

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GREAT AMERICAN INSURANCE	)	Case No. 12-00833-SC
COMPANY, and GREAT AMERICAN	)	
INSURANCE COMPANY OF NEW YORK,	)	ORDER GRANTING MOTION FOR
	)	<u>PARTIAL SUMMARY JUDGMENT</u>
Plaintiffs,	)	
	)	
v.	)	
	)	
MICHAEL CHANG, d/b/a SUNRISE	)	
CLEANERS, INC., and ROXANNE	)	
CHANG, d/b/a SUNRISE CLEANERS,	)	
INC.,	)	
	)	
Defendants.	)	

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**I. INTRODUCTION**

This case involves an insurance coverage dispute arising from underlying state court actions and government orders concerning the alleged contamination of a property owned by Defendant Michael Chang (the "Property"). Defendant Michael Chang and his wife, Defendant Roxanne Chang (collectively, the "Changs"), operated a dry cleaning business on the property from 1977 to 1981. During this period, the Property was insured by the above-captioned plaintiffs (collectively, "Great American"). Through this action, Great American seeks a declaration that it does not owe a duty to defend or indemnify the Changs in the underlying actions. Now

1 before the Court is Great American's motion for partial summary  
2 judgment. ECF No. 64 ("MSJ"). The motion is fully briefed, ECF  
3 Nos. 68 ("Opp'n"), 69 ("Reply"), and appropriate for determination  
4 without oral argument per Civil Local Rule 7-1(b).<sup>1</sup> For the  
5 reasons set forth below, Great American's motion for partial  
6 summary judgment is GRANTED.

7

8 **II. BACKGROUND**

9 The Property at issue in this case is located on Baldwin  
10 Avenue in San Mateo, California. ECF Nos. 16 ("Compl.") ¶ 4, 29  
11 ("Answer") ¶ 4. Various parties have alleged that the Property is  
12 contaminated with PCE and stoddard solvent due to leaking  
13 underground storage tanks. The Changs acquired the Property in  
14 1977, along with a dry cleaning business already located on the  
15 Property. Michael Chang operated a dry cleaners on the Property  
16 from 1977 until about 1981 under the name Sunrise Cleaners. In  
17 1981, Michael Chang sold the Sunrise Cleaners business, though he  
18 continued to own the Property and leased the premises to others.

19 Soon after the Changs acquired the Property, Great American  
20 issued a policy to Sunrise Cleaners for a policy period of December  
21 15, 1977 to December 15, 1980. Great American later issued a  
22 policy to Michael Chang for a policy period of December 15, 1980 to

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24 <sup>1</sup> The Changs' opposition brief exceeds the page limits set forth in  
25 Civil Local Rule 7-3(a). Further, the Changs filed a surreply  
26 brief without seeking leave of the Court, in violation of Civil  
27 Local Rule 7-3(d). ECF No. 73 ("Surreply"). The Surreply does not  
28 present any evidence or authority that was previously unavailable  
to the Changs. Nor does it respond to new arguments raised on  
reply. In the interest of justice, the Court has reviewed all of  
the arguments raised by the Changs. However, the Court advises the  
Changs to comply with the Civil Local Rules going forward, as  
future violations may have consequences.

1 December 15, 1983. The Changs claim that Roxanne Change is an  
2 additional insured under the policies. Neither Great American nor  
3 the Changs retained a copy of the policies, but the parties have  
4 stipulated to some of the policy terms, including policy limits of  
5 \$500,000 for property damage.

6 The Changs later leased the Property to Bilal Kartal  
7 ("Kartal"), who opened an Italian restaurant on the premises. In  
8 2006, Kartal brought a nuisance action against the Changs in the  
9 California Superior Court for San Mateo County in connection with  
10 an alleged solvent leak on the Property (the "Kartal Action"). ECF  
11 No. 65 ("RJN") Ex. 1 ("Kartal Compl."). Kartal alleges the  
12 following: At the time the Changs purchased the Property in 1977,  
13 they knew or should have known that one or more storage tanks  
14 containing dry cleaning solvent were buried under a previously  
15 unused portion of the Property behind what is now the restaurant.  
16 Id. ¶ 3. In 1992, Kartal built a patio behind the restaurant. Id.  
17 ¶ 1. The patio was later enclosed and became a banquet area  
18 central to the restaurant's business. Id. In or around 2002 or  
19 2003, customers began noticing a peculiar odor coming from the  
20 banquet area, which was caused by solvents leaking from the buried  
21 storage tanks. Id. ¶ 6. The odor became worse over time and drove  
22 customers away from the restaurant. Id. ¶¶ 7-8.

23 At some unspecified time, the California Regional Water  
24 Quality Control Board (the "State Water Board") began to  
25 investigate the alleged contamination at the Property. Zacharias  
26 Decl. Ex. 1.<sup>2</sup> On December 28, 2007, the Changs tendered the Kartal

27 \_\_\_\_\_  
28 <sup>2</sup> Catherine Zacharias ("Zacharias"), a claims manager at Great  
American who has worked on the Changs' claims, filed a declaration

1 Action, along with the state investigation, to Great American for  
2 defense and indemnity. Id. As to the government investigation,  
3 the Changs informed Great American: "The local Environmental Health  
4 Department, [State Water Board] and federal Environmental  
5 Protection Agency are investigating the liability of your insured.  
6 Governmental agencies have ordered action on the part of the  
7 responsible parties to investigate the occurrence and mitigate the  
8 damages to groundwater and off-site properties." Id. Great  
9 American initially denied the tender with respect to both the  
10 Kartal Action and the government investigation.

11 After Great American denied the tenders, the Changs filed  
12 cross-complaints in the Kartal Action against various third  
13 parties, including Grace Yamaguchi ("Yamaguchi"), who allegedly  
14 operated a dry cleaners on the property before the Changs, and  
15 Christopher Chang (no relation to the Changs), who allegedly  
16 operated a dry cleaners on the property after the Changs. RJN Exs.  
17 3-4. In their amended cross-complaint in the Kartal Action, the  
18 Changs alleged that Yamaguchi and Christopher Chang caused the  
19 solvent contamination on the Property and asserted claims for  
20 negligence, indemnity, and contribution, among other things. RJN  
21 Ex. 4. The Changs prayed for "response costs, lost rents and all  
22 other damages incurred due to Cross-Defendants['] [conduct]," and  
23 "damages, defense costs and potential liability, if any." Id. at  
24 20-21.

25 On February 11, 2009, the court in the Kartal Action entered  
26 "Pre-Trial Order No. 5," which stated: "In order to avoid  
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28 in support of Great American's motion for summary judgment. ECF  
No. 64-6 ("Zacharias Decl.").

1 unnecessary filing of pleadings by Defendants and Cross-Defendants  
2 in this action, it shall be deemed that . . . [a]ll Defendants and  
3 Cross-Defendants have filed Cross-Complaints for implied equitable  
4 indemnity and for a determination of comparative negligence against  
5 all of the Defendants and Cross-Defendants." RJN Ex. 10. Michael  
6 Chang then requested that Great American indemnify him with respect  
7 to the cross-complaints that were deemed filed in the Kartal  
8 Action. Compl. ¶ 83; Answer ¶ 83. In response, Great American  
9 denied that the "deemed" affirmative cross-complaints gave rise to  
10 a duty to defend, but agreed to provide a defense subject to a full  
11 reservation of rights. Id.

12 Yamaguchi and Christopher Chang filed actual cross-complaints  
13 against the Changs in late 2010. RJN Exs. 5 ("C. Chang X-Compl."),  
14 6 ("Yamaguchi X-Compl."). These cross-complaints also named as a  
15 defendant Eun Kyung Lee ("Lee"), who allegedly operated a dry  
16 cleaning business on the Property after Christopher Chang, from  
17 approximately 1989 until 1996. C. Chang X-Compl. ¶ 23; Yamaguchi  
18 X-Compl. ¶ 21. Yamaguchi and Christopher Chang's cross-complaints  
19 essentially sought indemnity and contribution from the Changs for  
20 any damages for which they were held liable. In March 2011, Lee  
21 also filed a cross-complaint for indemnity and contribution against  
22 the Changs, Yamaguchi, and Christopher Chang. RJN Ex. 7 ("Lee X-  
23 Compl."). Additionally, Lee sought "damages in the form of  
24 property damage, contents damage, loss of value, loss of use, loss  
25 of rents, repair costs, and other economic and non-economic  
26 damages." Id. at 5.

27 Apparently, the State Water Board continued to investigate  
28 contamination on the Property as the Kartal Action was ongoing.

1 The parties have not filed with the Court any documents actually  
2 issued by the State Water Board. However, according to an April  
3 10, 2009 letter from the Changs' counsel, the Changs applied for  
4 funding from the California Underground Storage Tank Fund (the  
5 "Storage Tank Fund") for pollution clean-up on the Property.  
6 Zacharias Decl. Ex. 4. The State Water Board denied the  
7 application, and the Changs requested that Great American pay for  
8 legal fees and costs incurred to challenge that denial. Id.  
9 Subject to a complete reservation of rights, Great American agreed  
10 to pay, and has paid, certain fees and costs incurred by the Changs  
11 to prosecute the litigation against the State Water Board.  
12 Zacharias Decl. ¶ 10.

13 At some unspecified time, the Changs conducted a voluntary  
14 site investigation and recommended further investigation of alleged  
15 PCE contamination on the Property. Compl. ¶ 92; Answer ¶ 92.  
16 Sometime in 2010, the State Water Board approved the proposed  
17 investigation and asked the Changs to submit a work plan. Id. The  
18 Changs requested that Great American pay the costs of the site  
19 investigation approved by the State Water Board. Zacharias Decl. ¶  
20 11, Ex. 5. Great American agreed to pay certain costs in  
21 connection with the investigation, subject to a full reservation of  
22 rights. Id. ¶ 11.

23 Great American brought this action against the Changs in  
24 February 2012. Great American's amended complaint asserts nine  
25 causes of action for, inter alia, declaratory relief, reimbursement  
26 of money paid, and breach of contract. Great American essentially  
27 seeks a declaration that it does not owe the Changs a duty to  
28 defend or indemnify as to the Kartal Action or the government

1 orders. It also seeks reimbursement of the amounts it has paid or  
2 will pay on behalf of the Changs. The Changs have counterclaimed  
3 for breach of contract and tortious breach of the covenant of good  
4 faith and fair dealing. Great American now moves for partial  
5 summary judgment on its claims and the Changs' counterclaims.  
6

7 **III. LEGAL STANDARD**

8 Entry of summary judgment is proper "if the movant shows that  
9 there is no genuine dispute as to any material fact and the movant  
10 is entitled to judgment as a matter of law." Fed. R. Civ. P.  
11 56(a). Summary judgment should be granted if the evidence would  
12 require a directed verdict for the moving party. Anderson v.  
13 Liberty Lobby, Inc., 477 U.S. 242, 251 (1986). Thus, "Rule 56[ ]  
14 mandates the entry of summary judgment . . . against a party who  
15 fails to make a showing sufficient to establish the existence of an  
16 element essential to that party's case, and on which that party  
17 will bear the burden of proof at trial." Celotex Corp. v. Catrett,  
18 477 U.S. 317, 322 (1986). "The evidence of the nonmovant is to be  
19 believed, and all justifiable inferences are to be drawn in his  
20 favor." Anderson, 477 U.S. at 255. However, "[t]he mere existence  
21 of a scintilla of evidence in support of the plaintiff's position  
22 will be insufficient; there must be evidence on which the jury  
23 could reasonably find for the plaintiff." Id. at 252.  
24

25 **IV. DISCUSSION**

26 Great American has asked the Court to render summary judgment  
27 on ten issues: (1) & (2) whether Great American has a duty to  
28 defend or indemnify the Changs with respect to government agency

1 orders to address pollution; (3) & (4) whether Great American has a  
2 duty to defend or indemnify the Changs with respect to the  
3 complaint in the Kartal Action; (5) whether Great American has duty  
4 to pay the Changs' expenses of pursuing claims against other  
5 parties in the Kartal Action; (6) whether Great American has a duty  
6 pay the Changs' expenses in pursuing litigation against the Storage  
7 Tank Fund; (7) & (8) whether Great American has a duty to defend or  
8 indemnify as to the cross-complaints against the Changs in the  
9 Kartal Action; (9) & (10) whether the Changs may recover against  
10 Great American on their counterclaims for breach of contract and  
11 breach of the covenant of good faith and fair dealing.

12 **A. The Duty to Defend and the Duty to Indemnify**

13 Before considering the particular issues raised by Great  
14 American's motion for partial summary judgment, the Court reviews  
15 some general principles concerning the duty to defend and the duty  
16 to indemnify. An insurer generally has a duty to indemnify its  
17 insured for risks covered by the relevant insurance policy. The  
18 duty to indemnify and the duty to defend are correlative, but are  
19 not coterminous. Certain Underwriters at Lloyd's of London v.  
20 Super. Ct. (Powerine Oil Co.) ("Powerine"), 24 Cal. 4th 945, 958  
21 (Cal. 2001). "Whereas the duty to indemnify can arise only after  
22 damages are fixed in their amount, the duty to defend may arise as  
23 soon as damages are sought in some amount." Id. (citations  
24 omitted). Further, the duty to defend is broader in scope than the  
25 duty to indemnify. Horace Mann Ins. Co. v. Barbara B., 4 Cal. 4th  
26 1076, 1081 (Cal. 1993). An insurer must defend its insured against  
27 a claim that creates even the potential for liability, and so an  
28 insurer may owe its insured a duty to defend in a case where no



1 damages are ultimately awarded. Id. Moreover, in "mixed actions"  
2 -- actions in which some claims are at least potentially covered by  
3 an insurer and the others are not -- "the insurer has a duty to  
4 defend the action in its entirety." Buss v. Super. Ct., 16 Cal.  
5 4th 35, 47-48 (Cal. 1997).

6 **B. Duty to Defend as to the Government Orders**

7 Great American argues that, under the stipulated language of  
8 the policies, it has no duty to defend the Changs with respect to  
9 government orders pertaining to pollution. The policies state:  
10 "The company shall have the right and duty to defend any suits  
11 against the insured seeking damages on account of such bodily  
12 injury or property damage . . . ." Zacharias Decl. Ex. 2 at EXH  
13 018, Ex. 3 at EXH 045. Relying on Foster-Gardner, Inc. v. National  
14 Union Fire Insurance Co., 18 Cal. 4th 857 (Cal. 1998), Great  
15 American argues that the duty to defend "suits" does not include  
16 the duty to pay costs of responding to government agency orders.  
17 Opp'n at 15.

18 In Foster-Gardner, the California Department of Toxic  
19 Substances Control ("DTSC") found that the plaintiff had incurred  
20 liability for cleaning up contamination on the site of his  
21 wholesale pesticide and fertilizer business. 18 Cal. 4th at 861-  
22 63. The plaintiff tendered the defense of the DTSC order to his  
23 insurers, which had issued policies providing that they had a "duty  
24 to defend any suit against the insured seeking damages . . . ."  
25 Id. at 863. The California Supreme Court held that the insurers  
26 did not have a duty to defend because the DSTC Order did not  
27 constitute a "suit," which the court defined as "a court proceeding  
28

1 initiated by the filing of a complaint."<sup>3</sup> Id. at 887.

2 In response, the Changs cite to an earlier California Supreme  
3 Court decision, AIU Insurance Co. v. Superior Court, 51 Cal. 3d  
4 807, 818 (Cal. 1990). Opp'n at 6. In AIU, the United States and  
5 local administrative agencies brought third-party suits against an  
6 insured for alleged violations of various environmental laws and  
7 the alleged contamination of seventy-nine different hazardous waste  
8 sites. 51 Cal. 3d at 815. The insured brought an action against  
9 its insurer seeking a judicial declaration that it was entitled to  
10 coverage for costs it might have become obligated to pay as a  
11 result of injunctive relief or reimbursement ordered in the third-  
12 party suits. Id. at 816. The court found that the insurer was not  
13 entitled to summary adjudication, because the insured's liability  
14 in the third-party suits could constitute damages under the  
15 insurance policies. Id. at 843.

16 The Court finds that AIU is inapposite here. Unlike the  
17 insured in AIU, there is no indication that the Changs have been  
18 sued in court by a government agency. As the California Supreme  
19 Court observed in Foster-Gardner: "AIU's holding -- that there is  
20 coverage for certain damages sought in a third-party suit  
21 prosecuted [by a government agency] -- has nothing to do with  
22 whether the carrier has a duty to defend when no third-party suit  
23 has been filed." 18 Cal. 4th at 857 (quotations omitted).

24 The Changs also suggest that it is irrelevant whether the  
25 government agency orders constitute suits for the purposes of the

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26 <sup>3</sup> Courts in other states have adopted a broader interpretation,  
27 holding that an agency proceeding does constitute a suit for the  
28 purposes of triggering insurance coverage. See Pac. Employers Ins.  
Co. v. Servco Pac., Inc., 273 F. Supp. 2d 1149, 1156 (D. Haw.  
2003).

1 policies, since "there are pleadings before the San Mateo County  
2 Superior Court that are asking the court to hold the Changs liable  
3 for compliance with an administrative order to investigate  
4 pollution-impacted third party properties . . . ." Opp'n at 6.  
5 The Changs appear to be referring to the cross-complaints filed in  
6 the Kartal Action. But whether Great American has a duty to defend  
7 in the Kartal Action is a separate question from whether it has a  
8 duty to defend with respect to the government agency orders.

9 Accordingly, the Court GRANTS Great American's motion for  
10 summary judgment as to its duty to defend the Changs against the  
11 government orders pertaining to pollution.

12 **C. Duty to Indemnify as to the Government Orders**

13 The policies state: "[Great American] agrees . . . [t]o pay on  
14 behalf of the insured all sums which the insured shall become  
15 legally obligated to pay as damages because of property damage  
16 caused by the occurrence." Compl. ¶ 31; Answer ¶ 31. Relying on  
17 Powerine, Great American contends that this language does not  
18 create a duty to indemnify the Changs as to the government orders.  
19 MSJ at 15-16.

20 Powerine concerned whether an insurer was liable for costs  
21 incurred by the insured in complying with orders issued during  
22 administrative environmental proceedings. 24 Cal. 4th at 952-55.  
23 Like the policies at issue here, the Powerine policy required the  
24 insurer to defend "any suit seeking damages" and to "pay all sums  
25 that the insured becomes legally obligated to pay as damages." Id.  
26 at 950. Based on its earlier holding in Foster-Gardner, which is  
27 discussed in Section IV.B supra, the California Supreme Court held  
28 that the policy only created a duty to pay money ordered by a court

1 and did not extend to any expenses required by an administrative  
2 agency pursuant to an environmental statute. Id. at 951. The  
3 Court reasoned that the duty to defend is broader than the duty to  
4 indemnify. Id. at 961. Thus, if an insurer's duty to defend is  
5 not broad enough to extend beyond a civil action pending in court,  
6 the duty to indemnify is not broad enough to extend beyond money  
7 damages awarded by a court. Id. at 961.

8       The Changs appear to argue that the government orders involve  
9 damages because of the claims and counterclaims asserted in the  
10 Kartal Action. See Opp'n at 7. The Changs' reasoning seems to be  
11 that the Kartal Action creates the potential for a court judgment  
12 finding them liable for the cleanup ordered by the government. Id.  
13 This argument is unavailing for the reasons set forth in Section  
14 IV.B supra. The pertinent question here is whether the government  
15 orders, not the pleadings in the Kartal Action, create a duty to  
16 indemnify. The Court addresses Great American's duty to indemnify  
17 as to the Kartal Action below.

18       Since there is no indication that the government has brought a  
19 civil action against the Changs, the Court finds that Great  
20 American does not have a duty to indemnify the Changs with respect  
21 to the government orders.

22       **D. Duty to Defend and Indemnify as to Kartal's Complaint**

23       Great American contends that it does not have a duty to defend  
24 or indemnify the Changs as to the claims asserted against them by  
25 Kartal, because the damages alleged in Kartal's complaint occurred  
26 after the expiration of the policy period. MSJ at 16-19. Great  
27 American points out that the Changs' policy period ran from 1977 to  
28 1983, while Kartal alleges that he was first injured by

1 contamination caused by the leaking storage tanks in or around  
2 2002, when his customers first noticed a peculiar odor emanating  
3 from the property. Id. The Changs respond that they are entitled  
4 to coverage since the loss of use asserted by Kartal was allegedly  
5 caused by the Changs' failure to deal with the underground storage  
6 tanks when they purchased the property in 1977. Opp'n at 8-9.

7 The Great American policies issued to the Changs constitute  
8 third-party liability insurance, since they provide coverage for  
9 liability of the insured to a third party, as opposed to coverage  
10 for loss or damage sustained directly by the insured. See  
11 Zacharias Decl. at EXH 019 ("This policy does not apply to . . .  
12 property damage to property owned or occupied by or rented to the  
13 insured . . .").<sup>4</sup> The policies obligate Great American "[t]o pay  
14 on behalf of the insured all sums which the insured shall become  
15 legally obligate to pay as damages because of property damage  
16 caused by an occurrence" and "to defend any suits against the  
17 insured seeking damages on account of . . . property damage."  
18 Zacharias Decl. Ex. 1 at EXH 018. The policies define "property  
19 damage" to mean:

20  
21 (1) physical injury to or destruction of tangible  
22 property which occurs during the policy period  
23 including the loss of use thereof at any time  
24 resulting therefrom, or (2) loss of use of tangible  
25 property which has not been physically injured or  
26 destroyed provided such loss of use is cause by an  
27 occurrence during the policy period.

28 <sup>4</sup> See also Montrose Chem. Corp. v. Admiral Ins. Co., 10 Cal. 4th  
645, 663-666 (Cal. 1995) (discussing the distinction between first-  
party and third-party liability insurance).

1 Id. at EXH 021. They define "occurrence" to mean "an accident,  
2 including continuous or repeated exposure to conditions, which  
3 results during the policy period in bodily injury or property  
4 damage neither expected nor intended from the standpoint of the  
5 insured." Id.

6 The California Supreme Court addressed almost identical policy  
7 language in the context of third-party liability insurance in  
8 Montrose.<sup>5</sup> Montrose involved property damage that was continuous  
9 or progressing over a number of years and an insured who had  
10 obtained a series of successive liability policies from multiple  
11 insurers while the property damage was ongoing. 10 Cal. 4th at  
12 655. At issue was whether an insurer whose policy covered only the  
13 last few years of this period had a duty to defend suits alleging  
14 continuous and progressive property damage that resulted from  
15 hazardous chemicals that the insured started manufacturing before,  
16 but continued manufacturing during, the policy period. Id. at 656-  
17 661. The court held that a continuous condition becomes an  
18 occurrence for the purposes of the policy when the property damage  
19 manifests:

20 Th[e] policy language unambiguously distinguishes  
21 between the causative event -- an accident or  
22 "continuous and repeated exposure to conditions" --  
and the resulting "bodily injury or property damage."  
It is the latter injury or damage that must "occur"

23 <sup>5</sup> The insurer in Montrose contracted to "pay on behalf of the  
24 insured all sums which the insured shall become legally obligated  
25 to pay as damages because of . . . bodily injury, or . . . property  
26 damage to which this insurance applies, caused by an occurrence . .  
27 . ." 10 Cal. 4th at 668. The policy defined "property damage" as  
28 "(1) physical injury to or destruction of tangible property which  
occurs during the policy period, including the loss of use thereof  
at any time resulting therefrom . . . ." Id. Occurrence meant "an  
accident, including continuous or repeated exposure to conditions,  
which results in bodily injury or property damage neither expected  
nor intended from the standpoint of the insured." Id. at 669.

1 during the policy period, and "which results" from the  
2 accident or "continuous and repeated exposure to  
3 conditions."

4 Id. at 669.

5 The Montrose court found that its decision was confirmed by  
6 prior case law, including Remmer v. Glens Falls Indemnity Co., 140  
7 Cal. App. 2d 84 (Cal. Ct. App. 1956). Id. In Remmer, the insureds  
8 had obtained property insurance for the period of 1945 through  
9 1948. 140 Cal. App. 2d at 85. In 1947, during the policy period,  
10 the insureds graded and filled portions of their property. Id. In  
11 1952, after the policy period, a landslide on the property damaged  
12 an adjacent lot. Id. The owner of the adjacent lot brought a  
13 nuisance action against the insureds, and the insureds tendered the  
14 suit to their insurer. Id. The Court held that the loss was not  
15 covered because "the occurrence of an accident within the meaning  
16 of the policy is not the time the wrongful act was committed"  
17 (i.e., the grading of the property in 1947), "but the time when the  
18 [third] party was actually damaged" (i.e., the landslide in 1952).  
19 Id. at 88.

20 Interpreting the language of the policies pursuant to Montrose  
21 and Remmer, Great American does not owe a duty to defend or  
22 indemnify the Changs as to Kartal's complaint. With respect to the  
23 policies' definition of "property damage," Kartal alleges that the  
24 physical injury or destruction of tangible property manifested as  
25 early as 2002, when Kartal first started losing customers due to  
26 the odor caused by the solvent leak. Likewise, the "occurrence" or  
27 "accident" about which Kartal complains happened as early as 2002.  
28 The policies expired in 1983, about nineteen years prior to the  
events that could potentially trigger coverage.

1           The Changs argue that Kartal's complaint alleges occurrences  
2 in 1977, including failure to discover the storage tanks and  
3 failure to discover the contamination at the time of the purchase  
4 that proximately caused the property damage. Opp'n at 8. But the  
5 California Supreme Court rejected this same reasoning in Montrose  
6 when it found that the "causative event" does not constitute an  
7 occurrence for the purpose of a similarly worded policy.<sup>6</sup> 10 Cal.  
8 4th at 669. The pertinent question is not when the negligent act  
9 allegedly occurred, but when the third party was allegedly damaged.  
10 See id. In this case, there is no dispute the Kartal alleges that  
11 he was damaged well after the expiration of the policy period.

12           The Changs also argue that the policies provide coverage for  
13 loss of use that occurs "at any time." Opp'n at 9. Specifically,  
14 the policies define property damage as, among other things,  
15 "physical injury to or destruction of tangible property which  
16 occurs during the policy period including the loss of use thereof  
17 at any time resulting therefrom." Zacharias Decl. Ex. 1 at EXH 21.  
18 The Changs' interpretation of this language is unpersuasive. While  
19 the "loss of use" can occur "at any time," it must result from  
20 property damage "which occurs during the policy period." In this  
21 case, Kartal could not have possibly suffered property damage  
22 during the policy period because he leased the Property over a  
23 decade after the policy period's expiration. Even if the Changs

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24 <sup>6</sup> Contrary to the Changs' suggestion, State v. Continental  
25 Insurance Co., 55 Cal. 4th 186 (Cal. 2012), does not hold  
26 otherwise. See Opp'n at 9. Continental Insurance stands for the  
27 proposition that an insurer may be held liable for ongoing property  
28 damage that commenced prior to the policy period as long as some of  
the continuous property damage occurred during the policy period.  
55 Cal. 4th at 199-200. In this case, there is no evidence that  
any of the property damage alleged occurred during the Great  
American policy period.



1 suffered some property damage from the leaking storage tanks during  
2 the policy period, the policies only provide coverage for damage to  
3 third parties.<sup>7</sup>

4 For these reasons, the Court finds that Great American does  
5 not have a duty to defend or indemnify as to Kartal's complaint.

6 **E. Duty to Pay Costs Incurred Prosecuting Cross-Complaints**  
7 **in the Kartal Action and Seeking Recovery from the**  
8 **Storage Tank Fund**

9 Next, the Court must determine whether Great American must pay  
10 the costs incurred by the Changs in pursuing cross-complaints  
11 against various third parties in the Kartal Action or seeking  
12 recovery from the Storage Tank Fund. The Changs' arguments in  
13 favor of finding a duty here are unpersuasive.

14 First, the Changs argue that Great American is obligated to  
15 fund their cross-complaints because they are an essential part of  
16 the Changs' defense in the Kartal Action. Opp'n at 10. However,  
17 under California law, an insurer does not have a duty to prosecute  
18 a counterclaim or a cross-complaint on behalf of the insured absent  
19 some contractual provision requiring such action. See James 3  
20 Corp. v. Truck Ins. Exch., 91 Cal. App. 4th 1093, 1105-06 (Cal. Ct.  
21 App. 2001). The Changs have pointed to no such contractual  
22 provision. In any event, as discussed in Section IV.C supra, Great  
23 American does not owe the Changs a duty to defend or indemnify with  
24 respect to Kartal's claims against them.

25 \_\_\_\_\_  
26 <sup>7</sup> The Changs argue that the definition of "property damage" used by  
27 Great American in policies issued after 1993 shows that their  
28 interpretation is correct. Surreply at 8. As an initial matter,  
the Court is only concerned with the language in the policies at  
issue. Further, even if the revised language were used in the  
relevant policies, the Court would reach the same conclusion.

1           The Changs also argue that the California Supreme Court's  
2 decision in Ameron International Corporation v. Insurance Co., 50  
3 Cal. 4th 1370 (Cal. 2010), requires Great American to provide  
4 coverage.<sup>8</sup> Opp'n at 12. The Court disagrees. In Ameron, the  
5 Supreme Court held that administrative adjudicative proceedings  
6 before an administrative law judge, which involved twenty-two days  
7 of trial, numerous witnesses, and substantial evidence, constituted  
8 a "suit" triggering an insurer's duty to defend. Ameron, 50 Cal.  
9 4th at 1374. As the Changs point out, Ameron could be construed as  
10 "emphasizing form over substance." However, nothing in that  
11 opinion suggests that an insurer has a duty to fund a cross-  
12 complaint or any other type of offensive action by an insured for  
13 contribution against a third party.

14           Finally, the Changs argue that Great American has a duty to  
15 fund their action against the Storage Tank Fund because Great  
16 American "voluntarily and in writing" agreed to advance the Changs'  
17 costs in that action. Opp'n at 12-13. However, as the Changs  
18 concede, Great American advanced those costs under a full  
19 reservation of rights. See Opp'n at 13. An insurer does not owe a  
20 duty to defend merely because it provides a defense under a  
21 reservation of rights. In fact, an insurer may later seek  
22 reimbursement from the insured for defending claims that are not  
23 even potentially covered. See Buss, 16 Cal. 4th at 48.

24 ///

25 \_\_\_\_\_  
26 <sup>8</sup> The Changs cite Ameron International Corp. v. Insurance Co., 150  
27 Cal. App. 4th 1050 (Cal. Ct. App. 2007), the unpublished opinion by  
28 the California Court of Appeal that was later reversed by the  
California Supreme Court; however, they appear to be referring to  
the California Supreme Court opinion.

1           Accordingly, the Court finds that Great American does not owe  
2 the Changs a duty to defend or indemnify with respect to their  
3 cross-complaints against third parties in the Kartal Action or  
4 their action against the Storage Tank Fund.

5           **F. Duty to Defend and Indemnify as to the Cross-Complaints**  
6           **Filed by Christopher Chang, Yamaguchi, and Lee**

7           Next, the Court considers whether Great American has a duty to  
8 defend or indemnify the Changs as to the cross-complaints filed  
9 against them by Christopher Chang, Yamaguchi, and Lee in the Kartal  
10 Action. As discussed above, the policies obligate Great American  
11 to defend "any suits against the [Changs] seeking damages," and to  
12 pay all sums "the [Changs] shall become legally obligated to pay as  
13 damages." Great American argues that the cross-complaints do not  
14 trigger coverage because they do not seek affirmative recovery from  
15 the Changs. MSJ at 20. Rather, according to Great American, they  
16 merely seek to reduce any liability the cross-complaintants may be  
17 found to have to the Changs in the Kartal Action. Id.

18           Great American relies on the California Court of Appeal's  
19 decision in CDM Investors v. Travelers Casualty and Surety Co., 139  
20 Cal. App. 4th 1251 (Cal. Ct. App. 2006). MSJ at 21. That case  
21 concerned alleged contamination on a commercial property owned by  
22 the plaintiffs. CDM, 139 Cal. App. 4th at 1257. After the State  
23 Water Board ordered the plaintiffs to test the property for  
24 pollutants, the plaintiffs sued their former tenants under CERCLA  
25 to apportion liability for response costs. Id. at 1266. The  
26 tenants raised affirmative defenses seeking to apportion  
27 responsibility to plaintiffs. Id. The plaintiffs argued that  
28 those affirmative defenses were the functional equivalent of a

1 counterclaim and that the plaintiffs' insurer had a duty to defend  
2 as to those affirmative defenses. Id. at 1266-67. The court held  
3 that an affirmative defense would only constitute a suit seeking  
4 damages for the purposes of the policy if the affirmative defense  
5 "would unquestionably have been a suit for damages if asserted in a  
6 court of law." Id. at 1269. The court found that the affirmative  
7 defenses asserted by the tenants did not trigger coverage because  
8 they were "purely defensive":

9  
10 Here, plaintiffs' tenants had no independent suit  
11 against [plaintiffs] that they sought to reduce to a  
12 monetary value by asserting it as a setoff payment for  
13 the liability that [plaintiffs] was alleging against  
14 them. They had no claim whatsoever and could not have  
15 sued [plaintiffs] for anything. Regardless of  
16 plaintiffs' characterization of a CERCLA proceeding as  
17 an action to apportion liability, the reality of CDM's  
18 CERCLA case is that [plaintiffs] sued the tenants for  
19 indemnity as to an obligation imposed upon [them] by  
20 the [State Water] Board and the tenants countered with  
21 an indemnity claim against [plaintiffs]. In this  
22 posture, the tenants' indemnity claim was purely  
23 defensive -- it sought and functioned only to reimpose  
24 upon [plaintiffs] what [plaintiffs] w[ere] already  
25 legally obligated for.

26 Id.

27 Like the affirmative defenses in CDM, the cross-complaints in  
28 this action are almost exclusively defensive. The cross-complaint  
filed by Yamaguchi merely seeks to hold the Changs liable or  
partially liable for any judgments rendered against Yamaguchi. See  
Yamaguchi X-Compl. (praying that the cross-defendants be adjudged  
liable to Yamaguchi for "total," "partial," and "equitable or  
comparative indemnity"). As does the cross-complaint filed by  
Christopher Chang. See C. Chang X-Compl. Lee's cross-complaint is

1 slightly different. In addition to seeking a set-off against the  
2 Changs, Lee asserts "damages in the form of property damage,  
3 contents damage, loss of value, loss of use, loss of rents, repair  
4 costs, and other economic and non-economic damages in an amount  
5 according to proof." Lee X-Compl. at 5. However, since Lee  
6 operated a dry cleaners on the property between 1989 and 1996,  
7 several years after the Great American policy period, these damages  
8 cannot trigger a duty to defend or indemnify under the policies.  
9 See Section IV.D supra.

10 The Changs' opposition brief provides a confused set of  
11 arguments on this issue. The Changs repeatedly concede that  
12 Yamaguchi, Christopher Chang, and Lee cross-complaints are "purely  
13 defensive," but the Changs then go on to argue that these cross-  
14 complaints seek affirmative relief for property damage. Compare  
15 Opp'n at 14-15 with id. at 25. They contend that CDM is  
16 inapposite, but then appear to point out the similarities between  
17 that case and the instant action. Id. at 15. The Changs also  
18 argue, without further explanation, that the cross-complaints  
19 should trigger coverage because they are "an essential part of the  
20 Changs defense in the underlying Kartal action." Id. at 14. Once  
21 again, the Changs urge the Court to place "substance over form,"  
22 but they fail to cite any on-point case law which would support  
23 their position. The Changs' surreply brief does little to clarify  
24 their position. In it, the Changs assert that the cross-complaints  
25 show the potential for coverage, because they do not allege when  
26 the contamination on the property started or stopped. Surreply at  
27 3. However, the Changs again concede that the cross-complaints are  
28 "'defensive' in nature." Id. at 4.

1 For these reasons, the Court finds that Great American does  
2 not have a duty to defend or indemnify as to the cross-complaints  
3 filed by Yamaguchi, Christopher Chang, and Lee.

4 **G. The Changs' Counterclaims for Breach of Contract and**  
5 **Breach of the Covenant of Good Faith and Fair Dealing**

6 Finally, Great American moves for summary judgment on the  
7 Changs' two counterclaims. MSJ at 24-25. Great American reasons  
8 that if the Court finds that Great American does not owe the Changs  
9 a duty to defend or indemnify in any of the underlying actions,  
10 then the Changs cannot possibly show that Great American breached  
11 its duty to defend and indemnify or engaged in bad faith. Id. The  
12 Changs do not appear to dispute this reasoning. They merely argue  
13 that if the Court does find that Great American owes a duty, then  
14 the Court should find that it breached that duty. Opp'n at 16-17.  
15 As Great American has prevailed on all of the issues discussed  
16 above, the Court finds that the Changs cannot succeed on their  
17 counterclaims.

18  
19 **V. CONCLUSION**

20 In sum, the Court finds that the Changs' Great American  
21 insurance policies, which provided coverage against third-party  
22 lawsuits from 1977 to 1983, do not provide coverage for lawsuits  
23 and government actions commenced over twenty years after the  
24 policies' expiration. Accordingly, the Court GRANTS Great  
25 American's motion for partial summary judgment. The Court finds  
26 that Great American is entitled to partial summary judgment of the  
27 following issues:  
28

- 1 • Under the language of its insurance policies, Great American  
2 has no duty to defend or indemnify the Changs with respect to  
3 government orders to address pollution.
- 4 • Under the language of its insurance policies, Great American  
5 has no duty to defend or indemnify the Changs as to the  
6 complaint filed by Kartal in the Kartal Action.
- 7 • Under the language of its insurance policies, Great American  
8 has no duty to defend or pay expenses incurred by the Changs  
9 with respect to cross-complaints the Changs filed against  
10 other parties in the Kartal Action.
- 11 • Under the language of its insurance policies, Great American  
12 has no duty to pay expenses incurred by the Changs in seeking  
13 recovery from the California Underground Storage Tank Fund.
- 14 • Under the language of its insurance policies, Great American  
15 has no duty to defend or indemnify the Changs as to cross-  
16 complaints filed against the Changs in the Kartal Action.
- 17 • Because Great American is entitled to partial summary judgment  
18 of the above issues, the Changs are not entitled to any  
19 recovery from Great American under their counterclaims for  
20 breach of contract and breach of the covenant of good faith  
21 and fair dealing.

22  
23 IT IS SO ORDERED.

24  
25 Dated: June 19, 2013

  
UNITED STATES DISTRICT JUDGE