No. 89228

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORTH RIVER INSURANCE COMPANY,

Appellant,

v.

JAMES RIVER INSURANCE COMPANY,

Appellee.

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Certification from the United States Court of Appeals for the Ninth Circuit – Case No. 23-55757

APPELLANT'S OPENING BRIEF

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons or entities described in NRAP 26.1(a) that must be disclosed. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal. Appellant The North River Insurance Company, a New Jersey corporation, is wholly owned by United States Fire Insurance Company, a Delaware corporation, which is wholly owned by Crum & Forster Holdings Corp., a Delaware corporation, which is wholly owned by Fairfax (US) Inc., a Delaware corporation, which is substantially owned by FFHL Group Ltd., a Canadian company, which is wholly owned by Fairfax Financial Holdings Limited, a Canadian public company. The North River Insurance Company was represented in the related district court proceeding by Blaise S. Curet and Sharon Lewis of Sinnott, Puebla, Campagne & Curet, APLC. The North River Insurance Company was represented in the ensuing appeal in the Ninth Circuit by Sabrina S. Strong, Zoheb P. Noorani, and Jessica A. Snyder of O'Melveny & Myers LLP. Those same attorneys, along with J. Colby Williams and Philip R. Erwin of Campbell & Williams, represent Appellant before this Court.

Dated: December 12, 2024

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JURISDICTIONAL STATEMENT

The question certified to this Court by the Ninth Circuit Court of Appeals is a pure legal question of Nevada law over which this Court has jurisdiction pursuant to its grant of review under Nevada Rules of Appellate Procedure 5(a).

ROUTING STATEMENT

The Supreme Court must retain this case under NRAP 17(a)(6) as it involves a question of law certified under Rule 5.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Ninth Circuit Court of Appeals certified the following question to this Court: Under Nevada law, can an excess insurer state a claim for equitable subrogation against a primary insurer where the underlying lawsuit settled within the combined policy limits of the insurers?

STATEMENT OF THE CASE[1]

This is a dispute between an excess insurer, Appellant The North River Insurance Company ("North River"), and a primary insurer, Appellee James River Insurance Company ("James River"), over James River's failure to settle a claim against the parties' insured for an amount within James River's $1 million policy limits. North River alleges that James River breached its duty to settle, ultimately

[1] Unless otherwise noted, this brief omits internal quotation marks and original alterations and adds any emphasis reflected in quoted passages. The facts about this case presented here were pleaded by Appellant The North River Insurance Company in the underlying action in the Central District of California, and the District Court was, therefore, required to accept them as true for purposes of deciding a motion to dismiss. *See Benavidez v. Cnty. of San Diego*, 993 F.3d 1134, 1144 (9th Cir. 2021).

subjecting the insured to a settlement demand five times those limits. And when James River then refused to pay anything more than $1 million, North River stepped in and—involuntarily—paid the remaining $4 million to protect the insured from an even costlier potential judgment at trial. North River now seeks to recover its payment from James River.

As the primary insurer, James River agreed to defend the parties' insured against claims for negligence and wrongful death stemming from a shooting at an apartment complex in Nevada. During that underlying litigation, James River had multiple opportunities to fulfill its obligation to reasonably settle the claim within the $1 million limits of James River's insurance policy. Over the course of two and a half years, the underlying plaintiffs made three settlement demands on James River for an amount at or below the $1 million primary policy limits. Despite a factual record that put James River on notice that there was a substantial likelihood of an adverse verdict and a judgment greater than $1 million, James River refused to effectuate a prompt, fair, and equitable settlement. As the discovery record developed and the parties proceeded toward trial, the underlying plaintiffs increased their demand to $5 million.

That new demand implicated North River's $10 million excess policy. James River's failure to protect the insured was now subjecting both insurers to potential liability for failure to settle. After James River belatedly agreed to

contribute its full limits of $1 million, North River then paid the $4 million balance under a full reservation of rights, including the right to seek reimbursement of its payment.

North River brought this action to recoup its $4 million payment from James River, which chose to gamble with North River's policy limits rather than settle the claim within its own policy limits when it had the chance. On those grounds, North River asserted a cause of action against James River in the Central District of California for breach of the implied covenant of good faith and fair dealing—a claim the insured could have brought itself had North River not responded appropriately and paid $4 million to the underlying plaintiffs on the insured's behalf. Because the claim belonged to the insured but for North River's payment, North River bases its action on the doctrine of equitable subrogation.

The District Court in the Central District of California dismissed North River's complaint with prejudice—on a motion to dismiss and without oral argument—based on an unpublished decision of a divided Nevada Supreme Court. In that nonbinding decision, *St. Paul Fire & Marine Ins. Co. v. Nat'l Union Fire Ins. Co.,* 2022 WL 17543613 (Nev., Dec. 8, 2022) ("*St. Paul*"), the Court—on an appeal from a motion for summary judgment—denied an excess insurer's subrogation claim against a same-level excess insurer because it found that the insured suffered no damages where the insurers' payments were sufficient to settle

the underlying claim within their collective policy limits. In a related appeal stemming from the same incident at issue in *St. Paul*, a three-justice panel applied the holding in *St. Paul* to bar the excess insurer's subrogation claim against the primary insurer. *Aspen Specialty Ins. Co. v. Eighth Judicial Dist. Court of Nev*., 2023 WL 3185274 (Nev., Apr. 28, 2023) ("*Aspen*"). Without allowing for discovery or an assessment of whether any other form of harm could be asserted (beyond the increased amount paid to settle the claim), the District Court in the Central District of California relied on the unpublished *St. Paul* decision to find that North River's claim is barred as a matter of law because the settlement amount did not exceed the insured's collective policy limits.

Although the Nevada Supreme Court has never decided whether it would recognize equitable subrogation among insurers in a published opinion, a well-established body of Nevada law makes plain that equitable subrogation should be recognized between insurers even where the claim settles within collective policy limits. Equitable subrogation substitutes the parties as if the excess insurer had never stepped in to pay the loss. *See Arguello v. Sunset Station, Inc*., 127 Nev. 365, 368–69, 252 P.3d 206, 208 (2011). The relevant inquiry is whether the insured could have brought a claim against the primary insurer if the excess carrier had not paid. *See id.* If an insurer's payment (here, the excess carrier's payment) obviates the loss to the insured and thereby eliminates any basis for a claim against

a third party to which the paying insurer can subrogate, an insurer could never assert a subrogation claim. *See Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co*., 182 Cal. App. 4th 23, 34, 105 Cal. Rptr. 3d 606, 615 (2010). The *St. Paul* majority misapplied these fundamental principles of equitable subrogation that are well established under Nevada law in reaching its decision.

In matters of first impression, Nevada courts consistently look to California, where courts recognize equitable subrogation between insurers even where there is no out-of-pocket payment by the insured. Indeed, the overwhelming majority of states recognize equitable subrogation between insurers.

Failing to recognize equitable subrogation among insurers would disincentivize excess insurers from stepping into the fray to protect their insureds from another carrier's bad faith. This would harm not only those insureds, but also claimants, whose meritorious claims should be settled, and the courts, whose limited resources should not be burdened by unnecessarily protracted litigation of meritorious claims. Instead of attributing such an extreme position to Nevada without clear guidance, the Ninth Circuit certified this potentially determinative question to this Court.

This Court should clarify any confusion caused by the *St. Paul* majority's failure to apply Nevada law correctly in its unpublished decision. But even under the rationale espoused by the *St. Paul* majority, North River could still show harm

to its insured sufficient to sustain an equitable subrogation claim. While the *St. Paul* majority found the insured was not damaged by the increased settlement payment, North River is prepared to show that its insured suffered other types of harm. Specifically, if allowed to proceed beyond a motion to dismiss, North River could show that its insured suffered harm in the form of a reduction in the aggregate policy limits available to it after James River's alleged bad-faith failure to settle. Nevada's longstanding approach to equitable subrogation as founded on the "facts and circumstances of the particular case" requires flexibility to consider different types of harm and is critical to achieving what is just and fair. *See Laffranchini v. Clark*, 39 Nev. 48, 56–7, 153 P. 250, 253 (1915).

A. The Underlying Lawsuit

Primary insurer James River issued a $1 million Commercial General Liability policy to L.A. Pacific Center Inc., in Monrovia, California. (1 JA 3 ¶ 7.) That policy identified Alhambra Place Partnership, LP dba Shelter Island Apartments as an additional named insured, with Shelter Island (located in Nevada) as an insured location. (*Id*.) Excess insurer North River issued a $10 million excess insurance policy to L.A. Pacific Center Inc. (1 JA 3 ¶ 10.) That policy also identified Alhambra Place Partnership, LP dba Shelter Island Apartments as an additional named insured, and identified Shelter Island as an insured location. (*Id*.)

On May 25, 2017, Marcus Collins was fatally shot in unit G-312 of the Shelter Island Apartments ("Shelter Island") in Las Vegas, Nevada. (1 JA 2 ¶ 5.) On March 7, 2019, the co-administrators of the decedent's estate filed suit in Nevada state court against Shelter Island, alleging negligence and wrongful death (the "Underlying Action"). (*Id*. ¶ 6.) The complaint alleged that Shelter Island "negligently failed to control, supervise and maintain the premises," citing security cameras that did not work or adequately record the grounds and "little, no and/or ineffective security patrols." (1 JA 14 ¶¶ 15–16.) It alleged that Shelter Island's "conscious disregard for the criminal activity" on the premises created the circumstances that ultimately cost the decedent his life. (1 JA 15 ¶ 24.) After receiving notice of the claim, James River agreed to defend Shelter Island in the Underlying Action and retained counsel to provide the defense. (1 JA 4 ¶¶ 12–13.)

On March 28, 2019, the plaintiffs in the Underlying Action made a settlement demand to Shelter Island for James River's policy limits of $1 million. (1 JA 5 ¶ 21.) James River did not accept it. As discovery proceeded in the Underlying Action, James River learned more about Shelter Island's troubled history. On October 18, 2019, James River was provided a Notice and Declaration of Chronic Nuisance that the Las Vegas Metropolitan Police Department had issued to the Shelter Island Apartments on March 9, 2017, two days after the plaintiffs filed the Underlying Action. (1 JA 4 ¶ 14.) The notice was based on the

number of calls for service to address violence at the property and other disturbance calls from December 2016 through February 2017. (*Id*.)

In or about May 2021, the plaintiffs in the Underlying Action made an offer of judgment for $990,000. (12 JA 5 ¶ 22.) James River did not accept it. On November 3, 2021, the plaintiffs reduced their settlement demand to $975,000. (*Id*. ¶ 24.) Again, James River did not accept it. North River alleges that James River's refusal to affect a settlement was unreasonable given that James River's own defense counsel on or about that same date—and then again in February 2022 and July 2022—valued the case at over $1 million. (1 JA 6 ¶ 25.)

On or about August 30, 2022, after James River had allowed more than three years to elapse without settling for its policy limits or even less, the plaintiffs in the Underlying Action increased their settlement demand to $5 million. (*Id*. ¶ 28.) The case ultimately settled for this amount on November 30, 2022. (*Id*. ¶ 30.) James River contributed only the $1 million available under the primary policy limits. (1 JA 7 ¶ 32.) To protect its insured and subject to a full reservation of rights, including its right to reimbursement, North River funded the $4 million balance of the settlement. (*Id*. ¶ 33.) In doing so, North River was not acting as a volunteer. (*Id*. ¶ 34.) It was seeking to avoid the risk that James River's unreasonable behavior would cause the insured to bring claims against North River for bad-faith failure to settle.

B. Nevada's Recent Unpublished Decision on Equitable Subrogation Between Insurers

Between the events underlying this action and the filing of North River's complaint, the Nevada Supreme Court issued the first of two unpublished decisions addressing an equitable subrogation claim between insurers. In *St. Paul* and *Aspen*, a patron of a Las Vegas nightclub sued the insured nightclub and hotel, Marquee and Cosmopolitan, for negligent and intentional torts after security members injured him while attempting to oust him from the club. *St. Paul*, 2022 WL 17543613, at *1. Marquee tendered the claim to both its primary insurer, Aspen, and its excess insurer, National Union, whose policies named Cosmopolitan as an additional insured. *Id*. Aspen and National Union jointly defended both parties. *Id*. Cosmopolitan also had its own primary insurer, nonparty Zurich, and an excess insurer, St. Paul, which Cosmopolitan notified about its potential exposure about one month before trial. *Id*.

The* St. Paul *Litigation. As St. Paul alleged, Aspen and National Union were repeatedly informed by their attorneys that the potential verdict in the case might exceed $100 million, but inexplicably rejected an offer of judgment of $1.5 million, forcing the case to trial. Appellant's Opening Brief, *St. Paul Fire & Marine Ins. Co. v. Nat'l Union Fire Ins. Co.*, 2021 WL 1091473, at *6 (Nev., Mar. 1, 2021). At trial, the jury returned a verdict in favor of the patron for $160.5 million in compensatory damages. *St. Paul*, 2022 WL 17543613, at *1. Before

reaching the punitive-damages stage, the four insurers collectively funded a confidential settlement with the patron for an amount that exhausted, but did not exceed, their collective policy limits. *Id*. After the settlement, Cosmopolitan's excess insurer, St. Paul, brought a subrogation claim against National Union (Marquee's excess insurer) and Aspen (Marquee's primary insurer) for, among other things, breach of the implied covenant of good faith and fair dealing for failing to settle the case within their policy limits. *Id*.

National Union first moved for summary judgment on St. Paul's equitable subrogation claim. *St. Paul Fire & Marine Ins. Co. v. Aspen Specialty Ins. Co.*, 2019 WL 13257683 (Nev. Dist. Ct., Oct. 15, 2019). The trial court granted National Union's motion based primarily on its finding that "no jurisdiction, let alone Nevada, recognizes an equitable subrogation claim between excess carriers in separate towers of coverage [a]nd this Court is unwilling to be the first to do so." Findings of Fact, Conclusions of Law and Order Granting National Union Fire Insurance Company of Pittsburgh Pa's Motion for Summary Judgment at 11, *St. Paul Fire & Marine Ins. Co. v. Aspen Specialty Ins. Co.* (Nev. Dist. Ct., May 14, 2020). In its order, the trial court focused on equitable superiority, which is an element of a subrogation claim. The trial court specifically noted that St. Paul could not be "equitably superior" to National Union because they are same-level excess insurers in two different coverage towers. *Id.*

The parties repeated their arguments on appeal to the Nevada Supreme Court. On December 8, 2022, a six-justice panel (short one justice) of the Nevada Supreme Court decided St. Paul's appeal. *St. Paul*, 2022 WL 17543613. The majority did not adopt the reasoning of the trial court, but rather held that Cosmopolitan, as the insured, lacked an underlying claim for St. Paul to subrogate because it suffered no damages once the carriers settled the claim within their collective policy limits. *Id.* at *2. That reasoning was not the basis for the trial court's decision and drew a sharp dissent that highlighted the majority's misunderstanding of subrogation law, which substitutes the parties as if the subrogee had never assumed the subrogor's loss. *Id.* at *15 (dissent) (the majority's conclusion "misapplies a fundamental presupposition of subrogation that the subrogee insurer's payment reflects the subrogor insured's loss").

The* Aspen *Litigation. Aspen (Marquee's primary insurer) also moved for summary judgment on St. Paul's equitable subrogation claim. *St. Paul Fire & Marine Ins. Co. v. Aspen Specialty Ins. Co.*, 2020 WL 13616460 (Nev. Dist. Ct., Oct. 9, 2020). Aspen's motion raised the issue of equitable subrogation between an excess insurer and primary insurer, and the trial court came to a different conclusion about the viability of St. Paul's claim against the primary insurer. In its order denying Aspen's motion and allowing St. Paul's equitable subrogation claim to proceed, the *same trial court* found that its earlier National Union ruling did not

apply because "St. Paul and National Union were both excess carriers on the same footing in the underlying litigation, and that neither was in an equitably superior position as to the other." Order Denying Defendant Aspen Specialty Insurance Company's Renewed Motion for Summary Judgment at 4, *St. Paul Fire & Marine Ins. Co. v. Aspen Specialty Ins. Co.* (Nev. Dist. Ct., Oct. 9, 2020). The trial court distinguished the relationship between St. Paul and Aspen, explaining "Aspen was the primary insurer . . . that made the decisions that resulted in the case going to trial, and in the verdict, and the consequent settlement. Aspen is the entity that allegedly refused to settle. Aspen is in a completely different position than National Union." *Id.*

On appeal of the *Aspen* decision, however, the three-justice panel was bound to follow the *St. Paul* majority decision as law of the case and reversed the trial court's decision. *Aspen*, 2023 WL 3185274. Because the *St. Paul* majority found that the insured, Cosmopolitan, suffered no damages to which St. Paul could subrogate once the insurers paid the settlement amount, that same reasoning foreclosed St. Paul's equitable subrogation claim against Aspen as well. *Id.* at *2 ("in light of our disposition in [*St. Paul*], the district court is required by clearly controlling law to grant summary judgment in favor of Aspen"). The Court never engaged with the merits of the equitable subrogation issues (e.g., equitable

superiority) presented by insurers in different layers of coverage that the trial court had addressed.

C. Procedural History

On January 4, 2023, North River filed this action seeking to recover its $4 million settlement payment under the doctrine of equitable subrogation. (1 JA 1-23 (the "Complaint").) The Complaint alleged that James River "knew that there was a substantial likelihood of an adverse verdict and a judgment in excess of [James River's] primary policy limit, including an award of punitive damages," and asserted that "there was no reasonable basis not to accept [the underlying plaintiff's] demands within its policy limit." (1 JA 5-6 ¶¶ 20, 26.) North River also alleged that "in order to protect [the insured] and pursuant to a complete reservation of its rights under [North River's] excess policy and the law, including, but not limited to, its right to reimbursement, [North River] agreed to fund the balance of the settlement of the Underlying Lawsuit." (1 JA 7 ¶ 33.) Consistent with the principles of equitable subrogation, North River explicitly alleged that "it was not acting as a volunteer in contributing to the settlement" of the Underlying Action. (*Id*. ¶ 34.)

James River moved to dismiss on the grounds that Nevada does not recognize equitable subrogation between insurers where the ultimate judgment did not exceed the insured's available insurance. (*See* 1 JA 146.) On August 4, 2023,

the District Court in California granted James River's motion, dismissing the Complaint without leave to amend. (1 JA 153.) The District Court based its order on the unpublished *St. Paul* decision. (1 JA 151-52) (citing *St. Paul*). The District Court concluded that "since [North River] has not shown that the $5 million settlement amount exceeded the $11 million combined policy limits, [North River] has not shown that Shelter Island suffered damages to state an equitable subrogation claim." (1 JA 153.)

The District Court also relied improperly on James River's recitation of facts in its motion, which introduced disputes outside the four corners of the Complaint. The District Court, for instance, cited James River's assertion that "[North River] and Shelter Island agreed with the decisions not to settle," and that when James River purportedly decided to make a $1 million settlement offer, "[North River] told [James River] not to make such an offer, fearing that it would lead to negotiations and a settlement requiring [North River] to pay out its excess policy coverage." (1 JA 145.) The Complaint does not allege such facts. As the District Court itself acknowledged, it was required at the motion-to-dismiss stage to accept all pleaded facts as true and construe them in the light most favorable to North River. (1 JA 146 [citing *Turner v. City & Cnty. of San Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015); *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009)].)

North River appealed. After briefing and oral argument, the Ninth Circuit certified the above question (*supra* 1) to this Court because the answer will "be determinative of the cause" pending before the Ninth Circuit. This Court granted the request.

SUMMARY OF ARGUMENT

This Court should hold that, under Nevada law, an excess insurer can state a claim for equitable subrogation against a primary insurer, even where the underlying lawsuit settled within the insurers' combined policy limits. A well-established body of Nevada equitable subrogation law requires that result. Subrogation applies when one party, the subrogee, involuntarily pays the obligation or loss of another, the subrogor, for which a third party or wrongdoer is eventually found to bear responsibility.

In the insurance context, Nevada's doctrine of equitable subrogation creates derivative rights whereby an insurer that compensates its insured for losses caused by a third party is subrogated to the rights the insured had to pursue damages against the third-party tortfeasor before the insurer's payment was made. As relevant here, those rights include recovering from a defending primary insurer that unreasonably fails to settle claims against the insured. In such a case, the insurer is liable to the insured for all consequential damages arising from its breach—including a judgment or settlement of the claim that exceeds the primary insurer's

policy limits. Where an excess insurer steps in to pay the damages caused by the primary carrier's failure to settle, existing Nevada law principles dictate that the excess insurer is subrogated to the insured's claim against the offending primary insurer. When deciding whether the insured has a claim to which the excess insurer can subrogate, Nevada courts look at the loss *before* the excess insurer steps in.

There is good reason to treat a wrongdoing "primary insurer" just like any other third-party wrongdoer. This is why California—which Nevada looks to in cases of first impression—and an overwhelming majority of states similarly recognize equitable subrogation between insurers. As those states have recognized, public policy reasons benefiting claimants, insureds, and the courts also favor recognizing equitable subrogation by excess carriers against primary carriers.

Finally, even if the excess insurer's payment was construed to obviate some component of damage to the insured (following the misguided rationale of *St. Paul*), the excess insurer may still have grounds to show that its insured suffered harm for which it should be allowed to recover. For example, to the extent the insured's remaining coverage for other claims was inappropriately limited due to the primary insurer's failure to settle within its limits (as it was for North River's insured here), the excess insurer should be permitted to state an equitable

subrogation claim against the primary insurer for breach of its duty to settle. Thus, a bright-line rule that Nevada does not recognize equitable subrogation where the claim settles within limits would violate the longstanding fundamental tenets of Nevada equitable subrogation law and strip courts of a flexible remedy designed to accomplish what is fair and just in each individual circumstance.

Accordingly, this Court should answer "yes" to the Ninth Circuit's certified question.

ARGUMENT

I. NEVADA LAW AND PUBLIC POLICY REQUIRE RECOGNITION OF EQUITABLE SUBROGATION AMONG INSURERS WHERE THE UNDERLYING CLAIM SETTLED WITHIN COMBINED POLICY LIMITS

Under Nevada law, subrogation "is an equitable doctrine created to accomplish what is just and fair as between the parties." *AT&T Techs., Inc. v. Reid*, 109 Nev. 592, 595, 855 P.2d 533, 535 (1993). It applies when one party, the subrogee (here, the excess insurer), involuntarily pays the obligation or loss of another, the subrogor (here, the insured), for which a third-party wrongdoer (here, the primary insurer) is eventually found to bear responsibility. *See id.* at 595–96, 855 P.2d at 535–36. That is, "where it is equitable that a person furnishing money to pay a debt should be substituted for the creditor, or in place of the creditor, such person will be so substituted." *Laffranchini v. Clark*, 39 Nev. 48, 56–57, 153 P. 250, 253 (1915). Subrogation creates derivative rights and requires an underlying independent basis on which the subrogor could have recovered the payment had

the subrogee never stepped in to assume the loss. *See Arguello v. Sunset Station, Inc*., 127 Nev. 365, 368–69, 252 P.3d 206, 208 (2011).

These basic principles establish that under existing Nevada law, an insurer can assert an equitable subrogation claim against a third party where (i) its insured has an independent basis to recover from that third party for a loss it would have had to pay had the insurer not stepped in to pay it, and (ii) the insurer steps in to pay the loss (for which the third party is responsible). Those are precisely the facts at issue. Nothing in Nevada law would support a different outcome merely because the third-party wrongdoer here happens to be another insurer.

Accordingly, this Court has three bases for finding that an excess insurer can state a claim for equitable subrogation against a primary insurer where the loss is within collective policy limits. First, existing Nevada law already provides that where an insured has an independent basis to recover from a third party for a loss its insurer pays, the insurer can bring a claim for equitable subrogation against the third party to recover that loss (and there is no reason to treat a "primary insurer" differently from any other third-party wrongdoer). *See, e.g., Arguello*, 127 Nev. at 368–69, 252 P.3d at 208. Second, when Nevada decides issues of first impression, it looks to California law, which recognizes equitable subrogation among insurers even where the claim settles within collective policy limits. *See Mort v. United States*, 86 F.3d 890, 893 (9th Cir. 1996) (analyzing California law to apply Nevada

law). Finally, recognizing equitable subrogation between insurers promotes important public policies, including encouraging settlement of meritorious claims and ensuring excess insurance market stability—outcomes that benefit claimants, insureds, and the courts alike. *See, e.g., Northwestern Mut. Ins. Co. v. Farmers' Ins. Group*, 76 Cal. App. 3d 1031, 1045–46, 143 Cal. Rptr. 415 (1978).

A. Nevada Law Provides that Where an Insured Has an Independent Basis to Recover from a Third Party for a Loss and the Insured's Loss Was Paid by Its Insurer, the Insurer Can Bring an Equitable Subrogation Claim Against the Third-Party Wrongdoer for that Loss

Well-established Nevada law makes clear that an insurer can bring a claim for equitable subrogation against a third party that causes harm to its insured when the insurer steps in to pay the insured for the loss. *See AT&T*, 109 Nev. 592, 855 P.2d 533; *Arguello*, 127 Nev. 365, 252 P.3d 206. The fundamental question driving the analysis is whether the insured has an underlying independent basis on which it could have sued the third party for a loss before the insurer stepped in to pay the loss. *See Arguello*, 127 Nev. at 368, 252 P.3d at 208.

Because Nevada law recognizes insureds' bad-faith claims against primary carriers that fail to settle within limits, insureds (like Alhambra Place here) have an independent basis to assert a claim against a primary insurer that causes harm by breaching its duty to settle. *See Allstate Ins. Co. v. Miller*, 125 Nev. 300, 311, 212 P.3d 318, 325–26 (2009) ("*Miller*") (expanding bad-faith liability beyond solely circumstances in which an insurer rejects a settlement offer within the policy

limits); *cf*. NRS 686A.310(1)(e) (An insurer must "effectuate prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear."). An insurer that violates this duty is liable for the judgment against the insured, even if it exceeds the policy limits. *See Miller*, 125 Nev. at 314, 212 P.3d at 327–28 (an insurer's breach of the duty to settle subjects it to "all compensatory damages proximately caused by its breach," which may exceed the policy limits). It, therefore, follows that any excess insurer stepping in to pay the loss suffered by the insured for its primary insurer's failure to settle has the right to bring a claim for equitable subrogation against the primary insurer.

Any ruling that precludes subrogation where the claim settles within the collective policy limits—based on the mistaken notion that the insured has suffered no harm because the insured has been compensated by its insurer—ignores that under Nevada law subrogation substitutes the parties as if the subrogee had never assumed the subrogor's loss. *See Arguello*, 127 Nev. at 368–69, 252 P.3d at 208 (discussing that full payment subrogates the insurer to the insured's claims against the third-party wrongdoer that arose before the payment occurred); *see also Valley Power Co. v. Toiyabe Supply Co*., 80 Nev. 458, 396 P.2d 137 (1964).

The Nevada Supreme Court in *Valley Power* set forth the basic principles that govern an insurer's right to assert an equitable subrogation claim against a third-party wrongdoer—even after the insurer compensates the insured for the

loss—and that reasoning applies equally here, where the third-party wrongdoer is another insurer. In *Valley Power*, insured corporations suffered losses due to financial crimes committed by their employees, for which their insurer fully compensated them. 80 Nev. at 460, 396 P.2d at 138. That insurer then became subrogated to the insureds' claim against the tortfeasors. *Id*. As the Nevada Supreme Court in *Valley Power* explained, an insurer that pays its insured "in full for their claimed losses . . . [is] subrogated, by operation of law, to the rights, if any, which the assureds may have had against the [tortfeasor] *before such payments were made*." *Id*.

Even though the insureds in *Valley Power* were fully compensated by their insurer, with no loss exceeding their insurance policy limits, they still had a claim against the tortfeasors to which the paying insurer could subrogate: that is, if their insurer had never stepped in to pay, the insureds could have pursued an action against their tortfeasors to recover their losses. After the insurer's payment, the losses belonged to the insurer. The tortfeasors' liability did not disappear simply because the insureds had the foresight to purchase insurance (or, in the present case, excess insurance).

The majority in the unpublished *St. Paul* decision misapplied established Nevada equitable subrogation law when it found that Cosmopolitan did not suffer damages because of St. Paul's payment. *St. Paul*, 2022 WL 17543613, at *2. As

the dissent in *St. Paul* explained, by finding Cosmopolitan never suffered damages because of St. Paul's contribution to settlement, the majority "fail[ed] to recognize that subrogation substitutes the parties as if the subrogee had never assumed the subrogor's loss." *St. Paul*, 2022 WL 17543613, at *5 (dissent) (citing *Arguello*, 127 Nev. 368–69, 252 P.3d at 208). If St. Paul had not paid, Cosmopolitan would have had a cause of action against National Union for its breach of the duty to settle, and National Union would have been liable for all consequential damages, even if they exceeded its policy limits. *Id.* at *6, n.6 (dissent) (citing *Century Surety Co. v. Andrew*, 134 Nev. 819, 825–26, 432 P.3d 180, 185–86 (2018), and *Miller*, 125 Nev. at 314, 212 P.3d at 327–28). Thus, the only reasoning provided by the *St. Paul* majority for finding St. Paul had no equitable subrogation rights contradicted established Nevada equitable subrogation law. This Court should not adopt reasoning that "misapplies basic precepts of subrogation." *St. Paul*, 2022 WL 17543613, at *5 (dissent).[2]

[2] *St. Paul* is also inapplicable to this case on its face because it involved equitable subrogation between same-level insurers with different named insureds. The parties presented arguments focused on whether the balance of the equities favored shifting the loss borne by one excess insurer to another excess insurer at the same level of coverage. *Supra* 10. And even though *Aspen* involved different-level insurers, the three-justice panel was bound by the law of the case in *St. Paul* that Cosmopolitan had no damage to subrogate. *Supra* 12. That is, the justices did not have an opportunity to re-weigh the equities in a different scenario. Thus, the Court in both *St. Paul* and *Aspen* was presented with unique circumstances that did not allow it to engage with the equitable subrogation analysis presented by North River's suit.

B. Nevada Law Should Follow California and the Majority of States in Recognizing Equitable Subrogation Between Insurers

Although the Nevada Supreme Court has "recognized the doctrine of equitable subrogation in a variety of situations," *In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 572 n.8, 289 P.3d 1199, 1209 n.8 (2012) (en banc) (collecting cases), the Court "has not issued a binding decision addressing whether it would recognize equitable subrogation in the context of two insurance companies and, if so, what an insurer claiming subrogation would have to prove." (1 JA 150.) In such circumstances, the Nevada courts look to "the law of other jurisdictions, particularly California, for guidance." *Mort*, 86 F.3d at 893 (analyzing California law to apply Nevada law); *Home Haven, Inc. v. United States*, 17 F. App'x 512, 513 (9th Cir. 2001). Indeed, Nevada looked to California law when it established the implied covenant of good faith and fair dealing in the insurance context—the underlying basis for North River's equitable subrogation claim. *See U.S. Fidelity & Guaranty Co. v. Peterson*, 91 Nev. 617, 620, 540 P.2d 1070, 1071 (1975).

The majority of states, including California, recognize equitable subrogation between insurers for the same public policy reasons discussed *infra*. The few states that do not are unpersuasive because they misapprehend equitable subrogation law and the policy reasons that underlie its application.

1. California recognizes equitable subrogation where a claim settles within combined policy limits

California has well-developed law on the standards for equitable subrogation between insurers. *See Patent Scaffolding Co. v. William Simpson Constr. Co.*, 256 Cal. App. 2d 506, 509, 64 Cal. Rptr. 187 (1967) (listing elements of an insurer's equitable subrogation cause of action and collecting California cases). California law recognizes equitable subrogation between excess and primary insurers, even where the loss exceeds only the primary insurer's limits. *See Commercial Union Assurance Cos. v. Safeway Stores, Inc*., 610 P.2d 1038, 1041 (Cal. 1980) (citing, *e.g., Northwestern Mut. Ins. Co. v. Farmer's Ins. Group,* 76 Cal. App. 3d 1031, 143 Cal. Rptr. 415 (1978); *Valentine v. Aetna Ins. Co.,* 564 F.2d 292 (1977); *Estate of Penn v. Amalgamated General Agencies,* 148 N.J. Super. 419, 372 A.2d 1124 (1977)); *see also Ace Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 2 Cal. App. 5th 159, 170, 206 Cal. Rptr. 3d 176, 184 (2016) (extending to settlements in excess of primary insurer's limits).

California courts have explicitly rejected the argument that the excess insurer's payment obviates damages to the insured. In *Northwestern*, wrongful death claims against an insured driver involved in a fatal accident proceeded to trial after the defendant primary insurers failed to settle the claims within their limits. 76 Cal. App. 3d at 1038–39. The jury returned a judgment that exceeded the primary insurers' limits but was within the insured's available excess policy

limits. *Id.* at 1039. After satisfying the balance of the judgment, the excess insurer then sought to recover the amounts it paid from primary insurers under the theory of equitable subrogation. *Id.* at 1039–40.

Among the defendants' arguments was that the insured's estate "had no right of action against them for bad faith refusal to settle because there was no judgment against the estate in excess of all applicable insurance and the estate was never threatened with or suffered any loss." *Id.* at 1044. The California Court of Appeal rejected that theory, holding that "[i]t is not a prerequisite to equitable subrogation that the subrogor suffered actual loss; it is required only that he would have suffered loss had the subrogee not discharged the liability or paid the loss." *Id.* (collecting cases permitting recovery by one insurance carrier against another on a theory of equitable subrogation without any showing that the insured had suffered any loss). The court also found that, contrary to defendants' arguments, public policy supports recognizing equitable subrogation between insurers for many reasons, including that not recognizing it would "imperil[] the public and judicial interests in fair and reasonable settlement of lawsuits" and "permit an unfair distribution of losses among insurers." *Id.* at 1045.

The *St. Paul* majority misinterpreted the California authority it considered in deciding whether St. Paul could state a claim for equitable subrogation. The majority found that "exhaustion of the policy limits prior to an excess judgment

necessarily protects the insured from the harm that the duties purport to avoid." *St. Paul*, 2022 WL 17543613, at *2 (citing *Safeco Ins. Co. of Am. v. Super. Court of Contra Costa Cnty*., 71 Cal. App. 4th 782, 84 Cal. Rptr. 2d 43 (1999)). The majority characterized *Safeco* as "concluding that the cause of action for bad faith refusal to settle arises only after a judgment has been rendered in excess of the policy limits." *Id*. This misstates the holding of *Safeco*.

As the California Court of Appeal in *Ace American* explained—rejecting a similar argument made by the primary insurer defendant in that case—*Safeco* "makes clear that the purpose behind the statements requiring a judgment in an underlying lawsuit is simply to ensure that a plaintiff has a reliable basis for alleging that damages have resulted from the insurer's alleged breach of the duty to settle within policy limits." *Ace Am.*, 2 Cal. App. 5th at 175. *Safeco* held that a settlement entered into without the defending insurer's consent was not reliable proof of damages from the insurer's failure to settle. 2 Cal. App. 5th at 175–76. This is because the primary insurer retained the right to control the defense and would have been liable for an excess verdict at trial if its refusal to settle within limits was unreasonable. *Id.* at 176. Here, as in *Ace American*, the primary insurer, James River, consented to the ultimate settlement that exceeded its policy limits—and that settlement, for purposes of a motion to dismiss, is reliable evidence of alleged damages resulting from its failure to settle within limits.

Nevada should follow California's guidance and find that equitable subrogation can exist between excess and primary insurers.

2. The overwhelming majority of states recognize equitable subrogation between insurers

A rule that an excess carrier has no subrogation claim where it settles the insured's liability within its limits would mean that Nevada *never* recognizes equitable subrogation between an excess and primary insurer. *See Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co*., 182 Cal. App. 4th 23, 34, 105 Cal. Rptr. 3d 606, 615 (2010) ("Under [the] view [that the insurer's payment obviated damages], no insurer could ever state a cause of action for subrogation in order to recover amounts it paid on behalf of its insured, because of the very fact that it had paid amounts on behalf of its insured."). If that is the case, Nevada would be one of the few states to not recognize equitable subrogation between insurers. In the Ninth Circuit alone, besides California, at least Arizona, Hawaii, Oregon, and Washington have adopted an excess insurer's equitable subrogation rights against a primary carrier. *See Millers Cas. Ins. Co., of Texas v. Briggs*, 665 P.2d 887 (Wash. 1983); *Cal. Cas. Ins. Co. v. State Farm Mut. Auto. Ins. Co*., 913 P.2d 505 (Ariz. 1996), *corrected* (Feb. 28, 1996); *School Dist. No. 1, Multnomah Cnty. v. Mission Ins. Co*., 650 P.2d 929 (Or. App. 1982); *St. Paul Fire & Marine Ins. Co. v. Liberty Mut. Ins. Co*., 353 P.3d 991 (Haw. 2015). Indeed, the majority of states throughout the country give excess insurers equitable subrogation rights against primary

insurers. Litig. & Prev. Ins. Bad Faith § 7:9 ("The courts are all but unanimous in holding that a paying excess carrier, as subrogee of the insured's rights, may maintain an action against a primary carrier for the latter's bad faith, excess liability resulting from breach of its settlement duties, or defense duties, or both. The vehicle used has largely been that of equitable subrogation.").

Courts in the states below have recognized, or have indicated they would recognize, equitable subrogation between insurers. Their reasoning aligns with the public policy reasons for recognizing equitable subrogation between insurers discussed below.

State	**Case**
Alaska	*R.W. Beck & Associates v. City and Borough of Sitka*, 27 F.3d 1475, 1486 (9th Cir. 1994) (applying Alaska law and finding that "California and other jurisdictions recognize that the excess carrier is entitled to equitable subrogation to the rights of the insured and may make the same bad faith claims that the insured could have made" and that "[s]uch a rule seems eminently sound, and again, we agree with the district court that Alaska courts would follow it").
Arizona	*Hartford Accident & Indem. Co. v. Aetna Cas. & Sur. Co*., 792 P.2d 749, 754 (Ariz. 1990) (recognizing equitable subrogation between excess and primary insurers because "[w]hether on insurance-economics principles or general equitable principles, a party should not be made to bear a loss that rightfully belongs to another party").
California	*Commercial Union Assurance Cos. v. Safeway Stores, Inc*., 610 P.2d 1038, 1041 (Cal. 1980) (recognizing equitable subrogation between excess and primary insurers); *Ace Am. Ins. Co. v.*

	Fireman's Fund Ins. Co., 2 Cal. App. 5th 159, 170 (2016).
Connecticut	*Infinity Ins. Co. v. Worcester Ins. Co*., 2000 WL 1890126, at *3 (Conn. Super. Dec. 4, 2000) (noting, in dicta, that equitable subrogation was appropriate cause of action for excess insurer alleging it was injured by primary insurer's defense of mutual insured).
Florida	*Perera v. U.S. Fidelity and Guar. Co.*, 35 So. 3d 893, 900 (Fla. 2010) (recognizing equitable subrogation between excess and primary insurers).
Georgia	*Home Ins. Co. v. N. River Ins. Co*., 385 S.E.2d 736, 740 (Ga. App. 1989) (recognizing equitable subrogation between excess and primary insurers).
Illinois	*Home Ins. Co. v. Cincinnati Ins. Co*., 821 N.E.2d 269, 281 (Ill. 2004) (recognizing equitable subrogation between excess and primary insurers).
Indiana	*Certain Underwriters of Lloyd's v. Gen. Accident Ins. Co. of Am*., 909 F.2d 228, 232–33 (7th Cir. 1990) (applying Indiana law and recognizing equitable subrogation between excess and primary insurers, in part, because "should the primary's duty of good faith evaporate with the purchase of excess coverage, thus increasing the probability of an excess judgment, the insured's excess premiums would correspondingly increase").
Kansas	*Ins. Co. of N. Am. v. Med. Protective Co*., 768 F.2d 315, 320–21 (10th Cir. 1985) (applying Kansas law and recognizing equitable subrogation between excess and primary insurers).
Kentucky	*National Sur. Corp. v. Hartford Cas. Ins. Co*., 493 F.3d 752, 755–56 (6th Cir. 2007) (applying Kentucky law and predicting the Kentucky Supreme Court would "likely adopt the majority rule because that rule naturally follows from two other Kentucky insurance rules: (1) that an insured may sue an insurer who, in bad faith, fails to settle a claim within policy limits, and (2) that an insurer may step into the shoes of the insured, pursuant to the doctrine of equitable subrogation. In addition, the majority rule furthers Kentucky policies of encouraging fair and reasonable

	settlements and preventing wrongdoers from piggybacking on an insured's insurance").
Louisiana	*Great Sw. Fire Ins. Co. v. CNA Ins. Cos*., 557 So. 2d 966, 967 (La. 1990) (recognizing equitable subrogation between excess and primary insurers).
Maryland	*Fireman's Fund Ins. Co. v. Cont'l Ins. Co*., 519 A.2d 202, 205 (Md. App. 1987) (recognizing equitable subrogation between excess and primary insurers, in part, because it aligns with the public's strong interest in the prompt and reasonable settlement of lawsuits and a "disincentive to settle obviously would lead to increased insurance and litigation costs")
Massachusetts	*Hartford Cas. Ins. Co. v. N.H. Ins. Co*., 628 N.E.2d 14, 15 (Mass. 1994) (recognizing equitable subrogation between excess and primary insurers).
Michigan	*Commercial Union Ins. Co. v. Medical Protective Co*., 393 N.W.2d 479, 483 (Mich. 1986) (recognizing equitable subrogation between excess and primary insurers because it "serves the public and judicial interests in fair and reasonable settlement of lawsuits…" and "…[t]he public interest in avoiding unnecessarily high insurance premiums is [also] served…").
Minnesota	*Cont'l Cas. Co. v. Reserve Ins. Co*., 238 N.W.2d 862, 864–65 (Minn. 1976) (recognizing equitable subrogation between excess and primary insurers because it supports "the public and judicial interests in fair and reasonable settlement of lawsuits" and prevents "an unfair distribution of losses among insurers").
Mississippi	*National Union Fire Ins. Co. of Pittsburgh, PA v. Blasio*, 2008 WL 2224886, at *8 (N.D. Miss., May 27, 2008) (applying Mississippi law and recognizing, in dicta, "an excess insurer who becomes subrogated to its insured's rights may bring suit based upon a breach of [the primary insurer's duty to look after the insured's interest at least to the same extent as its own, and also to make a knowledgeable, honest, and intelligent evaluation of the claim] pursuant to the equitable subrogation doctrine").

Missouri	*Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 832–33 (Mo. 2014) (recognizing equitable subrogation by an excess carrier because "[o]ther jurisdictions recognize that allowing an excess insurer to bring a bad faith refusal to settle claim against the primary insurer promotes the fair and reasonable settlement of lawsuits by discouraging primary [insurers] from 'gambling' with the excess [insurer's] money when potential judgments approach the primary insurer's policy limits. It also prevents an unfair distribution of losses between the primary and excess insurers. Importantly, allowing an excess insurer to bring an action under equitable subrogation does not create a new duty or impose new obligations on the primary insurer; it merely substitutes the excess insurer for the insured.").
New Hampshire	*Allstate Ins. Co. v. Reserve Ins. Co*., 373 A.2d 339, 340–41 (N.H. 1977) (stating, in dicta, that the fact the excess insurer paid the excess judgment under an insurance policy for which it received premiums has never been a bar to equitable subrogation in the automobile collision context, and the court believes the same logic applies in the insurer-versus-insurer context).
New Jersey	*Estate of Penn v. Amalgamated Gen. Agencies*, 372 A.2d 1124, 1126–27 (N.J. Super. Ct. App. Div. 1977) (recognizing equitable subrogation between excess and primary insurers).
New York	*Hartford Accident & Indem. Co. v. Mich. Mut. Ins. Co*., 463 N.E.2d 608, 610 (N.Y. 1984) (recognizing equitable subrogation between excess and primary insurers).
North Carolina	*U.S. Fire Ins. Co. v. Nationwide Mut. Ins. Co*., 735 F. Supp. 1320, 1324 (E.D.N.C. 1990) ("The court is persuaded that a duty [by the primary carrier to the excess carrier] exists and need not determine whether North Carolina courts, if faced with this issue, would find a direct duty or a duty by equitable subrogation.").
Ohio	*Centennial Ins. Co. v. Liberty Mut. Ins. Co*., 404 N.E.2d 759, 762 (Ohio 1980) (recognizing equitable subrogation between excess and primary insurers).

Oklahoma	*Steadfast Ins. Co. v. Agric. Ins. Co.*, 548 F. App'x 544, 546 (10th Cir. 2013) (applying Oklahoma law and recognizing equitable subrogation between excess and primary insurers).
Oregon	*Me. Bonding & Cas. Co. v. Centennial Ins. Co*., 693 P.2d 1296, 1300, 1302 (Or. 1985) (recognizing equitable subrogation between excess and primary insurers and noting that "[r]elieving the primary insurer of its duty to diligently defend in those cases in which excess coverage and excess exposure exist may give the primary insurer a disincentive to settle").
Pennsylvania	*Greater N.Y. Mut. Ins. Co. v. N. River Ins. Co*., 85 F.3d 1088, 1094 (3d Cir. 1996) (applying Pennsylvania law and recognizing equitable subrogation between excess and primary insurers).
Rhode Island	*Columbia Casualty Co. v. Ironshore Specialty Ins. Co.*, 2015 WL 13706593, at *4 (D.R.I., Nov. 24, 2015) (recognizing equitable subrogation against a first-layer excess insurer by a higher-layer excess insurer).
South Dakota	*National Farmers Union Property and Cas. Co. v. Farm and City Ins. Co*., 689 N.W.2d 619, 625 (S.D. 2004) (recognizing equitable subrogation between excess and primary insurers).
Tennessee	*Elec. Ins. Co. v. Nationwide Mut. Ins. Co*., 384 F. Supp. 2d 1190, 1193 (W.D. Tenn. 2005) (applying Tennessee law and denying a primary insurer's motion to dismiss an excess insurer's allegation that it has a right to subrogation to pursue any claims the insured might have against a third party, including the primary insurer); *Great American Ins. Co. of New York v. Federal Ins. Co.*, 2010 WL 1712947, at *5 (Tenn. Ct. App., Apr. 28, 2010) (recognizing equitable subrogation between excess and primary insurers).
Texas	*Am. Centennial Ins. Co. v. Canal Ins. Co*., 843 S.W.2d 480, 482–83 (Tex. 1992) (recognizing equitable subrogation between excess and primary insurers, in part, to prevent unfair distribution of losses among primary and excess insurers and to encourage fair and reasonable settlement of lawsuits).
Virginia	*Horace Mann Ins. Co. v. Gov't Employees Ins. Co.*, 344 S.E.2d 906, 908 (Va. 1986) (assuming without deciding that the rule that

	an insurer owes a duty to its insured to exercise good faith in deciding whether to accept a settlement offer would also apply in a primary-secondary insurer situation).
Washington	*Truck Ins. Exch. of the Farmers Ins. Group v. Century Indem. Co*., 887 P.2d 455, 459–60 (Wash. Ct. App. 1995) (recognizing equitable subrogation between excess and primary insurers).
West Virginia	*Vencill v. Cont'l Cas. Co*., 433 F. Supp. 1371, 1376 (S.D. W. Va. 1977) (applying West Virginia law and recognizing equitable subrogation between excess and primary insurers).
Wyoming	*Hocker v. N.H. Ins. Co.*, 922 F.2d 1476, 1485 (10th Cir. 1991) (applying Wyoming law and assuming in dicta that equitable subrogation between excess and primary insurers is available).

3. The few states that reject equitable subrogation between insurers do not provide persuasive reasoning

Only three states decline to recognize equitable subrogation between insurers: Idaho, Alabama, and Wisconsin. *See Stonewall Surplus Lines Ins. Co. v. Farmers Ins. Co. of Idaho*, 971 P.2d 1142, 1148–49 (Idaho 1998); *Federal Ins. Co. v. Travelers Cas. and Sur. Co*., 843 So. 2d 140 (Ala. 2002); *Teigen v. Jelco of Wisconsin, Inc.*, 367 N.W.2d 806 (Wis. 1985). Each of these high-court decisions reflects flawed reasoning that contradicts Nevada law or public policy interests and, therefore, should not be persuasive to this Court.

First, the Idaho Supreme Court refused to recognize equitable subrogation by excess insurers because the "special relationship" that allows an insured to assert the tort of bad faith against its insurer is not present between excess and primary insurers. *Stonewall Surplus Lines*, 971 P.2d at 1148–49. This approach is

wrong under Nevada law because equitable subrogation is derivative liability in which the excess insurer steps into the shoes of the insured. *Supra* 20.

Second, the Alabama Supreme Court rejected equitable subrogation by an excess insurer where the claim settled within policy limits by comparing it to an earlier decision where an insured had no cause of action for bad-faith refusal to settle because the claim ultimately settled within the defending insurer's limits. *See Fed. Ins. Co*, 843 So. 2d at 145 (citing *Evans v. Mutual Assurance, Inc*., 727 So. 2d 66, 67–68 (Ala. 1999)). This approach is wrong under Nevada law because equitable subrogation requires courts to view the loss caused by the tortfeasor to the insured before payment by the insurer. *Supra* 20.

The Wisconsin Supreme Court refused to recognize equitable subrogation by an excess carrier because it found that the insurer had "incur[red] only those costs for which it is contractually responsible and for which it has already collected a premium." *See, e.g., Teigen*, 367 N.W.2d at 811–12. This rationale misapprehends the distinction between excess and primary insurance. As discussed below, excess carriers would have to increase premiums to address the additional risk from allowing primary insurers to "gamble" with the insured's excess coverage. *Infra* 36.

Accordingly, not only are these states in the minority, their reasoning for rejecting excess insurer equitable subrogation rights is not persuasive. Without a

published decision to the contrary, the Court should join the majority position that excess insurers can have equitable subrogation claims against primary insurers, even where the ultimate settlement or judgment is within the collective policy limits.

C. Recognizing Equitable Subrogation Between Insurers Promotes Important Public Policies

Declining to recognize equitable subrogation between insurers under *any* circumstances not only runs counter to Nevada's equitable subrogation law, but also creates perverse incentives that bad-faith rules seek to avoid. Besides allowing courts to distribute risk fairly—the entire purpose of equitable subrogation law—equitable subrogation between insurers: (1) promotes fair settlement practices, (2) protects policyholders, and (3) maintains insurance market stability. *See, e.g., Northwestern Mut. Ins. Co.*, 76 Cal. App. 3d at 1045–46; *see also* Cherry D. Williams, *A New Twist in Insurance Litigation: Stowers Suits by Excess Carriers Against Primary Carriers* (1992) 33 S. Tex. L. Rev. 1, 45 ("Public policy considerations require recognition of equitable subrogation to promote the twin goals of obtaining prompt and just settlement of claims and keeping premiums down to encourage the purchase of insurance, both excess and primary, by the general public.").

1. Equitable subrogation promotes fair settlement practices

By allowing an excess insurer to seek reimbursement from a primary insurer that acted in bad faith, equitable subrogation encourages responsible settlement behavior from primary insurers. *See Northwestern Mut. Ins. Co.*, 76 Cal. App. 3d at 1045–46 (finding recovery by an excess insurer is supported because "when a primary insurer breaches its good-faith duty to settle within policy limits, it imperils the public and judicial interests in fair and reasonable settlement of lawsuits . . . A primary insurer should not be permitted to obstruct in bad faith the important settlement process.").

If the primary carrier were not liable to someone for its actions, the public and judicial interests of fair and just settlements would suffer and the primary insurer would have an incentive to "gamble" with the excess carrier's money—at little or no risk to itself. *See Commercial Union Ins. Co. v Medical Protective Co.*, 393 N.W.2d 479 (Mich. 1986). "[W]hen the insured faces a potential judgment in excess of the policy limit (an 'excess judgment'), the insurer may have an incentive to undervalue the possibility of a loss at trial, because . . . as long as the insurer's liability is bounded by the policy limit, taking the case to trial imposes no added risk on the insurer . . ." Restatement of Liability Insurance § 24 cmt. b (2019). In such a case, the insurer is "effectively gambling with the insured's money, or gambling with the excess insurer's money, because the insured or the

insured's excess insurer will have to pay any verdict in excess of the policy limit." *Id*. "In short, if the existence of excess insurance relieved a primary insurer of its responsibility to negotiate and settle up to its policy limits in good faith, then the primary insurer would have a disincentive to settlement." *Valentine v. Aetna Ins. Co*., 564 F.2d 292, 298 (9th Cir. 1977). As long as an excess insurer can recover from a primary insurer that failed to settle within policy limits, the primary insurer will be discouraged from taking unnecessary risks with the policyholder's coverage.

Laws that promote settlement of meritorious claims serve important public policy interests—with the benefit redounding not only to policyholders, but also claimants and the courts. *See American Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480, 482–83 (Tex. 1992); *RSUI Indem. Co. v. Discover P & C Ins. Co.*, 649 F. App'x 534, 536 (9th Cir. 2016) (recognizing equitable subrogation is "consistent with public policy interests identified by California courts in the insurance context: it promotes the settlement of claims . . . and is favorable both to the insured and to claimants"); *Valentine*, 564 F.2d at 297 (under California law, "policy considerations pertinent to both the courts and the insurance industry favor allowing an excess insurer to enforce a primary insurer's duties to the insured"). Injured Nevada residents with meritorious claims deserve to have their claims settled without the burden and expense of protracted litigation. Nevada has a

strong interest in protecting injured claimants. The Nevada courts also benefit from not wasting judicial resources on meritorious claims that would have settled had an insurer not been incentivized to gamble with another insurer's policy limits. Recognizing these interests, Nevada has implemented other rules to encourage the out-of-court settlement of claims. *See, e.g., Schwartz v. Est. of Greenspun,* 110 Nev. 1042, 1048, 881 P.2d 638, 642 (1994) ("The purposes of [Nev. R. Civ. P. 68 Offers of Judgment] are to encourage settlements, thereby avoiding the expense to the parties and the court of protracted litigation.").

2. Allowing excess insurers to pursue equitable subrogation against defending primary carriers protects policyholders

A rule allowing excess insurers to seek equitable subrogation against wrongdoing primary insurers directly protects insureds from primary insurers' self-interested behavior. As long as the primary insurer knows that the insured has excess liability coverage—and is confident that the excess insurer cannot pursue equitable subrogation—the primary insurer has an incentive to reject settlement offers for its policy limits, gambling that it can achieve a better result without risking any additional liability for losing that bet. Such a rule does not protect insureds with the "fortuity" of having "obtained more than one applicable policy." *St. Paul*, 2022 WL 17543613, at *5 (dissent). To the contrary, it punishes those that obtained and paid for additional insurance coverage by requiring them to exhaust the additional coverage for which they paid premiums, whereas those with

insufficient coverage can transfer liability entirely to the wrongdoing insurer. *See A New Twist*, 33 S. Tex. L. Rev. at 45 ("Allowing the primary carrier to escape the consequences of its bad faith by shifting the financial burden to the excess carrier when a court would not condone the same conduct by a primary carrier if an insured had no excess coverage frustrates public interest.")

Such a rule, if endorsed by this Court, would lead to higher out-of-pocket costs for the adequately insured policyholder. First, encouraging the primary insurer to gamble with the insured's coverage can still lead to losses in excess of collective policy limits. Excess carriers will pay up only to their own limits, leaving policyholders to fund the excess losses that could have been avoided. Second, a rule against equitable subrogation disincentivizes excess insurers from stepping into the fray to protect their insureds from another carrier's bad faith. When an excess insurer covers the insured's excess loss in this scenario, allowing that insurer to then equitably subrogate the insured's claims against the primary carrier further protects insureds by incentivizing excess carriers to step in and pay. *See RSUI Indem. Co.*, 649 F. App'x at 536 (equitable subrogation between insurers "promotes excess insurers' contribution to settlement"). Excess insurers would not be inclined to settle even where it is in the insured's best interest because the excess insurer risks losing the policy-limit contributions of the primary insurer and footing the entire settlement itself. *Valentine*, 564 F.2d at 297. Thus, an excess

carrier might sit out when it thinks the primary insurer has unreasonably failed to settle within limits, requiring the insured to reach into its own pocket and pursue its remedy against the primary insurer. And, of course, the more claims an insured makes against an insurance policy, the higher the premium that insurer will charge.

3. Equitable subrogation maintains insurance market stability

Laws that hold primary insurers accountable for their settlement decisions help maintain a stable insurance market by preventing excessive risk-taking and protecting the financial integrity of excess insurers. Recognizing equitable subrogation between excess and primary insurers can maintain insurance market stability by ensuring that the primary insurer fulfills its obligations, thereby preventing the excess insurer from bearing undue financial burdens. *See A New Twist*, 33 S. Tex. L. Rev. at 45 ("In these days of spiraling verdicts, it is likely that a sufficient number of huge awards could put the excess carrier out of business."). This principle is supported by the notion that the primary insurer's duty to settle claims within policy limits is well established and reflected in its premiums. *See Northwestern Mut. Ins. Co.*, 76 Cal. App. 3d at 1045. That an excess insurer may recover from the primary carrier for a breach of duty does not increase the duty or the liability of the primary. *Id.*; *see also Valentine*, 564 F.2d at 298; *Medical Protective,* 393 N.W.2d at 482–83.

A primary carrier's unreasonable behavior increases costs for the same protection, unproductively raising premiums for excess insurance. *See Am. Centennial*, 843 S.W.2d at 483. Allowing the primary insurer to force the excess insurer to cover part of the primary's insurance exposure distorts the coverages and rate structures of the two distinct types of insurance—primary and excess—and would require excess insurance premiums to be adjusted. *See Valentine*, 564 F.2d at 298; *Medical Protective,* 393 N.W.2d at 483. If the excess insurer could not enforce the insured's rights against the primary insurer to compel the primary insurer to abide by its duty of good faith and fair dealing, then premiums would increase because the excess insurer would have to insure for that risk also. *United States Fire Ins. Co. v Royal Ins. Co.*, 759 F.2d 306 (3rd Cir. 1985); *Certain Underwriters of Lloyd's v. Gen. Accident Ins. Co. of Am*., 909 F.2d 228, 232–33 (7th Cir. 1990). This makes it harder for the general public to afford to be adequately insured. *See A New Twist*, 33 S. Tex. L. Rev. at 45 ("Without redress, an excess carrier would simply pass along the added financial burden through increased premiums, thereby making it more difficult for insureds to afford excess coverage.").

II. NORTH RIVER CAN SHOW HARM TO ITS INSURED NOTWITHSTANDING ITS SETTLEMENT PAYMENT

Even under the majority's flawed reasoning in *St. Paul*, this Court should still answer "yes" to the Ninth Circuit's certified question. On summary judgment,

the *St. Paul* majority found that Cosmopolitan suffered no damages after St. Paul's payment. But just because the Court found there was no damage to Cosmopolitan under the facts of that case does not mean that insureds *never* suffer damages when claims are settled within excess policy limits after a primary carrier fails to settle. Excess insurers like North River that have policies with aggregate limits can still show that their insureds suffered damages as a result of the primary insurer's breach of the duty to settle.

Establishing a bright-line rule that there can *never* be equitable subrogation where the claim settles within the collective policy limits violates Nevada's long-established tenets of equitable subrogation law. Nevada courts have consistently "balance[d] the equities based on the facts and circumstances of each particular case" and applied subrogation to the extent necessary to "grant an equitable result between the parties." *Am. Sterling Bank v. Johnny Mgmt. LV, Inc*., 126 Nev. 423, 428, 245 P.3d 535, 538 (2010) (internal quotation marks omitted). As the U.S. Supreme Court explained over a century ago: "The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties." *Memphis & L. R. R. Co. v. Dow*, 120 U.S. 287, 301–02 (1887). This foundational understanding aligns with Nevada's longstanding approach to equitable subrogation. *See Laffranchini*, 39 Nev. at 56–

7, 153 P. at 252–53 ("The right of subrogation . . . is founded upon the facts and circumstances of the particular case."); *Am. Sterling*, 126 Nev. at 428, 245 P.3d at 538. Applying a blanket rule that there can never be equitable subrogation where a claim settles within collective policy limits would deprive the courts of the ability to fashion an appropriate remedy to achieve an equitable result. Such a rigid approach is contrary to the equitable nature of a subrogation claim.

Unlike the insurer in *St. Paul*, North River would be able to show that its insured, Alhambra Place, suffered harm notwithstanding North River's payment. Where, as here, that insured purchased occurrence-based policies with aggregate limits, an insured is deprived of those insurance proceeds for any additional claims that might arise under that excess policy when the defending primary insurer fails to settle within its limits. North River's policy covers any occurrences within the policy period subject to an aggregate limit of $10 million. Once North River pays that $10 million for claims involving occurrences in the 2017 policy period, North River's policy is exhausted and will not pay any further amounts. As a result, the $4 million that North River paid to settle the claim against Alhambra Place after James River failed to accept a settlement demand has been spoken for; it is now unavailable insurance for any future claims with occurrences in 2017, leaving Alhambra Place with $6 million for any future losses. And because North River's

policy is occurrence-based, claims against Alhambra Place potentially covered by that policy could arise years later.

Thus, this Court should decline to impose a rigid approach to the longstanding flexible Nevada doctrine and allow equitable subrogation claims to proceed, even if the Court were inclined to follow *St. Paul.* North River should be afforded the opportunity to engage in discovery and prove its insured suffered damages from James River's alleged wrongdoing, which forms the basis for North River's equitable subrogation claim.

CONCLUSION

In response to the Ninth Circuit's certified question, this Court should hold that, yes, an excess insurer can state a claim for equitable subrogation against a primary insurer where the underlying lawsuit settled within the insurers' combined policy limits. That answer comports with established Nevada subrogation law and protects insureds, both directly and in the insurance industry at large.

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CERTIFICATE OF COMPLIANCE

I hereby certify this Appellant's Brief complies with: (i) the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 pt., double spaced, Times New Roman; and (ii) the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 11,032 words.

I further certify I have read this Appellant's Brief, and to the best of my knowledge, information, and belief, it is neither frivolous nor interposed for any improper purpose. I further certify that the foregoing brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the briefs regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions should the subject brief not conform with the requirements of the Nevada Rules of Appellate Procedure.

Dated: December 12, 2024

CAMPBELL & WILLIAMS

By: */s/ J. Colby Williams*
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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 12th day of December, 2024, I caused true and correct copies of the foregoing Appellant's Opening Brief to be delivered to the following counsel and parties:

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