Case No. 89228

In the Supreme Court of Nevada

NORTH RIVER INSURANCE COMPANY, a New Jersey corporation,

Appellant,

v.

JAMES RIVER INSURANCE COMPANY, an Ohio corporation,

Respondent.

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

Respondent's Answering Brief

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

James River Insurance Company ("James River") is a wholly owned subsidiary of James River Group Holdings, Ltd., a Bermuda-based insurance holding company. No shareholder owns more than 10% of James River Group Holdings, Ltd.'s stock.

Jeffrey V. Commisso, John T. Brooks, and Benjamin D. Brooks of Sheppard Mullin Richter Hampton LLP represented James River in the Ninth Circuit.

They, along with Abraham G. Smith and Lauren D. Wigginton of Holland & Hart LLP, represent James River in this Court.

March 12, 2025.

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ISSUES

The Ninth Circuit certified the following question: 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?

If this Court elects to answer the certified question, it must also answer the following additional questions:

1. If a case settles within the insured's policy limits before trial, has the insured suffered damages that the excess carrier can be subrogated to?

2. Were this Court's decisions in *St. Paul Fire & Marine Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, No. 81344, 521 P.3d 418, 2022 WL 17543613 (Nev. Dec. 8, 2022), and *Aspen Specialty Ins. Co. v. Eighth Jud. Dist. Ct.*, No. 83794, 528 P.3d 287, 2023 WL 3185274 (Nev. Apr. 28, 2023), wrongly decided?

STATEMENT OF THE CASE

I.
The relevant insurance policies.

The insured in this case is a Nevada apartment complex, Alhambra Place Partnership dba Shelter Island. (1 JA 3, ¶ 7.) James River Insurance Company issued a $1 million primary liability insurance policy covering Alhambra Place and several sister companies. (*Id.*) North River Insurance Company also insured Alhambra Place under a $10 million excess liability policy. (1 JA 3, ¶ 10.)

II.
The underlying wrongful-death lawsuit and settlement.

In 2017, a Nevada man was murdered inside one of the Alhambra Place apartments. (1 JA 2, ¶ 5.) His heirs sued Alhambra Place for negligent security in Nevada state court. (*Id.* ¶ 6.) Alhambra Place tendered its defense to James River and to North River.

The wrongful death case settled before trial for $5 million. (1 JA 6, ¶ 30.) James River paid its $1 million limit (1 JA 7, ¶ 32.); North River paid $4 million under its policy. (*Id.* ¶ 33.) Alhambra

Place did not contribute any money to the settlement or its defense. (*See* 1 JA 6-7, ¶¶ 30-33.)

III.
The equitable-subrogation case.

After the settlement, North River sued James River in California federal court for equitable subrogation to recoup its insurance payment to settle the wrongful death case. (1 JA 1-23.) Its theory was that James River should have settled the case earlier and for less than the $1 million primary policy limit; that Alhambra Place could have sued James River for bad faith if North River had not contributed to the later $5 million settlement; and that North River stands in Alhambra Place's shoes as its subrogee to recover its $4 million insurance payment. (1 JA 7-8.)

James River moved to dismiss the complaint. (1 JA 27-36.) In its order granting James River's motion, the district court held that Nevada law applied to the case and found this Court's decisions in *St. Paul* and *Aspen* persuasive. (1 JA 151-53.) In *St. Paul*, this Court held that there could not be an equitable-subrogation claim between co- or equal-level insurers because the underlying case had settled within the policy limits, because the insured had not been

harmed, and there was thus no underlying claim for the plaintiff insurer to be subrogated to. (1 JA 151.) In *Aspen*, the Court applied the same reasoning in an equitable-subrogation case between an excess insurer and a primary insurer. (1 JA 151-52.)

The district court explained that it was required to predict how this Court would resolve the issue before it: whether North River could state a claim for equitable subrogation based on its allegations that the underlying wrongful death suit settled within the combined policy limits. (1 JA 152.) Based on *St. Paul* and *Aspen*—which held under similar circumstances that the insured suffered no damages and that therefore there was no claim to be subrogated to—the district court predicted that this Court would decide this case in the same way. (*Id.*) Specifically, because the underlying lawsuit settled within the combined policy limits before trial, let alone an excess judgment, Alhambra Place was not damaged and there was no claim for North River to be subrogated to. (*Id.*)

North River appealed the decision to the Ninth Circuit, and after briefing and oral argument, the Ninth Circuit certified its question to this Court. (1 JA 270-80.)

SUMMARY OF THE ARGUMENT

North River and James River both issued liability insurance policies to their mutual insured Alhambra Place Partnership, a Nevada apartment complex. Alhambra Place was sued for wrongful death based on a murder in one of the apartments. Before judgment, verdict, or even trial the parties settled. The settlement placed no obligation on Alhambra place itself. Instead, insurance funded the settlement: James River contributed its $1 million primary policy limit. North River contributed $4 million from its $10 million excess policy limit. North River then sued James River for equitable subrogation to recoup its settlement contribution from James River.

The federal district court decided that Nevada law applies to the dispute, and it predicted based on this Court's recent unpublished decisions in *St. Paul* and *Aspen* that North River cannot state a claim. Because the underlying case settled before trial within the policy limits, Alhambra Place was not harmed and there was no claim against James River to be subrogated to.

North River appealed, and rather than applying this Court's recent on-point decisions in *St. Paul* and *Aspen* (and other equitable-subrogation decisions) to predict whether this Court would recognize North River's claim, the Ninth Circuit certified a broad question to this Court that would not resolve the choice-of-law issue the Ninth Circuit faces. Specifically, rather than ask whether an excess insurer can state a claim for equitable subrogation under the circumstances in this case (where the primary insurer met its defense obligation, paid its entire policy limit to settle, and the case settled within the combined policy limits before an excess judgment), the Ninth Circuit has asked whether under Nevada law an excess insurer can *ever* state a claim for equitable subrogation against a primary insurer following an in-limits settlement.

The Court should decline to answer the certified question. First, this Court already answered it, as relevant to this case, in *St. Paul* and *Aspen*. Under those cases, the excess carrier can be subrogated only to a claim that is ripe at the time of its payment, and in the context of a settlement before an excess judgment, there is no such claim. The Court reaffirmed the same analysis articulated in those decisions weeks ago in its published opinion *Protective Ins.*

Co. v. Comm'r of Ins., 141 Nev., Adv. Op. 3, ____ P.3d ____ (Jan. 16, 2025). The Court need not answer the question again. (*See infra* Section II.B.)

Second, this Court's answer would be an advisory opinion that will not resolve the Ninth Circuit's choice-of-law analysis. The question as framed by the Ninth Circuit is improperly preliminary and overbroad. There is no assurance that Nevada substantive law will apply to the dispute based on California's choice-of-law framework and an unresolved split of authority in California on the same question, as reflected in the California Court of Appeal decisions the Ninth Circuit's certification order references. (*See infra* Section II.C.1.)

Third, the certified question lacks sufficient factual certainty. North River's position here—that it should be allowed to pursue a theory that Alhambra Place was harmed because the settlement payment reduced its aggregate insurance policy limit—creates an entirely new potential conflict that would render the Court's answer to the certified question inapplicable. (*See infra* Section II.C.2.)

If the Court does answer the certified question as framed by

the Ninth Circuit, the answer is simply, "It depends." Contrary to North River's assertion—that if it cannot state a claim here, equitable subrogation cannot exist between excess and primary insurers—there are circumstances where such a claim could arise. For example, an excess insurer *might* have an equitable-subrogation claim if the insured incurs defense costs or faces an excess judgment before settlement, or if the primary carrier refuses to pay its portion of a settlement. (*See infra* Section III.)

The more appropriate question here, however, taking the facts of this case into account, is whether an excess insurer can state a claim for equitable subrogation against a primary insurer who met its defense obligation and exhausted its policy limit as part of a pretrial settlement within the insured's combined policy limits, so that the insured never incurred any liability. The answer is no. Under those circumstances, the insured suffered no harm and has no claim for the excess insurer to be subrogated to, just as this Court decided in *St. Paul* and *Aspen*. (*See infra* Section IV.)

North River's new damages theory that the insured was somehow harmed by the settlement because now its aggregate policy limit is reduced does not require a different result. There is no

authority supporting this theory. And under Nevada law, the theory is self-defeating because North River did not compensate the insured for that alleged harm. In any event, North River raised it for the first time on reply in the Ninth Circuit, and the argument is waived. (*See infra* Section V.)

Finally, North River's various policy speculations are unsupported by evidence, and the Nevada Legislature and Division of Insurance would be far better suited to address them. For example, providing excess insurers in North River's position a right to sue for equitable subrogation will not encourage settlement. It will instead cause insurer-versus-insurer litigation in Nevada to proliferate with the ultimate likely result of increasing primary insurance premiums. There is no evidence that recognizing such a right is necessary to stabilize the Nevada insurance market. (*See infra* Section VI.)

In sum, there is no reason for this Court to answer the certified question again or differently than it did in *St. Paul* and *Aspen*, and the Court should decline to do so.

ARGUMENT

I.
Nevada's equitable-subrogation law.

Nevada recognizes a claim for equitable subrogation when one party involuntarily pays the obligation or loss of another for which a third party is found to bear responsibility. *See AT&T Techs., Inc. v. Reid*, 109 Nev. 592, 595-96, 855 P.2d 533, 535 (1993); *see also In re Fontainebleau Las Vegas Holdings, LLC* (*In re Fontainebleau II*), 128 Nev. 556, 572 n.8, 289 P.3d 1199, 1209 n.8 (2012). The equitable-subrogation claim is derivative. There needs to be an independent underlying basis on which the subrogor could have recovered. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011). Further, Nevada's equitable-subrogation principles are flexible, and Nevada has opted not to adopt bright-line rules related to equitable subrogation. *See AT&T Techs., Inc.*, 109 Nev. at 595, 855 P.2d at 535 ("subrogation is an equitable doctrine created to accomplish what is just and fair as between the parties") (internal marks omitted).

No published Nevada case addresses whether or under what

circumstances an excess insurer can pursue equitable subrogation from a primary insurer, when both contributed to a prejudgment settlement within the combined policy limits to resolve claims against their mutual insured.

In December 2022 and April 2023, this Court issued two unpublished but reasoned decisions addressing insurer-versus-insurer equitable-subrogation claims following an in-limits settlement to which the insured did not contribute. *St. Paul*, 521 P.3d 418, 2022 WL 17543613; *Aspen Specialty*, 528 P.3d 287, 2023 WL 3185274. In *St. Paul*, the insureds operated a night club. 521 P.3d 418, 2022 WL 17543613, at *1. Club security allegedly injured a patron as they ousted him from the club. The patron sued. *Id.* The insureds tendered the claim to their primary carrier (Aspen Specialty) and one of their excess carriers (National Union). *Id.* They later notified St. Paul, another excess carrier, of the claim. *Id.* The carriers each contributed to settle the claim within their combined limits. St. Paul then sued National Union to recover its settlement contribution. It alleged that National Union unreasonably failed to settle the case within its own limits, and that it stood in the insured's shoes as a subrogee to recover the settlement amount

above National Union's limits. *Id.* The trial court granted summary judgment to National Union and dismissed the equitable-subrogation claim.

This Court affirmed. *Id.* at *1–2. The plaintiff could not state an equitable-subrogation claim because equitable subrogation is derivative. The in-limits settlement protected the insured so that the insured suffered no damages. Thus, there was no underlying claim to be subrogated to. *Id.* at *2. The Court explained that the insurers "guaranteed [the insured's] financial 'security, protection, and peace of mind' when they settled [the insured's] liability before excess-judgment exposure" within their combined limits. *Id.* "Therefore, [the insured] did not suffer damages which would give rise to either a bad-faith claim or a breach-of-contract claim," and "St. Paul thus lack[ed] any claim to assert on behalf of [the insured] against National Union." *Id.*

In *Aspen Specialty*, this Court explicitly applied the rule from *St. Paul* to bar an equitable-subrogation claim by an excess carrier (like North River) against a primary carrier (like James River) for the same reason: after an in-limits settlement before judgment, the insured did not suffer damages and did not have a claim to be

subrogated to, so the insurer could not pursue a derivative claim for equitable subrogation. 258 P.3d 287, 2023 WL 3185274, at *2.

What's more, the Court issued these decisions *after* a Nevada federal district court predicted (incorrectly, as it turned out) that this Court would allow an excess insurer's equitable-subrogation claim even if the case settled prejudgment within the combined limits. *See Zurich Am. Ins. Co. v. Aspen Specialty Ins. Co.*, No. 20-cv-01374, 2021 WL 3489713, at *2, *4–5 (D. Nev. Aug. 6, 2021).

II.
This Court should decline to answer the certified question again or differently than it did in *St. Paul* and *Aspen*.

A. This Court rejects certified questions that are unnecessary or seek advisory opinions.

Jurisdictional and prudential principles guide this Court's discretion in answering certified questions. *See Parsons v. Colt's Mfg. Co.*, 137 Nev. 698, 702, 499 P.3d 602, 606 (2021). "This court will not render advisory opinions on . . . abstract questions." *Mack v. Williams*, 138 Nev., Adv. Op. 86, 522 P.3d 434, 440 (2022) (quoting *Applebaum v. Applebaum*, 97 Nev. 11, 12, 621 P.2d 1110, 1110 (1981)). In fact, it is constitutionally prohibited from doing so. *Echeverria v.*

State, 137 Nev. 486, 489–90, 495 P.3d 471, 474-75 (2021). Even absent a jurisdictional bar, this Court rejects questions that are not worth the significant expenditure of resources, either because existing decisions provide adequate guidance or because the answer's impact on the federal proceedings is speculative. *See Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 125 Nev. 66, 72, 206 P.3d 81, 85 (2009).

Thus, this Court only accepts questions that (a) demand a necessary answer; (b) are potentially "determinative of the cause then pending in the certifying court"; and (c) stand on a sufficient legal and factual foundation. *Parsons*, 137 Nev. at 702, 499 P.3d at 606; *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 749-51, 137 P.3d 1161, 1163-64 (2006). The Ninth Circuit's question fails each of these requirements.

B. An answer to the certified question is unnecessary based on existing authority from this Court.

This Court is not subservient to the Ninth Circuit. *See Danforth v. Minnesota*, 552 U.S. 264, 289 (2008) ("[W]e have no . . . supervisory authority over the work of state judges."). The Ninth Circuit can intervene in a state matter only to "correct

wrongs of constitutional dimension." *Smith v. Phillips*, 455 U.S. 209, 221 (1982). Even in diversity cases, the Ninth Circuit cannot question how this Court applies Nevada law.

Instead, when it sits in diversity the Ninth Circuit need only predict what this Court would do. In this case, the Ninth Circuit has ample information to do this. Its request that this Court reexamine or abrogate its prior decisions infringes on this Court's sovereignty. *Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988) (noting that a federal court should not "routinely invoke [certification] whenever a federal [matter presents] . . . an unsettled question of state law"); *Hurd v. Flywheel Energy Prod., LLC*, No. 21-cv-1207, 2022 WL 6325259, at *2 (E.D. Ark. Sep. 9, 2022) (federal courts should not "make demands—even demands that can be refused—on the highest court of a state unless it is absolutely necessary").

1. *This Court does not answer certified questions that have already been answered, even if the answer is in an unpublished decision.*

This Court will not answer a certified question "again[] or differently" if a prior decision already addressed the issue. *Nalder v.*

United Auto. Ins. Co., No. 70504, 135 Nev. 692, 449 P.3d 1268, 2019 WL 5260073, at *1 (Sept. 20, 2019). In *Nalder*, the Ninth Circuit asked whether an insurer's liability for a good-faith, but mistaken, failure to defend is capped at policy limits. *Id.* After certification, this Court answered the same question in another case, *Century Surety Co. v. Andrew*, 134 Nev. 819, 432 P.3d 180 (2018). *Nalder*, 2019 WL 5260073, at *1. The Court then rebuffed the *Nalder* insurer's attempt to distinguish the facts: "We . . . decline to answer the question posed in *Century Surety* again, or differently, in this case." *Id.*

In such circumstances, this Court's answer "would not settle important questions of law," as NRAP 5 requires, "but would merely involve applying already established law to the facts in the Ninth Circuit's case." *U.S. Bank, N.A. v. SFR Invs. Pool 1*, No. 82988, 137 Nev. 973, 489 P.3d 514, 2021 WL 2646064, at *1 (June 25, 2021).

The same principles apply to this Court's unpublished decisions issued after January 1, 2016, which may be cited for their "persuasive value." NRAP 36(c)(2), (3). This Court routinely cites its unpublished decisions, including when answering certified

questions. For example, in *Magliarditi v. TransFirst Group Inc.*, this Court answered a certified question that the alter-ego doctrine extends to partnerships, relying on an unpublished order applying the doctrine to a limited partnership. No. 73889, 135 Nev. 681, 450 P.3d 911, 2019 WL 5390470, at *4 (Oct. 21, 2019) (citing *Sunrise Sec. Corp. v. Anzalone*, No. 49052, 125 Nev. 1082, 281 P.3d 1223, 2009 WL 1491324 (Feb. 5, 2009)).[1] Indeed, many of this Court's answers to certified questions, such as *Magliarditi*, are themselves unpublished.[2] Where this Court has already addressed an issue through an unpublished order, a federal court cannot require it to reiterate.

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1. Some unpublished decisions have been cited repeatedly. *E.g.*, *Zhang v. Barnes*, No. 67219, 132 Nev. 1049, 382 P.3d 878, 2016 WL 4926325 (Sept. 12, 2016), *cited in Segovia v. Eighth Jud. Dist. Ct.*, 133 Nev. 910, 914, 407 P.3d 783, 787 (2017), *and Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 136 Nev. 350, 353 n.3, 466 P.3d 1263, 1267 n.3 (2020), *overruled on other grounds, Limprasert v. Pam Specialty Hosp. of Las Vegas LLC*, 140 Nev., Adv. Op. 45, 550 P.3d 825, 828 (2024).

2. *See also, e.g.*, *Nalder*, 2019 WL 5260073; *Cantlon v. Wells Fargo & Co.*, No. 78629, 136 Nev. 790, 475 P.3d 776, 2020 WL 6870490 (Nov. 20, 2020).

2. This Court's recent decisions in St. Paul *and* Aspen *make certification unnecessary.*

This Court's recent decisions in *St. Paul* and *Aspen* decided the issue underlying this case: whether an insurer can, through equitable subrogation, recoup its contribution to a settlement from another insurer when the underlying case settled pre-judgment within the insured's combined policy limits.

In *St. Paul*, a patron sued the Marquee Nightclub and Cosmopolitan for personal injuries. *St. Paul*, No. 81344, 521 P.3d 418, 2022 WL 17543613. After a verdict on compensatory damages, but before a punitive-damages verdict or final judgment, the primary and excess carriers for both defendants—four total insurers—settled for their combined policy limits. *Id.* at *2. St. Paul, Cosmopolitan's excess insurer, then sued the Marquee's primary and excess insurers for, among other things, equitable and contractual subrogation. *Id.* Sitting *en banc*, a majority held that "[w]e do not need to reach the scope of equitable or contractual subrogation here because Cosmopolitan lacks an underlying claim to subrogate." *Id.* at *2.

The Court acknowledged that if an excess judgment is entered against the insured, breach of the duty to settle "may render the

insurer liable for the entire amount of the excess judgment, regardless of the policy's actual coverage limits." *Id.* (citing *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 313-14, 212 P.3d 318, 327-28 (2009); *Andrew*, 134 Nev. at 826, 432 P.3d at 186). But until an excess judgment, the insured is unharmed, so the insured's bad-faith claim does not accrue. *Id.* "[E]xhaustion of the policy limits prior to an excess judgment necessarily protects the insured from the harm that the duties purport to avoid." *Id.* (citing *Safeco Ins. Co. of Am. v. Superior Court*, 84 Cal. Rptr. 2d 43, 46 (Ct. App. 1999)). Settlement "before excess-judgment exposure" means "Cosmopolitan did not suffer damages which would give rise to either a bad-faith claim or a breach-of-contract claim," thus eliminating any claim to which St. Paul could subrogate. *Id.*

The majority rejected the dissenting view (also advanced by North River here) that in analyzing whether Cosmopolitan was harmed, the Court should disregard the "literal" fact that "Cosmopolitan never suffered damages because of St. Paul's settlement contribution" and focus instead on a hypothetical world in which the insured, rather than the insurer, paid the remaining portion of the settlement. *Id.* at *6. On petition for rehearing, St. Paul raised

many of the same policy points North River now raises, pressing that this Court's position was in the minority and would have grave impacts on the insurance industry. This Court denied the petition summarily.

In *Aspen*, a unanimous panel of this Court applied *St. Paul*'s reasoning to the claim against the Marquee's primary insurer.[3] *Aspen*, 2023 WL 3185274. The panel held that *St. Paul* was "clearly controlling law." *Id.* at *2. The analysis that "Cosmopolitan suffered no damages which St. Paul can acquire" equally extinguished St. Paul's claim against the primary carrier. *Id. Aspen* removed any doubt as to *St. Paul*'s application to cases involving an excess insurer's attempt to recoup its settlement payment from a primary carrier.

This case involves even simpler facts. It falls squarely within the analysis of *St. Paul* and *Aspen*. The insured, Alhambra Place, was sued, and the case settled within the combined policy limits, even before trial. James River as the primary insurer contributed its full $1 million policy limit, and North River as the excess insurer

3. *St. Paul* involved claims only against National Union, Marquee's excess carrier.

contributed the $4 million balance (well below its $10 million policy limit). Thus, applying the same rationale from *St. Paul* and *Aspen*, Alhambra Place suffered no injury, and there was no claim to subrogate.

Nothing in this case requires the Court to deviate from *St. Paul* or *Aspen*. For example, while the Ninth Circuit thought those cases were "meaningful[ly] differen[t]" from this one—because the settlement underlying *St. Paul* and *Aspen* was post-verdict, whereas the settlement underlying this case was pre-verdict (and pre-trial), *see N. River Ins. Co. v. James River Ins. Co.*, 116 F.4th 855, 860 (9th Cir. 2024)—that *a fortiori* is reason to apply *St. Paul* and *Aspen* here. Arguably, the insured in St. *Paul* and *Aspen* was at greater risk of harm following a trial and compensatory damages verdict than Alhambra Place, which never faced trial. Nevertheless, in *St. Paul* and *Aspen*, the Court held that the insured suffered no damages because the case settled prejudgment within the combined policy limits, without contribution from the insured. The same is true here.

The Ninth Circuit also expressed concern that "neither case

was decided by the full Nevada Supreme Court." *Id.*[4] Yet nothing in the Nevada Constitution, the enabling statute, this Court's rules, or its internal operating procedures discounts decisions by a panel or six-member quorum of the full Court. *See* NEV. CONST. art. 6, § 2; NRS 2.135, 2.140; NRAP 25A(a); IOP Rule 1(e).[5]

Nor is the cases' unpublished status reason to answer a certified question. *Contra N. River*, 116 F.4th at 860. (*See supra* Section II.B.1.)

In short, it is not the Ninth Circuit's role to disagree with Nevada's approach, or to cajole this Court into abrogating *St. Paul* and *Aspen* via a certified question. Those cases are carefully reasoned and speak with a clear majority's voice. The majority was aware of

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4. In its brief before the Ninth Circuit, North River even went so far as to suggest that this Court would reconsider *St. Paul* because dissenting Justice Cadish then served as Chief Justice. (1 JA 210 n.7.)

5. The Chief Justice in *St. Paul* could have requested a substitute for disqualified Justice Lee, but it was unnecessary as the four-Justice majority would have prevailed over a third dissenter. *See* IOP Rule 1(g)(4); *Valley Health Sys., LLC v. Murray*, 139 Nev., Adv. Op. 22, 533 P.3d 1040, 1046 (2023) (Pickering, J., dissenting in part) (noting that substitution of a seventh justice is mandatory only to break a tie).

other approaches to subrogation; Justice Cadish's dissent and the rehearing petition articulated the contrary view clearly. But the majority elected another path, one consistent with Nevada's rejection of subrogation where the insured itself lacks a ripe claim. *St. Paul* and *Aspen* are the best evidence of how this Court would rule in this case, and the Court need not and should not answer how it would decide the dispute between North River and James River in this case.

Nor is there any need for this Court to answer the much broader question that the Ninth Circuit certified, whether under Nevada law, an excess insurer could *ever* state a claim for equitable-subrogation claim where the underlying lawsuit settled within the combined policy limits of the insurers. As explained below, one can imagine circumstances where an excess insurer could state such a claim, but this case is not one of them. (*See infra* Section III.)

3. This Court's recent published decision in Protective Insurance *confirms that* St. Paul *and* Aspen *are correct.*

St. Paul and *Aspen* make clear that this Court assesses a subrogation claim based on the subrogor's actual injury, not the injury avoided. Those decisions embrace the commonsense principle

that an insurer can be subrogated to its insured's rights only when the insured itself has a ripe claim for relief. This Court recently confirmed its commitment to this analytical framework in a published opinion. *Protective Ins. Co. v. Comm'r of Ins.*, 141 Nev., Adv. Op. 3, ____ P.3d. ____ (Jan 16, 2025).

In *Protective*, an injured plaintiff negotiated a settlement with the tortfeasor's insurance company, Spirit. *Id.* at *2. Spirit became insolvent before payment. *Id.* Protective, the plaintiff's UM/UIM carrier, paid instead, then asserted a subrogation claim in Spirit's receivership proceedings. *Id.* at *3.

By statute, claims for "liability for bodily injury" receive higher priority, unless the loss was indemnified. NRS 696B.420(1)(b). If the loss was indemnified, the claim drops to the lowest priority, a catchall for "other claims." NRS 696B.420(1)(g). Protective argued its claim qualified for subsection (b) priority because although Protective had indemnified the plaintiff, Protective itself had not been indemnified. In other words, echoing the *St. Paul* dissent, Protective asked this Court to analyze the subrogation claim as though Protective had not compensated its insured.

But this Court analyzed the claim according to the *insured's*

"precise position," not Protective's. *Id.* at *3 (quoting 73 AM. JUR. 2D *Subrogation* § 60). The plaintiff had a subrogatable claim because he was physically injured *before* payment. *Protective*, 141 Nev., Adv. Op. 3 at *3. And Protective's payment had not extinguished his claim; he could have sued Spirit directly. *See id.* Under the collateral-source rule, Spirit could not argue that Protective's payment precluded his recovery. *Tri-Cnty. Equip. & Leasing, LLC v. Klinke*, 128 Nev. 352, 354, 286 P.3d 593, 595 (2012) (discussing collateral source rule). Subrogation is thus available.

But because Protective had indemnified plaintiff, his claim would be subsection (g) priority, not (b). So although Protective had a properly subrogated claim, Protective could acquire "no greater rights" than the insured. Thus, its claim was subsection (g) priority, as well.

Protective confirms the analytical framework this Court laid out in *St. Paul* and *Aspen*. In assessing a subrogated claim, this Court grapples with the insurer's payment and its impact on the insured's own claim, rather speculating what could have happened had payment not been made.

Protective, moreover, answers the concerns raised by North

River and the *St. Paul* dissent—that considering the insurer's payment would eliminate subrogation entirely because the insured will never be "literally" damaged. Under the collateral-source rule, the *Protective* plaintiff's claim remained cognizable even *after* Protective paid because he had already suffered a loss *before* payment. Protective had a claim to subrogate.

Here, in contrast with *Protective* but like *St. Paul* and *Aspen*, the insured had no accrued claim when North River paid. That is because a "cause of action for bad faith refusal to settle arises only *after* a judgment has been rendered in excess of the policy limits." *St. Paul*, 2022 WL 17543613, at *2 (emphasis added) (quoting *Safeco*, 84 Cal. Rptr. 2d at 46). By settling pretrial, before Alhambra Place experienced a loss, James River and North River prevented a claim from ever ripening. *See* J.H. Cooper, Annotation, *Limitation of Action Against Liability Insurer for Failure to Settle Claim or Action Against Insured*, 68 A.L.R.2d 892, 894 (1959) (collecting cases and noting consensus that "an action against a liability insurer for failure to settle a claim or action does not accrue . . . until the judgment in favor of the injured person against the insured is final"); Lee R. Russ & Thomas F. Segalla, Couch on

INSURANCE § 236:103 (3d ed. 2000) (accord).

Thus, *St. Paul*, *Aspen*, and now *Protective Insurance* confirm that this Court analyzes an insurer's subrogation claim by reference to the insured's actual position, without disregarding payment by insurance. If the insured has no claim, neither does the insurer. *Protective*, 141 Nev., Adv. Op. 3 at *6 (quoting 73 AM. JUR. 2D *Subrogation* § 60).

This Court's disciplined approach does not eliminate subrogation. To the contrary, it protects "bedrock requirements" of justiciability. *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (citation omitted). In Nevada, the injury to be imputed must be actual, not theoretical. This Court's balance is wisely struck: There is "[n]o principle is more fundamental to the judiciary's proper role in our system of government" than these limitations on justiciability. *Id.* (citation omitted). There are other mechanisms, such as contribution, for an insurer like North River to assert its own rights based on its own losses. *E.g.*, NRS 17.225. But when an insurer purports to subrogate to rights belonging to its insured, this Court correctly requires the insured's own claim to have accrued. If the insured had already suffered a loss, later reimbursement by insurance—a collateral-

source payment—will not extinguish the insured's claim. But if the insured had not suffered a loss before payment, this Court will not hypothesize about the losses that might have occurred absent payment. At least in Nevada, equitable subrogation is not the mechanism for the insurer to recoup its payment.

* * *

In sum, *St. Paul* and *Aspen* answer the specific question posed here. They are well-reasoned. And *Protective* confirms their approach was intentional, reflecting this Court's commitment to dealing in facts, reality, and fundamental constitutional principles, rather than hypotheticals. This Court need not answer the question again.

C. The Court should decline to answer the certified question because any answer would be advisory.

1. *Any answer to the certified question would be advisory because Nevada substantive law might not apply.*

The Court should decline to answer the certified question because doing so would not resolve any issue in the federal case. An answer is not "determinative" under NRAP 5 where it would

"have, at best, a speculative 'impact' in determining the underlying case," as when the answer cannot resolve the underlying case without further proceedings. *Mack*, 522 P.3d at 440-41; *see also Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 750-51, 137 P.3d 1161, 1164 (2006) (principles of federalism, comity and judicial efficiency require answers to certified questions to be determinative of part of the federal case).

The certified question cannot be preliminary. *See Mack*, 522 P.3d at 441 (rejecting certified question whether a private right of action existed under Nevada's Constitution because even if the right existed, the plaintiff might never recover under it). Nor can the certified question be overly broad. *Terracon*, 125 Nev. at 72, 206 P.3d at 85 (reframing overbroad certified questions to capture the facts of the case, whereas the questions as certified were overbroad for failure to do so). And the Court must have assurance that its law will apply in the federal proceedings. *See, e.g., Romero v. Allstate Ins. Co.*, 52 F. Supp. 3d 715, 734 (E.D. Pa. 2014) (declining to certify question on a limited issue governed by conflicts of law analysis because it "would not even finally resolve" the question of which

forum's law applies and was "un-workable").[6]

Under the foregoing principles, the Ninth Circuit's certified question seeks an improper advisory opinion from this Court. First, as certified, the question is whether Nevada would *ever* allow an excess insurer to state a subrogation claim against the primary insurer following a settlement within combined policy limits. Everyone agrees the answer is likely "yes," depending on the circumstances. For example, *St. Paul* itself suggests that the insured might have a subrogatable claim if settlement follows entry of an excess judgment. *St. Paul*, 2022 WL 17543613. (*See also infra* Section III.) But that answer does not resolve *this* case because it is not tethered to the facts, as the insurers settled the underlying claim against their mutual insured before judgment and within the combined policy limits. Answering the question as certified "would necessarily bear on situations not before this court and would therefore result in an advisory opinion." *Rozsavolgyi v. City of Aurora*, 102 N.E.3d 162, 170-71 (Ill. 2017). This Court should not

6. Undersigned counsel have not found a single case where a state supreme court agreed to elucidate state substantive law to assist a choice-of-law analysis governed by a *different* state's choice-of-law rules.

answer it. At minimum, this Court should rephrase the question to avoid creating an overbroad rule that does not determine the outcome here. *Terracon*, 125 Nev. at 68–69, 206 P.3d at 83.

Second, even if the Court rephrases the certified question to appropriately account for the relevant facts, the answer cannot resolve the choice-of-law analysis. To do so, the Ninth Circuit must determine whether there is a material conflict between Nevada and California law. But California law is also unsettled, as reflected by the California Court of Appeal cases cited in the Ninth Circuit's certification order. *N. River*, 116 F.4th at 859 (citing *Ace Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 206 Cal. Rptr. 3d 176 (Ct. App. 2016); *RLI Ins. Co. v. CNA Cas. of Cal.*, 45 Cal. Rptr. 3d 667 (Ct. App. 2006)).

Ace American and *RLI* represent a split of authority in California about the circumstances under which an excess insurer can recover under equitable subrogation from a primary carrier. *Ace American* allows a subrogation claim based on a pre-judgment settlement if the remaining elements of subrogation are met. 206 Cal. Rptr. 3d at 187. But *RLI* follows the same rationale as *St. Paul* and *Aspen*, holding that an excess insurer has no subrogation claim

against a primary insurer based on an alleged unreasonable failure to settle if the underlying claim "did not go to trial, and no excess judgment was entered against the insured." 45 Cal. Rptr. 3d at 671-72 (citing *Hamilton v. Md. Cas. Co.*, 41 P.3d 128, 132-33 (Cal. 2002)); *see also Hamilton*, 41 P.3d at 133 ("[T]he entry of a stipulated judgment is insufficient to show, even rebuttably, that the insured has been injured to *any* extent by the failure to settle, much less in the amount of the stipulated judgment."); *Safeco*, 84 Cal. Rptr. 2d at 46 (insured has no bad-faith claim until an adjudicated excess judgment). The California Supreme Court has not resolved the conflict, and the Ninth Circuit has not addressed the conflict to predict which rule the California Supreme Court would adopt.

Accordingly, this Court's recapitulation—or abrogation—of *St. Paul* and *Aspen* would resolve only part of a preliminary step in California's choice-of-law analysis. For example, if this Court reaffirms *St. Paul* and *Aspen*, that does not necessarily show any material conflict between California and Nevada substantive law based on *RLI.* And if there is no material conflict, then Nevada law will not apply to this dispute under California's choice-of-law framework. Nor would a determination that Nevada and California

law materially conflict resolve the issue because the Ninth Circuit has not decided which state has the greater interest in having its law apply. *See Chen v. L.A. Truck Ctrs., LLC*, 444 P.3d 727, 730-31 (Cal. 2019).

2. Any answer to the certified question would be advisory because the certified question lacks a solid factual foundation.

This Court will not answer a question where disputed facts exist that could render its answer inapplicable. *See Mack*, 522 P.3d at 440 ("[t]he insufficient[] facts, law, or context in the certification order . . . would require [the Court], in answering the question posed . . . to conceive of the claim in the abstract and to apply a framework to factual and legal uncertainty."); *Magliarditi*, 135 Nev. at 681, 450 P.3d at 911; *see also* NRAP 5(a) ("Certification ordinarily will not be accepted if facts material to the question of law certified are in dispute.").[7]

7. This Court rejected a similar question about excess-insurer subrogation in an uncitable order based on the insufficient development of the factual record. *Scottsdale Ins. Co. v. Liberty Mut. Ins. Co.*, No. 66706, 130 Nev. 1241, 2014 WL 7188790 (Dec. 16, 2014). James River recognizes that this decision is uncitable under NRAP

In *Magliarditi*, this Court declined to answer two certified questions from Nevada's federal district court because it was unclear whether its answer would apply. 135 Nev. at 681, 450 P.3d at 911. The relevant rule would control only if a party was a spendthrift trust. *Id.* Yet this Court was "unable to glean from the record provided the nature of the trusts involved." *Id.* The undeveloped factual record in *Magliarditi* rendered the question too speculative. *Id.*; *cf. also Archon Corp. v. Eighth Jud. Dist. Ct.*, 133 Nev. 816, 823, 407 P.3d 702, 708 (2017) ("To efficiently and thoughtfully resolve . . . an important issue of law demands a well-developed district court record, including legal positions fully argued by the parties and a merits-based decision by the district court judge.").

This case presents the same problem, as underscored by North River's brief. North River claims that, independent of the settlement payment, Alhambra Place "suffered harm" from the depletion of its aggregate limits during the policy period. (Opening Br. at 16, 41-44.) This theory is absent from North River's complaint, raised for the first time on reply before the Ninth Circuit. (2 JA

36(c)(3); we simply alert the Court that it has previously rejected this question in a nonprecedential disposition.

265.) The Ninth Circuit omits it from its certifying order. And as explained below, there is no legal basis supporting North River's theory. (*See infra* Section V.)

And yet, this Court cannot simply ignore it. While this Court cannot "intrud[e] into the certifying court's sphere" in answering certified questions, *In re Fontainebleau Las Vegas Holdings, LLC* (*In re Fontainebleau I*), 127 Nev. 941, 955–56, 267 P.3d 786, 794-95 (2011), the new allegation leaves this Court in an impossible position.

While North River forfeited this damages argument under clear Ninth Circuit precedent, that question is for the Ninth Circuit to assess in the underlying proceeding. *Id.* (*See also infra* Section V.) Indeed, forfeiture is a question of federal procedural law that this Court is incompetent to assess. *Cf. Reinkemeyer v. Safeco Ins. Co. of Am.*, 117 Nev. 44, 50, 16 P.3d 1069, 1072 (2001) (partially rejecting certified question "to the extent that it requests an answer based on the United States Constitution").

Moreover, were this Court to ignore the aggregate-limits argument, the usefulness of its answer would be even more limited. Indeed, as discussed below, if North River is correct about additional

damage, that changes the whole game: under the make-whole doctrine, North River's allegation that Alhambra Place experienced other, uncompensated losses would extinguish North River's subrogation claim altogether. *See Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 777-78, 121 P.3d 599, 604 (2005).

Because North River's new damages theory renders any answer to the certified question potentially inapplicable, the Court should decline to answer it.

III.
If the Court decides to answer the question as certified, the answer is, "It depends."

The question that the Ninth Circuit certified to this Court is, "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?" The answer to that precise question is, "It depends." In some circumstances, an excess insurer might state a claim for equitable subrogation from a primary insurer, as when the insured is exposed to an excess judgment before settlement or if the primary refuses to pay its portion of a settlement, again exposing the insured to

collection efforts. Likewise, if the insured incurs defense costs because a primary insurer breaches its duty to defend the insured, an excess insurer who reimburses those costs and secures an in-limits settlement might have an equitable-subrogation claim against the primary carrier because insured experienced a pre-settlement loss.

Thus, North River's argument that there can never be equitable subrogation between insurers unless an excess carrier can recover its contribution to an in-limits settlement from the primary carrier is wrong. (*See* Opening Br. at 27 (arguing that "[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.").)

But as detailed below, under the facts presented in *this* case, where the primary insurer defended the insured and the carriers agreed to settle the underlying litigation within the insured's combined policy limits before a judgment, such that the insured suffered no damages and received the benefit of its bargains with both the primary and excess insurers, there is no claim to be subrogated to, and the excess insurer should not be allowed to recoup its

contribution to the settlement.

IV.
Subrogation is not available for a prejudgment in-limits settlement with no contribution from the insured.

A. The insured suffers no harm from a prejudgment in-limits settlement.

As North River concedes, equitable subrogation is a derivative right and applies only where the subrogor would have had an independent basis to recover the payment. (*See* Opening Br. at 17–18.) For example, in a tort context, if a third party harms the insured, and the insurer compensates the insured for that harm, the insurer is subrogated to the insured's right to recover from the tortfeasor. *See Arguello*, 127 Nev. 365, 368. In the context of a liability claim against an insured, in which the claim is settled before a judgment, with no settlement contribution from the insured, the insured suffers no damages, and thus there can be no derivative claim for subrogation.

When presented with this issue in *St. Paul*, the Court held that it "need not reach the scope of equitable or contractual subrogation here because [the insured] lacks an underlying claim to

subrogate." 521 P.3d 418, 2022 WL 17543613, at *2. That is because "exhaustion of the policy limits prior to an excess judgment necessarily protects the insured from the harm that the duties [to settle] purport to avoid." *Id.* Because the insurers had "guaranteed [the insured] financial security, protection, and peace of mind when they settled [its] liability before excess-judgment exposure," the insured "did not suffer damages which would give rise to either a bad-faith claim or a breach-of-contract claim." *Id.* And thus, the insurer could not recoup its settlement contribution—which it was contractually obligated to provide—by standing in the insured's shoes.

Months later, in *Aspen*, the Court reiterated that because the insurers settled the underlying litigation prejudgment without exceeding the collective policy limits, including the plaintiff insurer's limit, the insured "suffered no damages" and there could be no equitable-subrogation claim. 528 P.3d 287, 2023 WL 3185274, at *2.

St. Paul and *Aspen* reached the correct equitable result. The excess and primary insurers both had a contractual duty to settle the claim; equity will not shift the excess insurer's share of a prejudgment in-limits settlement to the primary insurer. At that point,

the insured was not reimbursed for an existing loss; it never experienced any. Equity should not aid an excess insurer who, joining with a primary carrier to facilitate a settlement *before* the insured suffers a loss, does nothing more than it was contractually obligated to do.

B. Any theoretical prejudgment loss is too speculative and ignores the reality of a settlement involving an excess insurer.

Trying to avoid this result, North River argues that the Court should predict the loss that would have occurred had the excess insurer not stepped in. (*See* Opening Br. at 16.) In other words, North River argues that in a prejudgment in-limits settlement scenario, the Court should assume that if the excess carrier did not contribute to the settlement, the insured would have been damaged to the same extent as the excess insurer's settlement contribution. That assumption would be improper for many reasons, including that (1) a negotiated settlement without an excess policy or contribution from the excess carrier would typically be lower because plaintiffs know the full insurance policy limits and negotiate

within or based on those limits;[8] (2) similarly, a settlement by the insurers rarely reflects the settlement amount that would be reached if the insured was paying; and (3) under North River's proposed rule, an excess insurer would have an incentive to settle the case for *more* than the case's appropriate settlement value, knowing that the excess insurer can claw back its payment from the primary insurer in subsequent litigation. It is by no means certain that but for North River's settlement contribution, Alhambra Place would have contributed $4 million to settle the case itself or would have suffered $4 million in damages through a verdict.

C. North River has established no national consensus against *St. Paul* and *Aspen*.

North River also argues that this Court should follow jurisdictions that allow excess insurers to pursue equitable-subrogation claims when the underlying case settled within the combined policy limits. (Opening Br. at 23–35.) As a threshold matter, there is

8. *See, e.g.*, *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Blasio*, 2008 WL 2224886, at *3 (N.D. Miss. May 27, 2008) (plaintiff's demand increased from $2 million (primary limits) to $3 million (primary plus excess limits) after disclosure of excess coverage).

no need for Nevada to do so. Nevada is a sovereign state; it need not follow California, Arizona, or any other state's equitable subrogation rules. North River acknowledges, as it must, that several other states have expressly rejected excess carriers' attempts to collect premiums for excess coverage, but recover any losses by leaning on primary carriers. *See, e.g.*, *Stonewall Surplus Lines Ins. Co. v. Farmers Ins. Co. of Idaho*, 971 P.2d 1142, 1148–49 (Idaho 1998) (first party's right to sue its insurer "is not extended to insurers bringing bad faith actions against other insurers by way of subrogation"); *Teigen v. Jelco of Wis., Inc.*, 367 N.W.2d 806, 811 (Wis. 1985) (excess insurer cannot bring an equitable-subrogation claim against a primary carrier when their mutual insured suffers no loss); *Fed. Ins. Co. v. Travelers Cas. & Sur. Co.*, 843 So. 2d 140, 145 (Ala. 2002) ("equitable subrogation is not available to an excess insurer whose insured is subject to no . . . final judgment" because there is no underlying claim).

Further, as reflected in North River's lengthy case survey, many states have not addressed the issue at all. (*See* Opening Br. at 28–35 (addressing equitable-subrogation decisions from 36 states, implying that at least 14 states have not addressed the issue at all).)

Most critically, North River vastly overstates the support its position holds nationally. North River's brief includes a table purporting to show that 33 other states agree with its position here. Twenty-two of these cases are fully consistent with *St. Paul* and *Aspen*. Only one even arguably aids North River's position.

Specifically, in twenty-two of the thirty-five cases North River cites, the insurer seeking subrogation had paid a settlement *after* entry of an excess judgment.[9] These 22 cases do not support North

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9. *Greater N.Y. Mut. Ins. Co. v. N. River Ins. Co.*, 85 F.3d 1088 (3d Cir. 1996) (predicting Pennsylvania law); *Nat'l Sur. Corp. v. Hartford Cas. Ins. Co.*, 493 F.3d 752 (6th Cir. 2007) (predicting Kentucky law) (*see* Proof Br. of Appellee, 2006 U.S. 6th Cir. Briefs LEXIS 259 for discussion of procedural posture); *Steadfast Ins. Co. v. Agric. Ins. Co.*, 548 F. App'x 544 (10th Cir. 2013) (applying Oklahoma law) (*see Steadfast Ins. Co. v. Agric. Ins. Co.*, 475 F. App'x 683, 685 (10th Cir. 2012) for discussion of procedural posture); *Hocker v. N.H. Ins. Co.*, 922 F.2d 1476, 1479 (10th Cir. 1991) (applying Wyoming law); *R.W. Beck & Assocs. v. City & Borough of Sitka*, 27 F.3d 1475, 1478 (9th Cir. 1994) (applying Alaska law); *Ins. Co. of N. Am. v. Med. Protective Co.*, 768 F.2d 315 (10th Cir. 1985) (applying Kansas law); *Hartford Accident & Indem. Co. v. Aetna Cas. & Sur. Co.*, 792 P.2d 749, 751 (Ariz. 1990); *Commercial Union Assurance Cos. v. Safeway Stores*, 610 P.2d 1038, 1040 (Cal. 1980); *Infinity Ins. Co. v. Worcester Ins. Co.*, CV000597436, 2000 WL 1890126, at *2 (Conn. Super. Ct. Dec. 4, 2000); *Home Ins. Co. v. N. River Ins. Co.*, 385 S.E.2d 736, 739 (Ga. Ct. App. 1989); *Great Sw. Fire Ins. Co. v. CNA*

River's claim, where no such judgment is entered. As noted, these are consistent with this Court's decisions.

In three of the remaining thirteen cases, the insurer seeking subrogation had paid a settlement after a verdict.[10] It is unclear whether an insured facing a mere verdict without judgment suffers a loss to sustain a bad-faith claim in Nevada. *But see* J.H. Cooper, *supra*, 68 A.L.R.2d at 894; *accord* COUCH ON INSURANCE,

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Ins. Cos., 557 So. 2d 966, 966 (La. 1990); *Fireman's Fund Ins. Co. v. Cont'l Ins. Co.*, 519 A.2d 202, 204 (Md. 1987); *Commercial Union Ins. Co. v. Med. Protective Co.*, 116, 393 N.W.2d 479, 482 (Mich. 1986) (default judgment entered before settlement); *U.S. Fire Ins. Co. v. Nationwide Mut. Ins. Co.*, 735 F. Supp. 1320 (E.D.N.C. 1990); *Allstate Ins. Co. v. Res. Ins. Co.*, 373 A.2d 339, 340 (N.H. 1976); *Estate of Penn v. Amalgamated Gen. Agencies*, 372 A.2d 1124, 1126 (N.J. Super. Ct. App. Div. 1977); *Columbia Cas. Co. v. Ironshore Specialty Ins. Co.*, 2015 WL 13706593, at *7 (D.R.I. Nov. 24, 2015); *Elec. Ins. Co. v. Nationwide Mut. Ins. Co.*, 384 F. Supp. 2d 1190, 1192 (W.D. Tenn. 2005); *Great Am. Ins. Co. v. Fed. Ins. Co.*, 2010 WL 1712947 *2 (Tenn. Ct. App. 2010); *Horace Mann Ins. Co. v. Gov't Employees Ins. Co.*, 344 S.E.2d 906, 907 (Va. 1986); *Truck Ins. Exch. v. Century Indem. Co.*, 887 P.2d 455, 458 (Wash. Ct. App. 1995); *Vencill v. Cont'l Cas. Co.*, 433 F. Supp. 1371, 1376 (S.D. W. Va. 1977).

10. *Certain Underwriters of Lloyd's v. Gen. Accident Ins. Co.*, 909 F.2d 228, 231 (7th Cir. 1990); *Hartford Cas. Ins. Co. v. N.H. Ins. Co.*, 628 N.E.2d 14, 15 (Mass. 1994); *Centennial Ins. Co. v. Liberty Mut. Ins. Co.*, 404 N.E.2d 759, 761 (Ohio 1980).

supra, § 236:103 (3d ed. 2000). Regardless, there was no verdict here. Alhambra Place was even farther removed from any potential, future "loss," making North River's hypothetical even more speculative. These cases do not support North River's ability to subrogate harm they created by settling before a verdict, or even trial.

In four of the remaining ten cases, the party seeking subrogation had paid a settlement before excess judgment or verdict, but the underlying claims were not for a primary insurer's bad faith failure to settle or defend.[11] They involve claims based on an insurer's failure to pay, non-insurers' conspiracy to frustrate a settlement,[12] and an insured's failure to cooperate. Unlike a claim for a

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11. *Home Ins. Co. v. Cincinnati Ins. Co.*, 821 N.E.2d 269, 273 (2004) (seeks relief for insurer's alleged failure to pay its pro rata share of a settlement); *Blasio*, 2008 WL 2224886 (seeks relief from third-party administrator and its employees for conspiring to frustrate a settlement); *Hartford Accident & Indem. Co. v. Mich. Mut. Ins. Co.,* 463 N.E.2d 608, 610 (N.Y. 1984) (seeks relief for insured's refusal to join a necessary party); *Nat'l Farmers Union Prop. & Cas. Co. v. Farm & City Ins. Co.*, 689 N.W.2d 619, 620 (S.D. 2004) (seeks declaratory relief as to relative priority of two policies).

12. *Blasio* is doubly inapt because the subrogation claim there failed for multiple reasons. First, it was barred by the statute of limitations. 2008 WL 2224886, at *7. Second, the excess carrier

primary insurer's bad-faith failure to settle, none of these claims requires an excess judgment. Claims for failure to pay and cooperate respectively accrue at the time of the breach. *See*, *e.g.*, 3 UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 42.8 (updated Nov. 2023) (noting that a claim for failure to pay pursuant to a policy accrues "at the time of the insurer's breach"); 1 TEXAS PERSONAL INJURY HANDBOOK § 2.19 (updated Feb. 2025); 3 FLORIDA TORTS § 101.60 (updated Aug. 2024).

In four of the remaining six cases, the insurer was permitted to subrogate to a bad-faith claim where it settled before excess judgment or verdict.[13] But those jurisdictions adopt a minority position

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did not sue any primary carrier, just a third-party administrator and employees who did not issue any insurance policy upon which the insured could have brought a claim. *Id.* at *8. Third, even if the defendants had interfered with settlement—persuading one insured to withdraw his consent to a global settlement funded without contribution from the excess carrier—did not mean that they breached "a duty owed to the insured." *Id.* (citation omitted).

13. *Cont'l Cas. Co. v. Res. Ins. Co.*, 238 N.W.2d 862, 867 (1976); *Ace Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 206 Cal. Rptr. 3d at 183; *Perera v. U.S. Fid. & Guar. Co.*, 35 So. 3d 893, 899 (Fla. 2010); *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 821 (Mo. 2014).

expressly allowing the insured to bring its own bad-faith claim before judgment.[14] These cases prove James River's point. This Court follows the majority position requiring an excess judgment for a bad faith claim, so there is no similar claim to subrogate before judgment in Nevada.

Of the remaining two cases, one is inapt because the court finds a direct duty from a primary to an excess carrier.[15] The facts are unclear as to whether a verdict or judgment was reached in the underlying action. But the question of whether the insured's bad-faith claim had been triggered by any such action was irrelevant because the carrier's claim was its own, based on the direct duty

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14. As indicated in the split between *Ace American* and *RLI* (which follows *Fortman v. Safeco Ins. Co.*, 271 Cal. Rptr. 117 (Ct. App. 1990)), it is unclear whether *Ace American* properly applied the California Supreme Court's decision in *Hamilton v. Md. Cas. Co*, 41 P.3d 128. While *Hamilton* suggested that an insured might have a claim for bad faith where the insured *itself* "actually contributes payment to conclude [a] settlement," 41 P.3d at 136, *Ace American* and *RLI* disagree on whether such a claim exists where the insured incurs no liability, as in a prejudgment settlement funded solely by insurance.

15. *Me. Bonding & Cas. Co. v. Centennial Ins. Co.*, 693 P.2d 1296, 1302 (1985).

owed by the other insurer. In contrast, *Protective Insurance* reinforces the derivative nature of subrogation claims in Nevada—this Court has not found a similar direct duty among co-insurers.

Ultimately, North River presents just one case contradicting *St. Paul*, *Aspen*, and *Protective Insurance*.[16] But this lone Texas outlier should not sway this Court. While the primary insurer's briefing in the Texas case makes plain that the excess's payment was before judgment and voluntary, the Texas court does not grapple with this fact. Nor did the primary carrier expressly raise the argument that without a judgment, the insured suffered no injury and had no claim to subrogate. *See* Def's Mot. for Summ. J. (No. 08-2474), 843 S.W.2d 480. Thus, without addressing the payment before judgment, the Court restates the general rule that "an excess carrier may bring an equitable subrogation action against the primary carrier." *Am. Centennial Ins.*, 843 S.W.2d at 483. The Texas court so held despite that, in Texas, an insured can only bring a bad-faith claim after excess judgment.

Again, James River agrees with the Texas court's broad rule.

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16. *Am. Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480, 482-83 (Tex. 1992).

An excess carrier can state a claim for equitable subrogation against a primary in appropriate circumstances. In line with this Court's precedent, however, James River disagrees that such circumstances exist where the subrogated claim is based on an insured's unaccrued bad-faith claim. The Texas case misses the mark and does not give this Court reason to deviate from its carefully reasoned decisions to the contrary.

In sum, North River's solitary, weakly-reasoned Texas case is far from the national consensus North River claimed supported its position here. And, in any case, this Court need not create a new blanket rule that allows excess insurers to recoup their insurance payments from primary insurers after a prejudgment in-limits settlement. Doing so would contradict Nevada's flexible equitable-subrogation rules, would violate the principle that equitable-subrogation rules are derivative, and would require the Court to decide that its recent reasoned decisions in *St. Paul* and *Aspen* were wrong.

V.
North River's new damages theory cannot change the result.

North River argued for the first time in its reply brief to the

Ninth Circuit, and again in its opening brief here, that the in-limits settlement at issue lowered the insured's aggregate policy limit, such that there is less insurance money available to the insured for potential other claims. (Opening Br. at 41–44.) This argument fails for many reasons.

As a threshold matter, such an argument destroys North River's subrogation rights altogether. Under the make-whole doctrine, North River's allegation that Alhambra Place experienced other, uncompensated losses would extinguish North River's subrogation claim. *See Canfora*, 121 Nev. at 777-78, 121 P.3d at 604. The doctrine prohibits an insurer from claiming subrogation rights "where an insured has not received compensation for his total loss[.]" *Id.* Were it true that Alhambra Place suffered an additional category of damages that North River did not address, North River's subrogation claim would be barred. This limitation makes sense as it prevents an insurer from relying on an insured's loss to assert a claim the insurer has not compensated. There is nothing equitable about allowing an excess insurer to recover its own settlement contribution based on North River's reduced aggregate limits theory because doing so would not restore the insured's

aggregate limits.

Second, no authority supports North River's argument that an excess insurer can recover a settlement contribution from a primary insurer because the settlement reduced the insured's aggregate limits.

Third, there is no evidence that the insured in this case—Alhambra Place Partnership—has been harmed in any way by this reduced aggregate limit. North River argues that Alhambra Place *could* face claims in the future covered by the policy, but there is no indication that any such claims have in fact been made. The possibility of an injury is not the same as its probability, and only the latter would support a claim by Alhambra Place. *See Moriscato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 157, 111 P.3d 1112, 1115 (2005). And without a claim by Alhambra Place, of course, North River has nothing to subrogate.

Fourth, North River's rule would usher in a new era of insurance litigation where policyholders could sue their liability insurer for "impairing" their limits by settling claims. This theory would be antithetical to the insurer's duty to reasonably settle claims within their limits, and it would put insurers at risk whether they

settle claims or not.

Finally, North River waived this damages theory by raising it for the first time on reply at the Ninth Circuit. *See Graves v. Arpaio*, 623 F.3d 1043, 1048 (9th Cir. 2010) ("arguments raised for the first time in a reply brief are waived."). Although as discussed above, this Court cannot address waiver directly, this Court should tread cautiously with a theory not incorporated into the certification order.

VI.
North River's various policy speculations do not require a different result.

North River also presents several policy rationales in support of its proposed rule, each of which is speculative, unsupported by any evidence. This Court should decline to wade into the complex area of insurance market regulation, which the Legislature and the Division of Insurance are better suited to address. *Cf., e.g.*, *M&T Farms v. Fed. Crop Ins. Corp.*, 103 F.4th 724, 732 (9th Cir. 2024) (deferring to federal crop insurance corporation in part because it produced a complex and highly technical regulatory program implicating exercise of judgment grounded in policy concerns).

First, North River argues that a policy allowing excess insurers to recoup their insurance settlement payments from primary insurers through equitable subrogation would encourage settlements. (Opening Br. at 36–40.) The authorities on which North River relies relate to an *insured's* claim for bad faith failure to settle, without which an insurer would be incentivized to undervalue claims and put the insured at risk.

The same considerations do not transfer to *excess insurers*, to which the primary insurer owes no primary duty, and which likewise owe the insured a contractual duty to pay covered claims and an implied duty of good faith and fair dealing. It is not necessary to give excess insurers an equitable-subrogation claim related to prejudgment in-limits settlements to encourage settlement because excess insurers are bound by the duty of good faith and fair dealing to settle claims within their policy limits. *See, e.g.*, NRS 686A.310(1) (prohibiting insurers from "[f]ailing to effectuate prompt, fair[,] and equitable settlements of claims in which liability of the insurer has become reasonable clear"); *Ohio Sec. Ins. Co. v. Hi-Tech Aggregate, LLC*, 746 F. Supp. 3d 947, 971 (D. Nev. 2024) ("Under Nevada law, '[e]very contract imposes upon each party a

duty of good faith and fair dealing.' ") (citing *A.C. Shaw Const., Inc. v. Washoe County*, 105 Nev. 913, 914, 784 P.2d 9, 9 (1989); *Miller*, 125 Nev. at 310, 212 P.3d at 325). Thus, if an excess carrier decides to "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" (Opening Br. at 40), the excess insurer exposes *itself* to potential liability for bad faith failure to settle within its limits.

Further, contrary to North River's assertion that its proposed rule would support the purpose of avoiding expense and protracted litigation, giving excess insurers an equitable-subrogation claim related to prejudgment in-limits settlements would cause insurer-vs.-insurer litigation to proliferate in Nevada.

Second, North River argues that equitable-subrogation claims arising from prejudgment in-limits settlements would protect insureds from primary insurers' incentive to defend claims even if the potential exposure exceeds the primary layer of coverage (but not the excess layer). (Opening Br. at 38–40.) Contrary to North River's assertion that this incentive denies the policyholder the benefit of the additional coverage they purchased, pursuing

potentially meritorious defenses and ultimately settling within the combined policy limits gives the insured exactly what it bargained for: coverage from both the primary and excess insurers to which the insured paid premiums.

North River further argues that without its proposed rule, premiums for excess coverage will increase. (Opening Br. at 39.) But there is no evidence supporting this claim. Whether excess insurers could pursue equitable subrogation arising out of prejudgment in-limits settlements was addressed by this court in late 2022 in *St. Paul*, and in the preceding years, excess carriers calculated premiums against the then-uncertain legal backdrop. Further, changing course from *St. Paul* and *Aspen* and adopting North River's proposed rule could cause primary insurance policy premiums to increase to Nevada insureds' detriment.

Third, North River argues that allowing excess insureds to recoup their prejudgment in-limits settlement contributions from primary insurers would promote insurance market stability. (Opening Br. at 40–41.) But there is no indication that the Nevada insurance market was unstable before the Court's decisions in *St. Paul* and *Aspen*, which addressed this issue for the first time. Nor

is there any indication that after those decisions the insurance market in Nevada has been destabilized. And there is no evidence that after the Court's decisions in *St. Paul* and *Aspen* excess insurance has become prohibitively expensive for Nevada insureds. Just as primary insurers' premiums should be calculated to address its duty to settle claims within their limits, excess carriers have the same duty to settle claims within their limits and according to their policy terms. Excess insurers can and do price their premiums accordingly. In any event, the Court should decline to wade into the complex and fraught field of insurance market stability—especially in this case where there is no evidence or record to support North River's policy assertions—which the Nevada Legislature and the Nevada Division of Insurance are better equipped to address.

CONCLUSION

The Court should decline to answer the Ninth Circuit's certified question because answering the question will not resolve the choice-of-law issue the Ninth Circuit faces. If the Court elects to answer, it should hold that under the facts of this case, the insured did not suffer any damages to which North River can be subrogated. North River cannot wish into existence a harm to its insured that never accrued.

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CERTIFICATE OF COMPLIANCE

I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e).

I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6). It was prepared with Microsoft Word in 14-point Equity font.

I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 10,958 words.

March 12, 2025.

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CERTIFICATE OF SERVICE

I certify that on March 12, 2025, I submitted the foregoing "Respondent's Answering Brief" for filing via the Court's electronic filing system. Electronic notification will be sent to the following:

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