

Treaty Tips

Shortcut Drafting Can Mean Good Business For Expert Witnesses

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Reinsurance wording can sometimes cause us to scratch our heads or even wince with pain as we search for the parties' intent. Usually, the seemingly opaque language becomes understandable in its intent, and apparent in its appropriateness, after the agreement is studied as a whole. At times, however, the unavoidable conclusion is that the wording resulted from poor drafting.

A common characteristic of problematic drafting is the use of essential terms in short-hand fashion and without definition on the assumption that anyone who picks up the agreement will understand their meaning. Expert witnesses love this approach to drafting inasmuch as it makes for good business (for them).

For example, a bankrupt reinsured argued that it was not liable for unpaid premiums under a reinsurance agreement because the contract was lacking in consideration and, therefore, illusory. At issue in this case (*In re: Acceptance Insurance Companies Inc.*) was the meaning of "subject net retained premium," which was a component of "subject ultimate net loss," itself the key term in defining the specific layer of the reinsurer's exposure. "Subject net retained premium" was not defined in the agreement. However, it did include a definition for "subject net retained premium income." The resulting ambiguity served as the basis for the reinsured's attempt to essentially avoid its premium payment obligations. The United States Court of Appeals for the Eighth Circuit eventually shot down the argument, but not after it had wound its way through the courts and expert witnesses weighed in on each side.



Shortcut Drafting Raises Many Questions