


CLERK OF THE COURT

1 **RPLY**
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7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 **NEVADA INSURANCE GUARANTY**
10 **ASSOCIATION**, a non-profit, unincorporated
11 Nevada entity,

12 Plaintiff,

13 vs.

14 **MGM/MIRAGE**, a Delaware Corporation;
15 **STEEL ENGINEERS, INC.**, a Nevada
16 Corporation; and **DOE CORPORATIONS I - X**,

17 Defendants.

Case no. A512004
Dept. XI

Date of Hearing: 2/13/07
Time of Hearing: 9:00 a.m.

19 **DEFENDANT SEI'S REPLY TO PLAINTIFF'S RESPONSE**
20 **TO DEFENDANT'S COUNTER-MOTION FOR**
21 **SUMMARY JUDGMENT**

22
23
24 COMES NOW the Defendant, STEEL ENGINEERS, INC. ("SEI"), by and through its counsel,
25 Robert O. Kurth, Jr., of the KURTH LAW OFFICE, and hereby files its Reply to Plaintiff's Response
26 to Defendant's Counter-Motion for Summary Judgment. This Reply is based on the Points and
27 Authorities submitted herewith, the pleadings and papers on file herein, the affidavits attached hereto,
28 together with such evidence to be adduced at the hearing of this matter.

1 **POINTS AND AUTHORITIES**

2 As previously stated, the Plaintiff and Defendants are in general agreement as to the facts
3 of this case. Since this case is solely a question of statutory interpretation, Summary Judgment is proper
4 and appropriate. Defendant SEI, as well as the other parties to this suit, merely seek a declaration as
5 to the meaning of the NIGA Act; specifically, whether the Act's guaranty protections extend to self-
6 insured employers like SEI.

7 The outcome of this case hinges upon the Court's ultimate interpretation of the word
8 "insurer" as used within the NIGA Act. As noted by the Plaintiff in its Response to the Defendants'
9 Counter-Motion for Summary Judgment, the Nevada Legislature failed to provide a definition for the
10 word "insurer" within the NIGA statutes. Although the Nevada Legislature has defined the term under
11 several other statutes, it neglected to include a definition specifically applicable to the NIGA Act. Since
12 the Act precludes any coverage of claims owed to "insurers," an entity that falls under the definition of
13 this term is prevented from receiving the surety protections of the NIGA Act. The Plaintiff has
14 previously posited the argument that the Defendant SEI, a reinforcing steel and concrete accessory
15 company, is somehow an "insurer" and therefore excluded from NIGA's protections. Nevertheless,
16 interpreting the term "insurer" to include companies like SEI (1) violates the plain meaning of the NIGA
17 statute's text, (2) violates the legislative intent with which the statute was drafted, and (3) undermines
18 the public policy principles that are embodied within the NIGA Act.

19
20 **DISCUSSION**

21 When interpreting the meaning of a statute such as this, the Court usually considers three
22 relevant factors: (1) the plain meaning of the statute's language, (2) the legislative intent with which
23 the statute was drafted, and (3) the reason and public policy interests underlying the statute. See e.g.,
24 Salas v. Allstate Rent-A-Car, Inc., 116 Nev. 1165, 1168, 14 P.3d 511, 513-14 (2000). Here, examining
25 any three of the above factors, the NIGA statutes dictate that self-insured employers, such as SEI, are
26 eligible for the surety protections of the Nevada Insurance Guaranty Association.

27 Addressing the arguments set forth in the Plaintiff's Response to the Counter-Motion
28 for Summary Judgment, Defendant SEI makes the following observations.

1 **1. The "Plain Language" of the Statute dictates that self-insured employers,**
2 **like SEI, are eligible for NIGA's protections.**

3 Even though the Legislature neglected to provide a definition of "insurer" within the
4 NIGA statutes, the term is plain on its face. An insurer, without any other modifications, is someone
5 who engages in the business of selling or otherwise profiting from the sale of insurance. See e.g. NRS
6 **679A.100; NRS 679B.540; NRS 686B.1759; NRS 692C.070; NRS 695A.014; NRS 695H.040; NRS**
7 **696B.120; Cal Ins Code 688.5; ARS 20-104; Utah Code Ann 31A-1-301(87); Idaho Code § 41-103,**
8 attached and incorporated as Exhibit "A." SEI simply does not fit within this definition; as such, it is
9 eligible for NIGA's protections.

10 The Plaintiff goes through a myriad of awkward and needlessly complicated polemics
11 to stretch the definition of "insurer" so that it might include a self-insured employer. However, the
12 Plaintiff's argument ignores the obvious fact that the word "insurer" is plain on its face and does not
13 require any in-depth deciphering.

14 "When the statutory language is plain, the sole function of the courts -- at least where
15 the disposition required by the text is not absurd -- is to enforce it according to its terms." Arlington
16 Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2459 (2006); see also Bacher v. Office of the
17 State Eng'r of Nev., 122 Nev. Adv. Rep. 95; 146 P.3d 793 (2006). Here, the word "insurer" is widely
18 understood to mean one who engages in the business of issuing insurance policies or otherwise profiting
19 from the issuance of such policies. See Ex. A.

20 Defining Defendant SEI as an "insurer" violates basic common sense. Simply stated,
21 SEI does not now, nor has it ever, engaged in the business of selling insurance. SEI engages in the
22 business of reinforcing steel, structural steel and providing concrete accessories and industrial supplies
23 and services to businesses and individuals in the Las Vegas Valley. The Plaintiff even admits that SEI
24 is not "in the business of insurance in the same sense as Allstate or Nationwide." **Plaintiff's Response**
25 **at 4.** Plaintiff further admits that the Defendant does not issue insurance policies. **Plaintiff's Response**
26 **at 5.** Finally, Plaintiff admits that "the majority of courts addressing this issue have concluded that self-
27 insured employers are not insurers under statutes similar to NRS 679A.100." Given these basic facts,
28 it appears obvious that SEI does not meet the definitional criteria of an "insurer."

1 The Plaintiff makes the bizarre assertion that SEI is somehow profiting from insurance
2 practices because it made the cost/benefit decision to self-insure against worker's compensation claims.
3 This argument defies the basic definition of profit. Profit is one's income remaining after expenses.
4 SEI does not receive any income from its decision to be a self-insurer. This arrangement may, under
5 certain circumstances, prove more affordable than purchasing full worker's compensation coverage
6 through an insurance carrier; nevertheless, it does not produce any income that could later be
7 categorized as profit. Further, the NIGA statutes require SEI to have an excess insurance carrier, which
8 they had. Under the Plaintiff's rationale, a person who chooses not to purchase medical insurance for
9 his family but covers the cost of any doctor's visits is somehow engaged in the insurance business. As
10 such, this interpretation of the word "insurer" defies common sense.

11 The Plaintiff also suggests that because the NIGA statute defines the term "member
12 insurer," the Legislature must have intended a broader definition for the term "insurer." However,
13 nothing within the NIGA Act suggests that the term "insurer" should be so broad as to include entities
14 that do not even operate in the insurance business. Under NRS 687A.037, a "Member insurer" means
15 any person, except a fraternal or nonprofit service corporation which:

- 16 1. Writes any kind of insurance to which this chapter applies,
17 including the exchange of reciprocal or interinsurance
18 agreements of indemnity.
- 19 2. Is licensed to transact insurance in this state

20 The obvious difference between a "member insurer" and the more general term "insurer" is that an
21 "insurer" need not be a "member." Given this plain-meaning distinction between the two terms, it
22 logically follows that the criteria for membership flows from the second prong of the definition cited
23 above. That is to say, a member insurer must, in addition to being an insurer as defined by the first
24 prong of the definition, also be "licensed to transact insurance in this state."

25 More importantly, using the definition cited above, it follows that an "insurer" would
26 be any person which "writes any kind of insurance to which this chapter applies, including the exchange
27 of reciprocal or interinsurance agreements of indemnity." Defendant SEI does not meet this definition,
28 since it does not issue insurance policies or otherwise write any kind of insurance.

1 Defining Defendant SEI as an "insurer" under the NIGA Act not only violates the plain
2 meaning of the word "insurer," but also leads to results that violate basic common sense. SEI is not an
3 "insurer" and nothing within SEI's operations even remotely compares to the business structure of an
4 insurance company. Accordingly, the Court should DECLARE that SEI is eligible for the protections
5 of the Nevada Insurance Guaranty Association.

6 **2. The Legislative Intent, as evidenced by the Legislative History, dictates**
7 **that self-insured employers, like SEI, are eligible for NIGA's protections.**

8 The Legislative Intent underlying the NIGA Act requires that company's like SEI receive
9 protection from the potential insolvency of their insurers. NIGA was created to ensure that persons who
10 purchase insurance benefits are protected from claims when their insurance company becomes insolvent
11 and is granted some sort of insolvency protection against these claims. Cimini v. Nevada Ins Guar
12 Ass'n, 112 Nev. 442, 915 P.2d 279 (1996). "The modern trend is to construe the industrial insurance
13 acts broadly and liberally, to protect the interest of the injured worker and his dependents. A reasonable,
14 liberal and practical construction is preferable to a narrow one, since these acts are enacted for the
15 purpose of giving compensation, not for the denial thereof." Department of Indus. Relations v. Circus
16 Circus Enters., 101 Nev. 405, 411 (Nev. 1985).

17 In its response to the Defendant's Counter-Motion for Summary Judgment, Plaintiff
18 misstated the legislative history of a recent amendment to the NIGA Act. The Plaintiff incorrectly
19 claimed that, in 2005, the Nevada Legislature rejected legislation that would have expressly included
20 the Defendants claims under NIGA's coverage. The Legislature never formally rejected such an
21 Amendment. On the contrary, the Legislature ultimately agreed to set aside the proposed amendment,
22 allowing time for further deliberation and analysis because they thought there should not be a question
23 that a self-insured employer is covered by NIGA from looking at the plain meaning of the statutes.

24 In 2005, the Legislature passed Assembly Bill 338 (AB 338), which made various
25 statutory changes relating to insurance. That bill originally included, under Section 81, a provision that
26 would have amended NRS 687A.033 "to clarify that claims arising from an insolvent excess workers'
27 compensation insurer are covered by the Nevada Insurance Guaranty Association (NIGA)." See AB
28

1 **338 Section Summary**, attached and incorporated as Exhibit B. Although the Legislature ultimately
2 decided to remove Section 81 from AB 338, nothing in the Legislative History suggests that legislators
3 outright rejected the provision. On the contrary, the Legislative History suggests that Section 81 was
4 principally viewed as "clarifying language," providing no substantive change to the law. That is to say,
5 the legislative history indicates that both legislators and lobbyists generally believed that the NIGA Act,
6 in its current state, already covered claims arising under excess worker's compensation policies. See
7 Ex B; See also Minutes of the Senate Committee on Commerce and Labor, attached and
8 incorporated as Exhibit "C." Even the Legislature's own summary of AB 338 refers to Section 81 as
9 clarifying language. See Ex. C.

10 Further, during a Senate Committee meeting on May 26, 2005, lobbyists made brief
11 mention of Section 81, essentially summarizing the reason for its ultimate deletion from AB 338.

12 **DON JAYNE** (Nevada Self-Insurers Association):

13 I want to comment on section 81 being deleted. The reason this section was in
14 the bill was a result of the insurance commissioner's subcommittee for self-
15 insurance. There was testimony that we originally had some issues with the
16 NIGA accepting claims or considering accepting claims for excess worker
17 compensation insurance policies. This is why that was in there. I am glad to
18 hear that it is clarification language. We were interested in that section and
19 would have preferred it to stay in the bill. Since it is clarification language, I
20 suppose it is something with which we can live.

21 **ROBERT A. OSTROVSKY** (Employer's Insurance Company of Nevada, A
22 Mutual Company):

23 I believe section 81 of A.B. 338 has been deleted because there are certain
24 segments of the property and casualty industry that believes the change was
25 substantive. Since we never reached agreement on whether it was clarification
26 or substantive we agreed to work on this in the future. It is not a pressing issue
27 at the moment so we all agreed to let it go. We will continue to work with the
28 commissioner in regard to our definition of excess insurance or reinsurance and
how the two play into the guaranty fund.

26 As indicated by the exchange cited above, lobbyists for and against Section 81 ultimately decided to
27 postpone its passage, pending further discussion. With the legislative session winding down, both
28 legislators and lobbyists decided to postpone the issue for further debate. They did not "reject" the

1 amendment as the Plaintiff previously claimed. Moreover, the exchange cited above illustrates that
2 only "certain segments" of the casualty and property industry viewed Section 81 as a substantive
3 change. The legislative summary and all other available commentary suggest that Section 81 was
4 merely clarifying language. See Ex X. The lobbyist for the Self-Insurers Association even acquiesced
5 to the deletion of Section 81 specifically because the section was understood as "clarification
6 language." This legislative history, less than two-years old, demonstrates that the legislative intent
7 underlying the NIGA Act anticipated that self-insured employers, like SEI, would receive the
8 protections of the NIGA. Accordingly, this Court should DECLARE that SEI is eligible for the
9 protections of the Nevada Insurance Guaranty Association.

10
11 **3. The Underlying Policy of the NIGA Act dictates that self-insured**
12 **employers, like SEI, are eligible for NIGA's protections.**

13 The Plaintiff, somewhat callously, dismisses the Defendant's policy arguments, and
14 incorrectly asserts that such arguments are irrelevant to the issues of this case. The Plaintiff's cursory
15 dismissal of these points contravenes fundamental canons of statutory construction and undermines the
16 role of the Courts in determining issues of public concern. It is essential that this Court, in determining
17 the meaning of the NIGA Act, take into consideration the statute's underlying policy and purpose. In
18 construing a law of doubtful meaning or application, the policy which induced its enactment, or which
19 was designed to be promoted thereby, is a proper subject for consideration. Blue Chip Stamps v. Manor
20 Drug Stores, 421 U.S. 723, 737 (U.S. 1975). Indeed, the proper course in all cases is to adopt that sense
21 of the words which promotes in the fullest manner the policy of the legislature. Ash Sheep Co. v. U.S.,
22 252 U.S. 159, 170 (1920).

23 Here, the Plaintiff admits that it is an unfair burden on insureds when carriers become
24 insolvent, and that this phenomenon complicates any planning for contingencies. Plaintiff's Response
25 at 9. The Plaintiff further admits that the Legislature created NIGA as an act of "legislative charity"
26 designed to cover certain losses stemming from the insolvency of insurance carriers. Plaintiff's
27 Response at 10. However, the Plaintiff then simply dismisses these considerations and instructs the
28 Court to ignore the defendant's equitable pleas. **Plaintiff's Response** at 10.

1 To truly understand any legislative act, the Court must examine the policies and
2 principles of equity that gave rise to that act. If a certain construction of the act would contravene
3 public policy and cause unjust results, the Court should certainly take that into consideration when
4 making its decision. In the present case, any construction of the NIGA Act, which would preclude SEI
5 from receiving its protections, would violate public policy and cause unjust results—results contrary to
6 the policy considerations that gave rise to the initial enactment of the NIGA Act. Accordingly, this
7 Court should DECLARE that SEI is eligible for the protections of the Nevada Insurance Guaranty
8 Association.

9
10 **CONCLUSION**

11 WHEREFORE, in light of the forgoing, this Court should DECLARE that the Defendant
12 SEI is entitled to recovery from the Plaintiff NIGA as a self-insured employer for those claims that
13 would have otherwise been paid by their insolvent, excess workers' compensation insurance carrier as
14 well as any monies owed in the future due to ongoing claims. Additionally, the Defendant SEI requests
15 such other relief this Court deems appropriate, along with their attorney's fees and costs incurred herein.
16 Pursuant to N.R.S. 239B.030, the undersigned does hereby affirm that the preceding Reply and exhibits
17 attached hereto do not contain the social security number of any person.

18 DATED this 9th day of February, 2007.

19 **Respectfully Submitted by,**
20 **KURTH LAW OFFICE**

21 /s/Robert O. Kurth, Jr.
22 **ROBERT O. KURTH, JR.**
23 Nevada Bar No. 4659
24 Attorney for Defendant,
25 **STEEL ENGINEERS, INC.**

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of February, 2007, I served a true and correct copy of the foregoing **DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S COUNTER-MOTION FOR SUMMARY JUDGMENT** in the above-entitled case by transmitting it electronically and by placing a copy of the same in a sealed envelope in the U.S. Mail, first class, postage prepaid, and addressed as follows:

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An employee of **KURTH LAWOFFICE.**

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EXHIBIT "A"

NEVADA REVISED STATUTES

679A.100. "Insurer" defined.

"Insurer" includes every person engaged as principal and as indemnitor, surety or contractor in the business of entering into contracts of insurance.

679B.540. "Insurer" defined.

"Insurer" means any insurer or organization authorized pursuant to this Title to conduct business in this state that provides or arranges for the provision of health care services, including, without limitation, an insurer that issues a policy of health insurance, an insurer that issues a policy of group health insurance, a carrier serving small employers, a fraternal benefit society, a hospital or medical service corporation, a health maintenance organization, a plan for dental care and a prepaid limited health service organization.

686B.1759. "Insurer" defined.

"Insurer" means any private carrier authorized to provide industrial insurance in this state.

692C.070. "Insurer" defined.

"Insurer" has the meaning ascribed in NRS 679A.100. It does not include agencies, authorities or instrumentalities of the United States, its possessions and territories, the Commonwealth of Puerto Rico, the District of Columbia, or any state or political subdivision of a state.

695A.014. "Insurer" defined.

"Insurer" includes every person engaged as principal and as indemnitor, surety or contractor in the business of entering into contracts of insurance.

695H.040. "Insurer" defined.

"Insurer" means any insurer, fraternal benefit society, nonprofit corporation for hospital, medical and dental services, organization for dental care, health maintenance organization or prepaid limited health service organization authorized pursuant to this title to conduct business in this State.

696B.120. "Insurer" defined.

"Insurer," in addition to persons so defined under NRS 679A.100, includes also persons purporting to be insurers, or organizing or holding themselves out as organizing in this state for the purpose of becoming insurers.

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1 **Cal Insurance Code § 688.5. "Insurer"; "Board of directors"**

2 "Insurer" as used in this article includes insurance corporations and insurer organizations of every type
3 and reciprocal or interinsurance exchanges and the incorporated attorney in fact of a reciprocal or
4 interinsurance exchange, which corporate attorney in fact is either organized under the laws of or has
its home office and principal place of business in this State.

5 "Board of directors" as used in this article includes the policy-determining body of an insurer whether
6 or not it is called by that name.

7 **ARS § 20-104. "Insurer" defined**

8 "Insurer" includes every person engaged in the business of making contracts of insurance.

9
10 **Utah Code Ann. § 31A-1-301. Definitions**

11 (87) (a) (i) "Insurer" means any person doing an insurance business as a principal including:

12 (A) fraternal benefit societies;

13 (B) issuers of gift annuities other than those specified in Subsections 31A-22-1305(2) and (3);

14 (C) motor clubs;

15 (D) employee welfare plans; and

16 (E) any person purporting or intending to do an insurance business as a principal on that person's
own account.

17 (ii) "Insurer" does not include a governmental entity to the extent it is engaged in the activities
described in Section 31A-12-107.

18 **Idaho Code § 41-103. "Insurer" defined**

19 "Insurer" includes every person engaged as indemnitor, surety, or contractor in the business of entering
20 into contracts of insurance or of annuity.
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