

Scholarly Commons @ UNLV Boyd Law

Nevada Supreme Court Summaries

Law Journals

10-2021

Zurich Am. Ins. Co. v. Ironshore Specialty Ins. Co., 137 Nev. Adv. Op. 66 (Oct. 28, 2021)

Jay Brunner

Follow this and additional works at: <https://scholars.law.unlv.edu/nvscs>

Recommended Citation

Brunner, Jay, "Zurich Am. Ins. Co. v. Ironshore Specialty Ins. Co., 137 Nev. Adv. Op. 66 (Oct. 28, 2021)" (2021). *Nevada Supreme Court Summaries*. 1455.

<https://scholars.law.unlv.edu/nvscs/1455>

This Case Summary is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

THE INSURED BEARS THE BURDEN TO PROVE A DUTY TO DEFEND

Summary

This case addresses certified questions brought forward by the Ninth Circuit Court of Appeals concerning the allocation of burdens of proof for the applicability of an exception to an exclusion in an insurance policy. This Court answered with the following: (1) the *insured* bears the burden of proving an exception to the exclusion in the insurance policy; and (2) the insured may use extrinsic facts that were available to the insurer at the time the insured tendered defense to meet this burden.

Facts and Procedural Background

Subcontractors, insured by Zurich American Insurance Company and American Guarantee and Liability Insurance Company constructed thousands of homes in Nevada throughout the 2000s. After the houses were built, the subcontractors switched their insurance provider to Ironshore Specialty Insurance Company. This policy insured the subcontractors protection from damages caused by bodily injury or property damage that occurred during the policy period. However, the Ironshore insurance policy did not cover any existing bodily injury or property damage, except for “sudden and accidental” property damage.

Homeowners who purchased homes built by these subcontractors collectively brought 14 construction defect lawsuits against the developers in Nevada state Court between 2010 and 2013. The developers sued the subcontractors as third-party defendants. The subcontractors tendered defense to Zurich, who agreed to defend them. Zurich requested indemnification and defense from Ironshore, who refused coverage under these claims pursuant to the exclusion in the insurance policy. Ironshore essentially claimed that the alleged property damage in the construction defect cases occurred due to faulty work that predated the Ironshore policy, thereby making it existing work that was neither sudden nor accidental.

Zurich settled the claims, then sued Ironshore in federal court (*Zurich I*).² The District Court granted summary judgment for Ironshore, holding that none of the underlying complaints alleged that damage occurred suddenly, and that Zurich failed to meet its burden of proof to support such an allegation.³ This holding implied that the *insured* carried the burden of proving that an exception to the exclusion applied. Another federal District Court in *Zurich II* reached the opposite conclusion in a case with substantially identical facts, concluding that Ironshore owed the duty to defend because the underlying complaints did not specify when the property damage occurred and

¹ Jay Brunner.

² Assurance Co. of Am. V. Ironshore Specialty Insurance Co., No. 2:15-cv-00460-JAD-PAL, 2017 WL 3666298, at *1 (D. Nev. Aug. 24, 2017).

³ *Id.* at *3.

did not contain allegations to conclude that the damage was not sudden or accidental.⁴ The District Court here implied that the *insurer* bore the burden of proving that the exception to the exclusion in the policy did not apply.

After the outcome of *Zurich II*, Zurich in *Zurich I* filed a motion seeking relief from the judgment of the original case.⁵ This motion was denied, and Zurich appealed. The Ninth Circuit certified these questions to the Nevada Supreme Court and stayed Zurich's appeal pending the latter's decision. The Ninth Circuit similarly stayed Ironshore's appeal in *Zurich II*.

Discussion

Standard of Review

The Supreme Court of Nevada only accepts certified questions of law for review.⁶ These questions of law are reviewed de novo. The Nevada Supreme Court's review is constrained to the facts provided from the certifying court, which in this case, is the Ninth Circuit Court of Appeals.

The insured has the burden to prove the duty to defend

Nevada law considers insurance policies as though they are contracts. Further, insurance policies hold insurers to two contractual duties: the duty to defend and the duty to indemnify. The duty to defend, however, is not absolute and can be excluded from coverage in certain instances. This matter is the first time the Nevada Supreme Court is directly addressing whether the insurer or the insured has the burden of proving that an exception to an exclusion of coverage applies when determining if there is a duty to defend.

Current trends place the burden of proof on the insured

The Court acknowledges that the majority rule in other jurisdictions is that the insured bears the burden of proving the sudden and accidental exception. Most states that follow the majority rule reach that conclusion because the insured usually bears the burden of establishing coverage, and the exception to the exclusion grants coverage where there is usually none, so the insured has the burden of proving that there is in fact coverage in these situations. This Court adopted the majority rule in accordance with Nevada principles of contract law and insurance law. The Court thereby assigns the burden to the insured to essentially re-establish coverage that would not otherwise exist. The Court also held that the majority rule is aligned with Nevada evidence law because the burdens of "production" and "persuasion" rest on the insured.

The Court also held that the burden of proof is on the insured to prove the duty to indemnify, but that this placement of burden is not to destroy the duty to defend by increasing the insured's burden of proof. The burden of the duty to defend is substantially lighter than the burden of the duty to indemnify – the former only requires the insured proving the potential for coverage.

⁴ Assurance Co. of Am. v. Ironshore Specialty Insurance Co., No. 2:13-cv-2191-GMN-CWH, 2015 WL 4579983 (D. Nev. July 29, 2015).

⁵ FED. R. CIV. P. 60(b).

⁶ NEV. R. APP. P. 5.

The Insured May Use Extrinsic Facts Available to the Insurer at the Time of Tender to Prove the Insurer had a duty to defend

Under Nevada law, the insured may present extrinsic facts to the insurer to argue that the insurer has a duty to defend. However, Nevada law has not defined what extrinsic facts the insured may use to meet their burden of proof. The Court acknowledged that there is a potential for indemnification and therefore a duty to defend, whenever allegations in the complaint show that there is possible coverage.⁷ The duty to defend is therefore triggered at the beginning of litigation and is based on the complaint and other facts available to the insurer. The Court, therefore, found that the insured may use extrinsic facts that were available to the insurer at the time the insured tendered its defense to prove there was potential for coverage, thus a duty to defend.

Conclusion

The certified questions from the Ninth Circuit were answered as follows: (1) the *insured* bears the burden of proving an exception to the exclusion in the insurance policy; and (2) the insured may use extrinsic facts that were available to the insurer at the time the insured tendered defense to meet this burden.

⁷ Nautilus Ins. Co. v. Access Med., LLC, 137 Nev., Adv. Op. 10, 482 P.3d 683, 687-88 (2021).