IN THE SUPREME COURT OF THE STATE OF NEVADA

ZURICH AMERICAN INS. CO., et al. Appellants, vs. IRONSHORE SPECIALTY INS. CO., Respondent.	Case No.: 81428

APPELLANTS' REPLY BRIEF

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Appellants Zurich American Insurance Company and American Guarantee & Liability Ins. Company (collectively "Zurich" or "Appellants") hereby submit the following Reply in connection with this Court's September 11, 2020 Order in which it accepted Certified Questions from the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

The central issue in this case is whether an insurer may decline to defend an insured in a lawsuit based on the contention that no potential for sudden damages to single family homes exists when the allegations asserted as to the homes themselves are silent regarding the timing, scope and extent of the alleged damages. Respondent Ironshore Specialty Ins. Co. ("Ironshore" or "Respondent") seeks to reframe the issue as a dispute between the parties regarding the technical rules regarding policy interpretation and burdens, asking the Court to ignore the context entirely in which the rules are applied.

The decisional law Ironshore cites in its brief as espousing a "majority rule" is inapposite because the decisions generally involved matters where actual evidence existed to affirmatively demonstrate that coverage was excluded. That was not the case here, as in each of the underlying actions, no evidence existed as to the scope, extent and timing of the damages when

Ironshore denied coverage on the basis of its "continuing damage" exclusion.

Stated simply, Ironshore cannot demonstrate whether the damages at issue occurred progressively (over time) or suddenly (at one time) although its policies exclude only the former. Without dispute, the underlying complaints here provided no information regarding the scope, extent and timing of damages, or whether alleged damages were progressive or sudden. Far from serving as a basis to deny coverage, the lack of specific information regarding damages creates a potential for coverage and obligates Ironshore to defend its insureds. See *Century Surety Company v. Andrew*, 134 Nev. 819 (2018); *Benchmark Ins. Co. v. Sparks*, 127 Nev. 407 (2011); see also *Cincinnati Specialty Underwriters Ins. Co. v. Red Rock Hounds*, 2021 WL 53339 (D. Nev. 2021,) holding that insurance policies are construed broadly so as to afford the greatest possible coverage to the insured; *United National Ins. Co. v. Frontier Ins. Co., Inc.*. 120 Nev. 678 (2004), holding that any doubt about whether the duty to defend arises is resolved in favor of the insurer owing a duty to defend.

And indeed, the rules regarding the duty to defend are rational, as at the outset of a case – when a defense is needed by an insured – little can be known about damages as there has been no development of facts and no

discovery. As the courts have long held, a carrier appropriately denies the duty to defend only where undisputed, dispositive facts establish the absence of a potential for coverage under the policies. That did not exist in any of the underlying cases at issue here.

As for the use of extrinsic evidence, this Court has already held that an insurer may not rely on facts outside the complaint in assessing its initial duty to defend, but instead may only do so in an effort to terminate any duty otherwise owed with evidence that is both uncontroverted and dispositive regarding coverage. See *Interstate Fire & Casualty Ins. Co. v. First Specialty Ins. Co.*, 2020 WL 5107612 (D. Nev. 2020), citing *Andrew*, *supra*, in noting that facts outside of the complaint cannot justify an insurer's refusal to defend its insured. Under this standard, an insurer must initially provide a defense if a potential for coverage exists and may only cease defending if it possesses evidence that conclusively demonstrates that no potential for coverage exists. *Andrew*, *supra*; see also *OneBeacon Ins. Co. v. Probuilders Specialty Ins. Co.*, 2009 WL 2407705 (D. Nev. 2009).

While Ironshore opines that a different standard should apply as to contribution claims between insurers, it cites to no law for this view while seeking to undercut this Court's ruling in *Andrew* (as well as *Interstate Fire*). As no differing rule exists, Ironshore's consideration of extrinsic evidence in

refusing to defend was and is both improper and contrary to law.

DISCUSSION

A. This Court May Consider Any Issue It Deems Appropriate.

In requesting assistance from the Court, the Ninth Circuit explained:

> Our phrasing of the questions should not restrict the Court's consideration of the issues involved. **The Court may rephrase the questions as it sees fit in order to address the contentions of the parties**. If the Court agrees to decide these questions, we agree to accept its decision. We recognize that the Court has a substantial caseload, and we submit these questions only because of their significance to actions brought to enforce an insurer's duty to defend under Nevada insurance law. (emphasis added)

Zurich American Ins. Co, v. Ironshore Spec. Ins. Co., 964 F.3d 804 (9th Cir. 2020).

The ability of the Nevada Supreme Court to reframe certified questions presented to it is well established, and therefore beyond meaningful dispute. See *Chapman v. Deutsche Bank Nat'l Trust Co.*, 129 Nev. 314 (2013); *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 125 Nev. 66 (2009). Accordingly, and notwithstanding Ironshore's protestations otherwise, this Court may frame the issue presented by the parties' appeals in the manner it deems appropriate.

B. The Core Issue In Dispute is Whether Ironshore Can Meet Its Burden Of Demonstrating No Potential For Coverage Exists.

By characterizing the parties' appeals to the Ninth Circuitas simply a

dispute regarding generalized, non-specific rules as to burdens of proof, Ironshore effectively ignores the context of the dispute (legally and factually) for which each side requested relief.[1] Only with the benefit of context can the issues to be adjudicated be properly framed.

First, case law regarding determination of the duty to defend is clear and well-established. An insurer must defend its insured whenever the insurer ascertains facts which give rise to the potential of coverage under an insurance policy with any doubt requiring the insurer to provide a defense. *Benchmark Ins. Co. v. Sparks*, 127 Nev. 407 (2011); *United National Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 686-687 (2004) [an insurer must defend its insured unless it can establish there is no potential for coverage under the insurance policy].

Second, the language of an insurance policy must be interpreted in a manner which provides to an insured the "greatest possible" coverage. *National Union v. Reno's Executive Air*, 100 Nev. 360, 365 (1984). Clauses providing coverage are broadly interpreted "so as to afford the greatest

[1] As pointed out in Appellants' Opening Brief, a separate appeal remains pending before the Ninth Circuit in which Ironshore contends the trial court erred in repeatedly holding that Ironshore improperly disclaimed coverage based on the same policy language at issue in this case and an nearly-identical set of facts and circumstances. See *Zurich American Ins. Co. v. Ironshore Specialty Ins. Co.*, 962 F.3d 1189 (9th Cir. 2020).

possible coverage to the insured, [and] clauses excluding coverage are interpreted narrowly against the insurer." *Ibid*. Any exclusion must be narrowly tailored so that it "clearly and distinctly communicates to the insured the nature of the limitation, and specifically delineates what is and is not covered." *Griffin v. Old Republic Ins. Co*., 122 Nev. 479, 485 (2006) (internal quotation marks omitted). To preclude coverage under an insurance policy's exclusion provision, an insurer must (1) draft the exclusion in "obvious and unambiguous language," (2) demonstrate that the interpretation excluding coverage is the only reasonable interpretation of the exclusionary provision, and (3) establish that the exclusion plainly applies to the particular case before the court. *Powell v. Liberty Mut. Fire Ins. Co*., 127 Nev. 156, 164 (2011); *Century Sur. Co. v. Casino W., Inc*., 130 Nev. 395, 398–99 (2014). Any ambiguity or uncertainty in an insurance policy must be resolved against the insurer and in favor of the insured. *Powell*, 127 Nev. at 163; *Fed. Ins. Co. v. Am. Hardware Mut. Ins. Co*., 124 Nev. 319, 322 (2008).

Finally, the duty to defend is based solely on the allegations of the Complaint and undisputed extrinsic evidence available at the time of tender as compared to the policy. *United National*, supra, 120 Nev. at 686-687; *First Financial Ins. Co. v. Scotch 80's Limited, Inc*., 2009 U.S. Dist. Lexis

54982 (D. Nev. 2009) [ascertaining whether a duty to defend exists is achieved by comparing the allegations of the Complaint with the terms of the policy]. This decisional law is clear, straight forward, and weighted in favor of a finding of a duty to defend where any potential for coverage exists.

Here, the factual framework giving rise to the parties' appeals is straight forward and largely undisputed. Ironshore issued insurance policies that extend coverage through a standard, "occurrence" based insuring agreement, under which coverage turns on when damage occurs:

> a. We will pay those sums that the Insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the Insured against any "suit" seeking those damages. . . .
>
> . . .
>
> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or" property damage" is caused by an "occurrence that takes place in the "coverage territory";
>
> (2) The "bodily injury" or "property damage" occurs during the policy period . . .
>
> . . .
>
> "Occurrence" means an accident. including continuous or repeated exposure to substantially the same general harmful conditions.

> . . .
>
> "Property damage" means:
>
> a. Physical injury to tangible property, including all resulting loss of use of that property . . .

See AA0219, 0231.

As to the underlying matters at issue, it is undisputed that allegations in each of the complaints raised the potential of "property damage," caused by an "occurrence," taking place during the periods the Ironshore policies were in effect.[2] In arguing that it was excused from providing a defense notwithstanding the potential for coverage, Ironshore relies on the following exclusion:

> This insurance does not apply to any “bodily injury” or “property damage”:
>
> 1. which first existed, or is alleged to have first existed, prior to the inception of this policy. “Property damage” from “your work”, or the work of any additional insured, performed prior to policy inception will be deemed to have first existed prior to the policy inception, unless such “property damage” is sudden and accidental and takes place within the policy period . . .

AA 0245. Ironshore's duty to defend, therefore, turns on whether alleged damages resulting from construction defects necessarily occurred

[2] Given the concession that damages potentially caused by an "occurrence" were alleged, the separate requirement that any potential damages be accidental has necessarily been met.

progressively and over time or could have occurred suddenly.

Given the well-established rules regarding the determination of the duty to defend and policy interpretation, here, the question of whether Ironshore owed a defense in the underlying disputes should be framed as a question as to whether a potential existed that damages fell within the insuring agreement and outside the scope of the exclusion, limiting that coverage. Accordingly, if a potential exists that the damages could have occurred during the policy period and could have occurred suddenly, a defense was necessarily owed.

It is undisputed that in connection with each of the underlying matters at issue in this case, no allegations were asserted regarding the timing and extent of the damages claimed as the pleadings instead simply include broad allegations of a myriad of defects causing damages. Stated otherwise, the parties agree that none of the underlying complaints include specific allegations regarding the timing and extent of the damages caused by the alleged defects so as to discern whether the damages at issue occurred progressively over time or suddenly.

Ironshore attempts to seize on the absence of specific allegations in the complaint to argue that no potential for coverage existed. However, it is this absence of specific allegations which creates the potential that the

damages could have occurred suddenly. A possibility of coverage creates a defense duty. Here, the possibility that the damages could have occurred suddenly, creates a potential for coverage and a corresponding duty to defend -- an outcome the trial court reached in connection with a series of rulings that are at issue in the other, related appeal pending before the Ninth Circuit. See *Assurance Co. of America v. Ironshore Spec. Ins. Co.*, 2016 WL 1169449 (D. Nev. 2016); *Assurance Co. of America v. Ironshore Spec. Ins. Co.*, 2015 WL 4579983 (D. Nev. 2015); *Assurance Co. of America v. Ironshore Spec. Ins. Co.*, 2014 WL 4829709 (D. Nev. 2014).

KB Home Jacksonville, LLC v. Liberty Mutual Fire Ins. Co., 2019 WL 4228602 (M.D. Fl. 2019) is instructive here. In that case, the court found that where pleadings were silent as to the scope, timing and extent of stucco cracks, a potential for coverage existed. The court explained:

> Here, the plaintiffs allege in the Underlying Complaints that "[s]ubsequent to construction of the Home, certain design and construction deficiencies were observed at the Home, which include, but are not limited to, an inadequately and improperly installed stucco system.". . . [T]he Underlying Complaints are silent as to when FSP's allegedly faulty workmanship began to physically damage other parts of the Project or when that alleged property damage was discovered. Nor are there any allegations regarding the nature of the property damage caused by FSP's allegedly faulty workmanship from which this Court could infer that the property damage was more likely gradual and nonaccidental, as opposed to sudden and accidental. As such, the Court finds that the CP Exclusion does "not preclude all arguable or possible coverage under the Ironshore Policy."

[citations omitted]

> Because the Court is required to resolve any doubts as to a duty to defend in favor of the insured, and because an insurer must defend if the allegations against the insured allege facts potentially and even only partially within coverage, see *United Nat'l*, 99 P.3d at 1158, the Court determines that Ironshore has a duty to defend KB Home in the Underlying Litigation with respect to the 83 Underlying Complaints at issue in the Motion.

Id. at p 9.[3]

As in *KB Home*, the pleadings at issue in this matter likewise do not describe the type and extent of damage arising from the defects necessitating repairs, nor do they comment on when physical injury to the property occurred. Based on this lack of specificity, the court in *KB Home* concluded some the damages could have occurred suddenly so as to trigger a duty to defend.

The same logic applies to the claims at issue in this case. In the absence of any specificity as to the scope, extent and timing of the damages at issue, Ironshore cannot demonstrate if the damages occurred progressively over time or suddenly. In the absence of specific allegations as to how the damages occurred, a potential necessarily exists that the damages could have

[3] While Ironshore suggests that the court in *KB Home* employed the "minority rule" in an effort to attack the court's rationale, the opinion itself reflects that the only rule the Court followed was that a duty to defend is owed if a potential for coverage exists - the same rule that governs the instant dispute.

occurred suddenly. By virtue of this potential, Ironshore owed a duty to defend.

C. The Trial Court Erred In Its Analysis.

In adjudicating the parties' motions for summary judgment, the trial court incorrectly framed the issue as follows:

> The plaintiffs maintain that the allegations against the insureds in the underlying actions create a potential for coverage triggering Ironshore's duty to defend under its policy. They reason that although the complaints did not allege that any sudden accidents happened, they also did not expressly state there were no such accidents. In short: because the insureds were sued for causing property damage, and because causing property damage could, in theory, include an accident—there is a potential for coverage triggering the duty to defend.

AA 5047.

Given that Ironshore concedes that damages because of "property damage" potentially caused by an "occurrence" has been alleged in connection with each of the underlying matters, the dispute between the parties is not based on whether accidents have been alleged consistent with controlling law. See *United National Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678 (Nev. 2004), holding that allegations of property damage arising from alleged negligence may be accidental and therefore potentially covered so as to trigger a duty to defend. Rather, the dispute between the parties centers on whether the accidents that were alleged were limited to damages that

were only continuous and progressive in nature or whether the damages resulting from the accidents could have occurred suddenly.

Stated otherwise, the issue to be adjudicated is whether all of the alleged damages were, beyond doubt, “continuous” and, therefore, did not occur suddenly. Again, Ironshore denied coverage based on its application of an exclusionary endorsement in the Ironshore policies, entitled, “Continuous or Progressive Injury or Damage Exclusion,” which states that the policies do not apply to property damage which first existed or is alleged to have first existed prior to the inception of the policy. It continues to describe what constitutes a continuous or progressive damage. To the extent Ironshore cannot eliminate all possibility that coverage exists, it cannot deny coverage, and where the pleadings are silent regarding whether damages fall within the endorsement’s description of “continuous” damage, Ironshore cannot meet that burden.

The trial court's conclusion that "there is not even the suggestion of an accident in any of the complaints" reflects a misunderstanding regarding the nature of construction defect claims as well as controlling law. See *United National, supra*. It is undisputed that the underlying matters alleged that damages had potentially occurred during the period the Ironshore policies were in effect (generally 2010-2011). Further, the fact that the allegations

asserted in the underlying matters are vague as to the scope, extent and timing of damages that allegedly had occurred in the relevant timeframe does not defeat coverage, but rather highlights why a potential for coverage exists.

Indeed, an Ironshore adjuster admitted that Ironshore performed only a limited investigation into the underlying actions and conceded that the insurer could not rule out that damages in those actions could have occurred suddenly:

> Q. . . . When you say the endorsement applies, how do you rule out that the damages are not sudden and accidental?
>
> A. We don't rule [it] out. . . .

AA 1791:22-1793:4. Common sense dictates that a defect in a product or structure can either lead to damages slowly over time or damages that occur suddenly. Here, the pleadings do not allege that the damages were "slowly caused" by defects. Nothing in the pleadings, therefore, leads to the conclusion that damages could not occur suddenly. And Ironshore makes no attempt to prove otherwise.

Courts from other jurisdictions have held that where a policy exclusion did not apply to damages which were “sudden and accidental,” a duty to defend arose where the pleading were silent on the issue of timing; those courts did not frame the issue in terms of a shifting burden based on

rigid rules regarding application of an "exception" to an exclusion. In *Newmont USA Ltd. v. American Home Assurance Co.*, 676 F.Supp.2d 1146 (E.D. Wash 2009), for example, the court examined two similarly-worded pollution exclusions which stated:

> "This Insurance does not apply: . . .
>
> (f) to bodily injury or property damage arising out of the discharge . . . or escape of smoke, . . . contaminants or pollutants into or upon land, the atmosphere . . . or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental."

Id. at 1152. The court analyzed the exclusion under both Washington and New York law, noting that any potential for coverage created a duty to defend. The court did not split the provisions of the exclusion into parts, holding part of the provision was an "exception" that flipped the burden of proof to the insured. The court reiterated common rules regarding the duty to defend, namely, that if a complaint is ambiguous, it must be construed liberally be "construed liberally in favor of triggering the insurer's duty to defend," that "when an insurer is in doubt as to its obligation to defend, insurers should not desert their policyholders but agree to defend under a reservation of rights," and that "an insurer may only be relieved of its duty defend if the claim alleged in the complaint is clearly not covered by the policy." *Id*. at 1157-58. Finding that the "complaint did not include any

specific facts regarding the alleged discharges or how the discharges occurred," the court held that a duty to defend arose as the complaint contained "no allegations . . . that would rule out the potential for coverage and the possibility of facts demonstrating that the contamination at issue was sudden and accidental." *Id*. at 1159-1160.

The same analysis should apply here where the same, common rules regarding the determination of the duty to defend are established. A potential that property damage occurred during the policy period and was not continuous and progressive, beginning before the applicable policy periods, gave rise to a duty to defend. If an insurer concedes that it is unknown whether the alleged damages were continuous and progressive or occurred suddenly, a defense is owed. As the construction defects which were alleged in connection with each of the underlying matters could have caused a myriad of damages that occurred suddenly, Ironshore owed a duty to defend.

D. The Real Majority Rule That Governs This Dispute Is That An Insurer Must Provide A Defense When A Potential For Coverage Exists.

Without question, an insurer's obligation to defend is construed expansively and broadly. See *Century Surety Company v. Andrew*, 134 Nev. 819 (2018); *Benchmark Ins. Co. v. Sparks*, 127 Nev. 407 (2011); see also *Cincinnati Specialty Underwriters Ins. Co. v. Red Rock Hounds*, 2021 WL

53339 (D. Nev. 2021). Any doubt about whether the duty to defend arises is resolved in favor of the insurer owing a duty to defend. *United National Ins. Co. v. Frontier Ins. Co., Inc.*. 120 Nev. 678 (2004).

In an effort to distance itself from this governing principle, Ironshore seeks to divert this Court's attention to decisional law in other jurisdictions that, according to Ironshore, bear out a majority rule and a minority rule regarding burdens. In so doing, Ironshore provides no context regarding this decisional law and how it applies to a case in which the allegations regarding the scope, extent and timing of the alleged damages are silent.

As a threshold issue, the cases Ironshore relies upon are inapposite as none address the circumstance of whether an insurer owes a duty to defend when the allegations are silent as to the scope, extent and timing of property damage. Rather, in each case, the scope, extent and timing of the damages were known.

Further, all but a few of the cases fail to address the issue of potentially sudden damage that is the crux of the dispute in this case. As to the few that do address this issue however, each involved circumstances where the allegations were clear regarding the scope, extent and timing of the damages – a sharp contrast with the facts here. In particular:

- *Schilberg Integrated Metals Corp. v. Continental Cas. Co.*,819

A.2d 773 (Conn. 2003) , parties stipulated that soil contamination at issue was progressive as it arose from the processing of the insulation from the wires the resulted in the release of hazardous substances.

- *Northville Industries Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 679 N.E.2d 1044 (N.Y. 1997), damages involved progressive release of nearly 2,000,000 gallons of gasoline from the insureds' facilities into the groundwater.

- *Plasticolors, Inc. v. Cincinnati Ins. Co.*, 620 N.E.2d 856 (Ohio 1992), damages related to clean up costs of hazardous substances, pollutants and contaminants that occurred progressively over time and were found on a site requiring remediation.

- *Employers Ins. of Wausau, A Mutual Company v. Tektronix, Inc.*, 156 P.3d 105 (Or. 2007), damages arose from the processing of waste that resulted in contaminants progressively leaching into the soil and groundwater

Unlike each of these cases, Ironshore is unable to demonstrate whether the damages at issue in this matter occurred progressively over time or suddenly. In the underlying actions at issue here, a window defect can give rise to glass that cracks suddenly. A roof defect can give rise to framing members that break suddenly. A foundation defect can cause tile to

crack suddenly. A drainage defect can give rise to a room that floods suddenly. Unable to rule out sudden and accidental damages, Ironshore had to defend as a potential for coverage existed.

E. This Court Has Addressed The Use Of Extrinsic Evidence.

This Court has already held that an insurer may not rely on facts outside the complaint in assessing its initial duty to defend, but instead may only do so in an effort to terminate any duty otherwise owed with evidence that is both conclusive and dispositive regarding coverage. *Century Surety Company v. Andrew*, 134 Nev. 819 (2018); see also, *Interstate Fire & Casualty Ins. Co. v. First Specialty Ins. Co.*, 2020 WL 5107612 (D. Nev. 2020), citing *Andrew*, *supra*. Under the ruling in *Andrew*, an insurer must initially provide a defense if a potential for coverage exists and may only cease defending if it possesses evidence that conclusively demonstrates that no potential for coverage exists. *Andrew*, *supra*; see also *OneBeacon Ins. Co. v. Probuilders Specialty Ins. Co.*, 2009 WL 2407705 (D. Nev. 2009).

Ironshore opines that a different standard should apply in a dispute between insurers. In so doing, Ironshore seeks to create a scenario in which an insurer that violates existing law faces no consequences for doing so if another insurer acts properly and complies with the law. If adopted, insurers will be motivated to play a game of "wait and see," delaying determinations

regarding the duty to defend to see if another insurer defends and insulates them from complying with the law.

The duty to defend is based on the information available at the time of tender. *United National Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 686-687 (2004). If the information creates doubts regarding whether a potential for coverage exists, a defense is owed. *Century Surety Company v. Andrew*, 134 Nev. 819 (2018).

Ironshore 's reliance on *Monticello Ins. Co. v. Essex Ins. Co.*, 162 Cal.App.4th 1376 (Cal. 2008) is misplaced. In that case, coverage was sought by a putative additional insured under a policy an insurer issued to a subcontractor which required a predicate showing of alleged damages caused by the subcontractor's work. In holding that the putative additional insured had not met this burden, the Court held that the party seeking coverage could not rely upon extrinsic evidence (a defect list) that was never provided at the time of tender.

In this case, no one is requesting that Ironshore consider after-acquired evidence in reconsidering its coverage denial. Instead, Zurich contends that Ironshore failed to meaningfully consider the evidence available to it at the time of tender - namely broad and expansive allegations of damages for which the allegations were silent as to scope, extent and

timing of the damages.

Ironshore's separate contention that it conducted a thorough and complete evaluation of coverage is belied by the record before this Court. Devoid from the record is any evidence of an investigation as to the scope, extent and timing of the damages. Rather in his deposition, the Ironshore adjuster testified to performing very little investigation:

> Q. Let me make this representation. Every denial that's at issue in this case is based upon this endorsement. So I'll represent to you that this is the centerpiece of this litigation.
>
> A. Okay.
>
> Q . . . So my question to you, given that this document and this endorsement is at issue in every claim issue in this case, is what do you all do to pin down whether the property damage is sudden and accidental?
>
> MR. MORISON: Objection. Vague and ambiguous. Overbroad.
>
> THE WITNESS: I don't think we do.
> BY MR. REEVES: Q Do you do anything?
>
> A. Yes. I think we determine -- we look at the first notice of loss.
>
> Q. Uh-huh.
>
> A. We determine when the work was performed. We obtain subcontract agreement. We generally speak with our insured, if that's possible. Find out when they did the work. And if the work was performed prior to the policy, then the endorsement applies.
>
> Q. Okay. When you say the endorsement applies, how do you

rule out that the damages are not sudden and accidental?

A. We don't rule out. In our denial letter, we ask if there's any evidence of sudden and accidental damage during the policy period.

Q. What if it's unknown?

A. Then it doesn't exist.

AA 1791:22-1793:4. The fact that the scope, extent and timing of the damages at issue are unknown does not mean that these factors do not exist. Rather, the fact that these factors are unknown necessarily means that a potential exists that the damages could have occurred suddenly, an issue that Ironshore neither investigates nor considers.

At bottom, the dispute between the parties centers around whether the alleged damages all occurred progressively over time or could have occurred suddenly. Given that this issue was never investigated and remains unknown, a potential exists so as to trigger a duty to defend.[4]

CONCLUSION

In responding to the first certified question, it is respectfully submitted

[4] While the issue is not before this Court, Ironshore's comments regarding the standard regarding indemnity are incorrect. When a recalcitrant insurer improperly denies coverage, the sums a participating insurer incurs as to defense and settlement are presumed both reasonable and covered with the recalcitrant insurer bearing the burden to prove otherwise as to the latter issue. See *Admiral Ins. Co. v. Illinois Union Ins. Co.*, 2010 WL 11579447 (D. Nev. 2010); citing *Safeco Ins. Co. of America v. Superior Court*, 140 Cal.App.4th 874 (Cal. 2006).

that where a potential for coverage is initially held to exist, an insurer seeking to disclaim coverage bears the burden of proving that coverage is conclusively excluded. If an insurer cannot meet its burden of proving that coverage is conclusively excluded, a defense is owed.

As to the second certified question, this Court has already held that an insurer may not rely on facts outside the complaint in assessing its initial duty to defend, but instead may only do so in any effort to terminate any duty otherwise owed with evidence that is both uncontroverted and conclusive as to coverage. A contrary rule for recalcitrant insurers in contribution cases addressing the duty to defend is nonsensical and would undercut this Court's rationale for barring the use of extrinsic evidence.

Dated: March 12, 2021

MORALES FIERRO & REEVES

By: /s/ William C. Reeves
William C. Reeves
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

I certify that I have read the Appellants' Reply Brief and, to the best of my knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose.

I certify that the brief complies will all applicable Nevada Rules of Appellate Procedure, including the requirement that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number of the appendix where the matter relied on is to be found. I certify that the brief complies with the formatting requirements of Rule 32 (a) (4)-(6) and with the type-volume limitation stated in Rule 32 (a) (7). The brief contains 5,332 words, excluding those sections exempted from the computation of type-volume limitation by NRAP 32(a)(7)(C). I understand that I may be subjected to sanctions in the event that the brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 12th day of March, 2021.

/s/ William C. Reeves

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PROOF OF SERVICE

I, William Reeves, declare that:

I am over the age of eighteen years and not a party to the within cause.

On the date specified below, I served the following document:

APPELLANTS' REPLY BRIEF

Service was effectuated in the following manner:

_____ BY FACSIMILE:

XXXX BY ELECTRONIC MAIL pursuant to the Court's electronic filing protocol

_____ BY MAIL: By placing a true copy thereof enclosed in a sealed envelope addressed as follows:

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 12, 2021

William Reeves