IN THE

SUPREME COURT OF THE STATE OF ARIZONA

INDUSTRIAL PARK CENTER, LLC, an Arizona limited liability company doing business as Mainspring Capital Group,
Plaintiff-Appellant,

v.

GREAT NORTHERN INSURANCE COMPANY, A FOREIGN INSURER,
Defendant-Appellee.

No. CV-25-0330-CQ
September 1, 2026

United States District Court for the District of Arizona
No. 2:22-cv-01196-MTL

Certified Question from the
United States Court of Appeals for the Ninth Circuit
Case Nos. 24-4788
25-295

QUESTION ANSWERED

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JUSTICE BOLICK authored the Opinion of the Court, in which CHIEF JUSTICE TIMMER, VICE CHIEF JUSTICE LOPEZ, and JUSTICES BEENE, MONTGOMERY, KING, and CRUZ joined.

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JUSTICE BOLICK, Opinion of the Court:

¶1 The United States Court of Appeals for the Ninth Circuit certified the following question to this Court:

> Is damage to property a "fortuitous" loss when, based on the insured's knowledge at the time the insurance policy issued, it was reasonably foreseeable that such damage was almost certain to occur if certain preventative measures were not taken?

¶2 We accepted the question. However, because the question assumes facts that the parties continue to contest in the context of whether summary judgment was properly granted, we address only the underlying question of law, which the trier of fact may subsequently apply. Specifically, we define what constitutes a "fortuitous loss" under Arizona law. We hold that a fortuitous loss is one that, so far as the parties to the contract are aware, is dependent on chance. A loss is non-fortuitous only when the insured knew, at the time coverage attached, that the loss-causing event had already occurred, was already in progress, or was certain to occur because no material contingency remained between the facts known to the insured and the loss-causing event. "Material" is understood as "[o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential." *Material*, Black's Law Dictionary (12th ed. 2024). "Contingency" means "[a]n event that may or may not occur in the future; a possibility." *Contingency*, Black's Law Dictionary (12th ed. 2024).

BACKGROUND

¶3 The following facts are taken from the Ninth Circuit's order certifying the question for our review. Because we received this question following the appeal by Plaintiff-Appellant Industrial Park Center LLC, dba Mainspring Capital Group ("Mainspring"), of the district court's grant of summary judgment in favor of Defendant-Appellee Great Northern Insurance Company ("GNIC"), the factual record may change depending on how the proceedings in the case continue.

¶4 Mainspring owns the commercial property at issue in this case, which was insured under an all-risk property insurance policy issued by GNIC. Mainspring has leased a portion of the property to Star Fisheries, Inc., since 1990. Throughout the over thirty years Star Fisheries leased the property, its operations compromised the building's structural integrity. Specifically, the combination of water and salt Star Fisheries utilized in its operations and to clean the building caused damage to the concrete stairs servicing Star Fisheries' suite, the interior slab-on-grade, and damage to an exterior wall. Eventually, in 2010, these issues were discovered with signs of damage to the stairs, interior slab, and concrete walls.

¶5 Mainspring retained an engineering firm, Meyer, Borgman & Johnson ("MBJ"), to review the potential issues and recommend repairs. MBJ issued its report, which largely found that the damage was the result of Star Fisheries' daily cleaning of the property with water. The water drained and damaged the building's walls, stairs, and subsoil.

¶6 As part of the fallout from MBJ's report, Mainspring and Star Fisheries amended their lease, and Star Fisheries was made responsible for the costs of remediating the damage. Mainspring also made multiple changes MBJ suggested, including repairing drains and faulty drainage systems, sealing cracks in the flooring, installing weep holes, and repairing the wall panels and the stair locations. Although MBJ recommended the installation of a waterproof floor coating, a vapor barrier, or additional drainage systems, Mainspring did not follow these recommendations. Mainspring did not file a claim under the all-risk policy it had with GNIC at the time.

¶7 Then, in 2021, additional damage was discovered at the property and appeared to again result from Star Fisheries' tenancy. The damage was similar to the earlier damage discovered in 2010, and included the deterioration of concrete panels, damaged stairs, and potential structural issues. The existence of structural issues was confirmed in early 2022. After the structural issues were confirmed, Mainspring filed a notice of loss with GNIC under the all-risk policy covering the property.

¶8 GNIC reviewed the loss and retained an engineering firm, Nelson Forensics, LLC ("Nelson"), to investigate the damage and its cause. Nelson claimed the deterioration was largely around the space Star Fisheries leased, and the damage was consistent with exposure to a corrosive environment for years or even decades. Nelson also concluded that while Star Fisheries' water and salt usage "may have exacerbated" damage to a different portion of the building, some of the other damage could not be attributed to the use of water and salt.

¶9 Ultimately, GNIC denied coverage for Mainspring's loss, explaining that the loss was the result of "poor/inadequate soil preparation and compaction, settlement, and long-term corrosion," and concluding the loss was within the policy's inherent-vice, faulty-workmanship, settling, and wear-and-tear exclusions. Mainspring requested that GNIC reconsider the denial. It did, and although supplemental reports provided revised conclusions that the damage was consistent with excess moisture and water and salt use, GNIC denied coverage for a second time.

¶10 Mainspring filed suit in the Maricopa County Superior Court in 2022, and GNIC removed the case to federal court via diversity jurisdiction. Litigation continued until 2024, when GNIC successfully moved for summary judgment. The district court utilized the test formulated in *Ingenco Holdings, LLC v. Ace American Insurance Co.*, 921 F.3d 803, 815 (9th Cir. 2019), which provides: "Courts have further concluded that a fortuity inquiry should look to, among other things, whether a particular loss was certain to occur, the parties' perception of risk at the time the policy issued, and whether the loss could reasonably have been foreseen." (Collecting cases.) The district court found "that [Mainspring]'s loss was reasonably foreseeable and almost certain to occur," and therefore

the loss was not fortuitous. *Indus. Park Ctr. LLC v. Great N. Ins. Co.*, No. CV-22-01196-PHX-MTL, 2024 WL 3553113, at *3 (D. Ariz. July 26, 2024).

¶11 Mainspring subsequently appealed the grant of summary judgment to the Ninth Circuit, which certified the question to us. We accepted review to resolve this issue pursuant to our jurisdiction under article 6, section 5(6) of the Arizona Constitution and A.R.S. § 12-1861.

DISCUSSION

¶12 Colloquially, "fortuitous" is defined as "happening by chance." *Fortuitous*, The Merriam-Webster Dictionary (7th ed. 2016). For over a century, courts around the nation have understood that insurance contracts carry an implicit exclusion: that a loss must be fortuitous to be insurable. *See generally* Stephen A. Cozen & Richard C. Bennett, *Fortuity: The Unnamed Exclusion*, 20 Forum 222 (1985) (describing the history and evolution of the fortuity doctrine); *see also Mellon v. Fed. Ins. Co.*, 14 F.2d 997, 1004 (S.D.N.Y. 1926) (holding "that, even in an 'all risk' policy, there must be a fortuitous event—a casualty—to give rise to any liability for insurance"). Like many other states, Arizona law acknowledges the exclusion. *See Pac. Indem. Co. v. Kohlhase*, 9 Ariz. App. 595, 596 n.1 (1969) ("Under 'all risks' coverage, recovery is allowed for all fortuitous losses not resulting from misconduct or fraud of the insured unless the policy contains a specific provision expressly excluding the particular loss from coverage.").

¶13 Although Arizona courts have recognized the exclusion since *Kohlhase*, no Arizona court has defined what constitutes a "fortuitous loss," nor is the term defined in the Arizona Revised Statutes. The term "fortuitous event" appears in A.R.S. § 20-3551(10)(a), but only in passing and merely within the definition of "travel assistance services," which are not insurance. *See id.* However, fortuity is a requirement for insurance contracts because a non-fortuitous loss would be non-contingent and, therefore, not an insurance contract under Arizona law. *See* A.R.S. § 20-103(A) (defining insurance as "a contract by which one undertakes to indemnify another or to pay a specified amount on *determinable contingencies*" (emphasis added)).

¶14 Because no court in Arizona has defined fortuity, we turn to other sources to inform our definition here. *See Martinez v. Woodmar IV Condos. Homeowners Ass'n*, 189 Ariz. 206, 208 (1997) ("In Arizona, if there is no statute or case law on a particular subject, we have traditionally followed the Restatement of Laws."); s*ee also Quiroz v. ALCOA Inc.*, 243 Ariz. 560, 570 ¶ 41 (2018) ("We generally follow the Restatement unless it conflicts with Arizona Law."). Most other jurisdictions have adopted The Restatement (First) of Contracts § 291 cmt. a (Am. L. Inst. 1932) (the "Restatement"), which provides:

> A fortuitous event within the meaning of the present and subsequent Sections is an event which so far as the parties to the contract are aware, is dependent on chance. It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event, as the loss of a vessel, provided that the fact is unknown to the parties. The event may be positive or negative—an occurrence or a failure to occur. But the fact that the time or amount of performance is dependent on a fortuitous event does not make a promise aleatory.[1]

Importantly, the Restatement includes a subjective element—"so far as the parties to the contract are aware"—that is central to the concept of fortuity.

¶15 For reasons discussed below, we adopt the Restatement's definition. To outline, the Restatement's definition (1) does not conflict with or offend the Arizona Revised Statutes or case law and supports Arizona's public policy, and (2) comports with the broader notion of fortuity around the nation and promotes predictability for parties on both sides of the contract.

[1] "An 'aleatory promise' in the Restatement means a promise conditional on the happening of a fortuitous event, or an event supposed by the parties to be fortuitous." Restatement § 291.

I. No Conflict with the Arizona Revised Statutes or Case Law

¶16 Fortuity is foundational within insurance contracts because it promotes their core purpose: to cover risk. *Univ. of Cincinnati v. Arkwright Mut. Ins. Co.*, 51 F.3d 1277, 1281 (6th Cir. 1995) (determining that fortuity as a chance event "is consistent with the idea that '[i]nsurance should only cover losses resulting from a casualty. There is no casualty unless some risk is involved.'" (quoting *Standard Structural Steel Co. v. Bethlehem Steel Corp.*, 597 F. Supp. 164, 191 (D. Conn. 1984))). If a loss is non-fortuitous, it is not a risk at all, but a certainty.

¶17 Fortuity is therefore necessarily read into all insurance contracts, including the all-risk policy here. *See Kohlhase*, 9 Ariz. App. at 596 & n.1 (stating that under an all-risk policy "recovery is allowed for all fortuitous losses not resulting from misconduct or fraud of the insured unless the policy contains a specific provision expressly excluding the particular loss from coverage"). As many courts have observed, all-risk does not necessarily mean all losses. *See, e.g.*, *Adams-Arapahoe Joint Sch. Dist. No. 28-J v. Cont'l Ins. Co.*, 891 F.2d 772, 775 (10th Cir. 1989); *Lloyd's Ins. Certificate No. 80520 v. Magi, Inc.*, 790 F. Supp. 1043, 1046 (E.D. Wash. 1991). By its terminology, all-risk requires risk; thus, the rule is that insurance policies do not cover non-fortuitous losses. To force insurers to cover losses that are certain or inevitable would violate public policy and encourage fraud. *See* Cozen & Bennett, *supra* ¶ 12, at 222; *Magi*, 790 F. Supp. at 1047. Instead, fortuity excludes certain losses while also respecting the right of the parties to contract as they see fit in order to manage risk through increased premiums or other mechanisms.

¶18 As the Restatement also notes, whether a loss is fortuitous depends on the facts known to the insured party. Restatement § 291 cmt. a. Thus, courts adopting the Restatement have consistently adopted a standard focusing on the subjective knowledge of the parties at the time of contract formation. *See, e.g.*, *Aetna Cas. & Sur. Co. v. Dow Chem. Co.*, 10 F. Supp. 2d 771, 789 (E.D. Mich. 1998); *Univ. of Cincinnati*, 51 F.3d at 1283 ("Under the so-called modern approach, the courts have begun to view the determination of fortuity as a subjective inquiry . . . rather than as an objective determination based on hindsight . . . ." (citing *Adams-Arapahoe*, 891 F.2d at 775, and *Magi*, 790 F. Supp. at 1048)). Arizona courts have also

consistently applied a subjective standard, focusing on the insured's state of mind. *See Transamerica Ins. Grp. v. Meere*, 143 Ariz. 351, 357 (1984) (distinguishing unintentional acts and intentional torts to rebut the presumption that a person intends the natural consequences of voluntary conduct as a basis for determining insurance coverage); *see also Farmers Ins. Co. v. Vagnozzi*, 138 Ariz. 443, 449 (1983) (holding that the presumption that a person intends the ordinary consequences of voluntary conduct "has no application to the interpretation of terms used in insurance contracts").

¶19 At oral argument, GNIC's counsel suggested that *Meere* and its progeny cut against the adoption of a subjective analysis, as doing so would give too much control to the insured. Indeed, *Meere* recognized that "if a single insured is allowed through intentional or reckless acts to consciously control risks covered by policy, the central concept of insurance is violated." 143 Ariz. at 356 (quoting 7A Appleman, *Insurance Law and Practice*, § 4492.01 at 21 (1979)) (emphasis omitted). But *Meere* emphasized that "[t]he mere knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent"; rather, one "who acts in the belief or consciousness that he is causing an appreciable risk of harm to another may be negligent, and if the risk is great his conduct may be characterized as reckless or wanton, but it is not classed as an intentional wrong." *Id.* at 357 (quoting Prosser, *Handbook on the Law of Torts* § 8 at 32 (4th ed. 1971)) (emphasis omitted). This reasoning has even been extended to situations where the insured acts wholly deliberately. *See Vagnozzi*, 138 Ariz. at 449. The Court in *Vagnozzi* plainly stated: "The presumption that a person intends the ordinary consequences of his voluntary actions . . . has no application to the interpretation of terms used in insurance contracts." *Id.*

¶20 Insurance companies are not powerless to minimize liability. They can independently assess risks and either decline coverage altogether or use their drafting leverage to create additional express or general exclusions. By contrast, insureds who purchase all-risk policies are entitled to the benefit of their bargain, which encompasses risks that they did not know were certain to occur. *See Price v. Hartford Accident & Indem. Co.*, 108 Ariz. 485, 488 (1972) (refusing to permit courts aiding an insurer that failed to exclude coverage it sought to avoid paying); *see also Teufel v. Am. Fam. Mut. Ins. Co.*, 244 Ariz. 383, 387 ¶ 20 (2018) (holding that an insurer

wishing to restrict coverage must clearly and distinctly communicate the nature of the limitation to the insured).

II. National Cases

¶21 The parties extensively briefed precedents from other states. Our holding is consistent with the view of the majority of jurisdictions. *See City of Burlington v. Indem. Ins. Co. of N. Am.*, 332 F.3d 38, 48 & n.9 (2d Cir. 2003) (collecting cases).

¶22 GNIC relies heavily on *Ingenco*, which was the Ninth Circuit's attempt at predicting how the Washington Supreme Court would define fortuity, rather than a definitive statement of the law in its own right. 921 F.3d at 815. Regardless, we do not find its reasoning persuasive for defining "fortuitous loss" under Arizona law.

¶23 *Ingenco* involved an all-risk policy covering a gas purification plant in Washington. *Id.* at 806. As part of that process, the gas emitted from the landfill was forced through beads that absorbed excess nitrogen. *Id.* If the gas directly contacted the beads, the pressure was too great and would grind the beads down, so a diffuser basket was required to reduce the gas pressure to levels the beads could withstand. *Id.* at 806–07. This basket broke, and the beads were destroyed leading to *Ingenco* making a claim under its all-risk policy. *Id.* at 807. Defendant Ace American Insurance Company denied coverage, arguing the loss was not the result of an external cause under the relevant policy language "covered against 'all risks of direct physical loss or damage occurring . . . from any external cause.'" *Id.* at 807–08.

¶24 The court in *Ingenco* was required to predict how the Washington Supreme Court would interpret fortuity as it relates to insurance policies. *Id.* at 815. After surveying other federal cases doing the same, it concluded that a fortuitous event is "one that is dependent on chance, taking into account the knowledge of the parties." *Id.* Ultimately, the *Ingenco* court interpreted Washington law to adopt an objective standard, "whether the loss could reasonably have been foreseen." *Id.* The court acknowledged that although the risk was reasonably foreseeable, Ingenco's loss was likely fortuitous. *Id.* at 815–16. Given that the point of insurance is to insure against reasonably foreseeable risks that are not

known to be certain to occur, we reject *Ingenco*'s forecast of Washington State law as inconsistent with the doctrine of fortuity and the Restatement.

¶25 Indeed, the *Ingenco* rule could create an entire class of uninsurable risks that are "reasonably foreseeable," largely defeating the purpose of insurance and eviscerating freedom of contract. Given that freedom of contract is enshrined in our constitution, Ariz. Const. art. 2, § 25 ("No . . . law impairing the obligation of a contract[] shall ever be enacted."), we do not lightly interfere with contractual bargaining, and we typically hold sophisticated parties (such as insurance companies) to obligations that were freely contracted. *See, e.g.*, *1800 Ocotillo, LLC v. WLB Grp., Inc.*, 219 Ariz. 200, 204 ¶ 17 (2008) (declining to hold liability-limitation clauses the parties contracted unenforceable); *cf. Equity Income Partners, LP v. Chicago Title Ins. Co.*, 241 Ariz. 334, 338 ¶ 13 (2017) (restating the Arizona policy that if ambiguity exists within an insurance contract and cannot be resolved through normal means, courts construe the policy "against the insurer, given that the insurer is in the best position to prevent ambiguity in a standard form contract").

¶26 The subjective standard that we adopt is consistent with other jurisdictions. The seminal case is *Compagnie des Bauxites de Guinee v. Insurance Co. of North America*, 724 F.2d 369 (3d Cir. 1983). In *Compagnie*, the insurer argued that unknown design defects made the structural defects of a building inevitable and therefore non-fortuitous as a matter of law. *Id.* at 371. The *Compagnie* court disagreed, particularly because the district court's finding of non-fortuitousness was founded upon "'certain[ty]' based on knowledge gained through hindsight." *Id.* at 372. The court further opined, "[w]e think it inappropriate to cause the insured to suffer a forfeiture by concluding, with the aid of hindsight, that no fortuitous loss occurred, when at the time the insurance took effect only a risk was involved as far as the parties were aware." *Id.* Ultimately, the court adopted the Restatement's definition and held, for the limited purpose of summary judgment proceedings, that the insured's loss was fortuitous. *Id.* at 374–75.

¶27 Other circuits agree with the subjective standard and provide valuable analysis. *See, e.g.*, *Adams-Arapahoe*, 891 F.2d at 775 (favorably citing *Compagnie*, 724 F.2d at 373, in holding that a "defective design and/or

construction, even if it exists before the policy is issued, can cause a fortuitous loss."); *see also Univ. of Cincinnati*, 51 F.3d at 1284–85 (illustrating a non-fortuitous loss where the insured deliberately destroyed its building after obtaining knowledge of asbestos).

¶28 Finally, GNIC erroneously relies upon *Magi*, 790 F. Supp. 1043, and *Churchill v. Factory Mutual Ins. Co.*, 234 F. Supp. 2d 1182 (W.D. Wash. 2002). Neither *Magi* nor *Churchill* adopts the objective foreseeability test; rather, both cases looked at whether the party behaved reasonably in light of the *knowledge* they had at the time of contracting. *See Magi*, 790 F. Supp. at 1049 ("[Plaintiffs] have not stated the issue properly. The question is not whether the damage was certain to occur because of the storage conditions which [defendant] chose, but *whether it was reasonable for [defendant] to choose the conditions which may have caused the damage*." (emphasis added)); *see also Churchill*, 234 F. Supp. 2d at 1188–89. *Magi*'s test also specifically looked at the parties' perception of risk at the time the policy was issued. *See Magi*, 790 F. Supp. at 1048. The weight of national authority supports the subjective standard we adopt here.

CONCLUSION

¶29 For the foregoing reasons, we answer the Ninth Circuit's certified question as follows: A loss is non-fortuitous only when the insured knew, at the time coverage attached, that the loss-causing event had already occurred, was already in progress, or was certain to occur because no material contingency remained between the facts known to the insured and the loss-causing event. This is a subjective standard that focuses on the insured's knowledge at the time of contracting.