incur for environmental property damages, among others, such as those alleged in government administrative enforcement actions. CGL policies provide the broadest form of coverage available, containing comprehensive insurance coverage for all unanticipated liabilities, except for those explicitly excluded under the policies' terms. CGL policies, which are standard policies drafted by the insurance industry's agents, contain language materially identical to the terms of Foster-Gardner's insurance policies at issue in this appeal.

Because Amici will be directly affected by the issues decided by this Court, they wish to address those issues by submitting a brief to assist the Court in its decision.<sup>2</sup>

#### **STATEMENT OF THE CASE**

The California Environmental Protection Agency ("Cal-EPA"), acting pursuant to California Health & Safety Code Section 25358.3 (the "State Superfund Act"), California's equivalent of the Federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), brought an action against Foster-Gardner alleging environmental contamination arising from its Coachella, California facility. See Foster-Gardner's Opening Brief ("Foster-Gardner Br.") at 5. Cal-EPA issued a Remedial Action Order requiring Foster-

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2. Amici are aware that the Court requested supplemental briefing on issues related to the interpretation of the term "suit." However, because an Amicus Brief submitted by the Insurance Environmental Litigation Association on behalf of Respondents and addressing the meaning of the "sudden and accidental" term is before the Court, Amici respectfully request an opportunity to likewise contribute on behalf of Appellant. In the event the Court is not so inclined, Amici respectfully request the Court consider its arguments pertaining to the interpretation of the term "suit."

Gardner to "take appropriate removal or remedial action to protect public health and safety and the environment . . . ." Id. Like CERCLA, the State Superfund Act imposes liability without fault on the owner or operator of a facility. See Cal. Health & Safety Code § 25323.5; 42 U.S.C. § 9607(a).

Faced with the prospect of substantial liability, Foster-Gardner turned to Respondents, its comprehensive general liability insurance companies, to defend it against the Cal-EPA action. See Foster-Gardner Br. at 6-7. When Respondents refused to fund Foster-Gardner's defense against the Cal-EPA action, Foster-Gardner filed the present action seeking a declaration of Respondents' defense obligations and for recovery of all defense costs incurred and to be incurred. Id. at 7.

Respondents employed standardized CGL policies, providing coverage for "all sums which the insured shall be legally obligated to pay as damages because of . . . bodily injury or . . . property damage . . . caused by an occurrence." Id. at 4. The policies require Respondents to "defend any suit against the insured seeking damages on account of such bodily injury or property damage . . . ." Id. (emphasis added.)

Respondents rely on the standard form Polluter's Exclusion, which excludes coverage for certain environmental liabilities unless the discharge, escape, etc. is "sudden and accidental." See Foster-Gardner Br. at 8. The Polluter's Exclusion was drafted by committees of insurance company representatives at the Insurance Rating Board ("IRB"), in concert with the Mutual Insurance Rating Bureau ("MIRB"), on behalf of member insurance companies.<sup>3</sup>

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3. The Insurance Services Office, Inc. ("ISO") is the successor to the IRB, and its predecessor, the National Bureau of Casualty Underwriters ("NBCU"). New Castle County v. Hartford Acc. & Indem. Co., 933 F.2d 1162, 1181 (3rd Cir. 1991). ISO is an insurance trade association providing rating statistical, actuarial and policy drafting services to approximately 3,000 insurance companies. Id.