

Book Promotes Use of Plain Language in Insurance Contracts

Kenneth S. Wollner, *How to Draft and Interpret Insurance Policies*.

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Nowhere are examples of plain language more difficult to find than in the convoluted boilerplate and standard provisions of the traditional insurance contract. This fact comes as no surprise to anyone who has ever tried to interpret, construe, or enforce one. Accordingly, insurance contracts are fertile territory for advancing plain-language reform.

Blazing a trail into that territory is Kenneth S. Wollner, whose recently published treatise, *How to Draft and Interpret Insurance Policies*, makes a strong appeal to policy drafters to incorporate plain language into insurance policies (although the book successfully covers much more ground than that). Because, as Wollner points out, insurance policies are exempt from coverage under most so-called "Plain Language" statutes,* it is incumbent upon policy drafters to avoid the tempting convenience of mindlessly copying age-old precedent and to update existing forms to incorporate plain language. For those willing to make the effort, Wollner's book is an essential resource, full of useful illustrations and drafting guidance written from over 30 years of insurance-industry experience by this attorney and underwriter turned insurance consultant. Moreover, in writing the treatise, Wollner practices what he preaches, making the nearly 300-page work a quick and easy read, without sacrificing substance.

The stated focus of Wollner's book is the critical reading and writing of insurance-contract provisions with the goal of pro-

viding guidance on how to express coverage clearly and succinctly. This goal is an important one, not only because it advances the plain-language cause, but also, as Wollner points out, because the standards of interpretation applied by courts place a very heavy burden on the drafter to write clearly, unambiguously, and conspicuously—or risk an unwanted interpretation. At the same time, to a degree, court interpretations may actually serve as a disincentive to clearer drafting. For instance, the Insurance Services Office, a trade organization that drafts policy forms used by many insurance companies, will employ language in these forms that has been construed in a manner favorable to the insurer. Although clearer language could often be used to express the same concept, since it is unknown how the courts might ultimately interpret a plain-language redraft, there is a natural tendency to copy the favorable verbiage. This is particularly true of insurance contracts, given that principles applicable to their interpretation fundamentally, and sometimes irrationally, work to the advantage of insureds.

Wollner dedicates the first third of his treatise to how courts interpret insurance contracts and the context in which they are viewed. This approach is an effective one from a plain-language perspective because it highlights quite clearly the need to minimize ambiguity. It also is a perfect prelude to the second part of the book, which is a practical guide to identifying and avoiding ambiguity through the use of plain language.

This second part of Wollner's book applies to drafting contracts generally—not just insurance contracts—so it has value to any attorney who is called on to draft an agreement. Wollner provides a series of illustrations highlighting common drafting problems in insurance policies and providing practical, plain-language solutions.

Again, he attacks many of the same culprits that afflict legal drafting in so many contexts, not merely insurance contracts. For example, Wollner provides guidance on how to avoid the syntactical ambiguity that can arise from the imprecise use of *and* and *or*:

It is not always clear whether the drafter intends the several and (A and B jointly or severally) or the joint and (A and B, jointly but not severally). Consider the insuring agreement of a typical Directors' & Officers' liability insurance policy:

"This policy shall pay the loss of director and officer. . ."

Two interpretations are possible:

- *The insurer shall pay the loss of a person who is a director, or an officer, or a director and an officer.*
- *The insurer shall pay the loss of a person who is both a director and an officer.*

Some D & O liability insurance policies contain the following provision:

"This policy shall pay the Loss of each and every Director and Officer."

This each and every wording can be interpreted as meaning that coverage applies to a loss sustained by each director and officer, individually or as a member of the board of directors. However, this does not eliminate the ambiguity as to whether the coverage is joint or several.

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**(Michigan, though, has a separate statute requiring readability in insurance contracts. See MCLA 550.2236; MSA 24.12236.—Ed.)*

If the intent is several, a less awkward way of phrasing the provision is as follows:

"The Insurer shall pay the loss of any Director or (any) Officer."

If, on the other hand, the intent is joint, the provision can be restated as follows:

"The Insurer shall pay the loss of any person who is both a Director and an Officer."

Similarly, on sentence length, Wollner offers this advice:

Readability experts recommend that the average length of sentences should be 20 or fewer words. Longer sentences risk providing too much information and often fail to organize that information in a clear, accurate and effective manner. To revise long sentences, two steps can be taken: (1) organize clauses carefully through transitional logical connections and (2) place separate ideas in separate sentences with appropriate transitional words to show their relationship.

Consider this insurance policy clause:

"REINSTATEMENT: If any renewal premium be not paid within the time granted the Insured for payment, a subsequent acceptance of premium by the Company or by any agent duly authorized by the Company to accept such premium, without requiring in connection therewith an application for reinstatement by the Company, shall reinstate the policy; provided, however, that if the Company or such agent shall promptly require an application for reinstatement and issue a conditional voucher for the premium tendered, the policy will be reinstated upon approval of such application or, lacking such approval, upon the 45th day (30th day in New Mexico) following the date of such conditional voucher unless the Company has previously notified the Insured in writing of its disapproval of such application."

The 123-word reinstatement provision is not just too long. The clause contains superfluous information, arranges its relative and subordinate clauses poorly (they intrude between the subjects and their verbs), and presents

ideas in a way that is not logically organized. A revision follows:

"If the Company or its duly authorized agent accepts a renewal premium that is not paid within the time granted the Insured for payment and the Company does not require an application for reinstatement, the policy will be reinstated. However, if the Company or its duly authorized agent accepts a renewal premium and issues a conditional receipt for the premium, the policy will be reinstated only when the Company approves the application. (If the Company neither approves nor disapproves the application in writing, the policy will be reinstated on the 45th day (30th day in New Mexico) following receipt of the premium.)"

In a similar vein, Wollner demonstrates the benefits of appropriate sentence construction:

Consider the following errors and omission clause in a property insurance policy:

"We will not disclaim coverage under this policy if you fail to disclose all hazards as of the inception date of the policy, providing such failure is not intentional."

This sentence pattern can be improved as follows:

"If your failure to disclose all hazards is not intentional, then we will not disclaim coverage under this policy."

Or, removing the double negative:

"Unless your failure to disclose all hazards is intentional, we will not disclaim coverage under the policy."

However, the latter revision shifts the burden to prove intent from the insured to the insurer.

As demonstrated by these examples and noted previously, much of the drafting

guidance Wollner provides applies to contracts generally. Accordingly, Wollner's book is useful not only to the person drafting and negotiating insurance contracts, but also to the broader class of persons who draft and negotiate any type of contract.

The third and final part of Wollner's book highlights a number of relevant considerations more narrowly of interest to the drafter of insurance contracts, such as legally mandated provisions and public-policy considerations. Although these topics are beyond the scope of the plain-language movement, they are a helpful resource to the insurance-contract drafter seeking the big picture. This third part is also of significant value to attorneys representing clients in coverage litigation.

Our only major criticism of Wollner's book is that it was poorly proofread. While proofing oversights are inevitable, the relatively large number of errors in Wollner's book tends to detract from the overall message he conveys.

Wollner's book is a critical analysis of insurance contracts derived from the *contra proferentum* maxim of interpretation, that is, interpretation against the drafter. With its principal focus being the elimination of ambiguity, it convincingly advocates greater use of plain language in insurance contracts. More importantly, however, the book provides the necessary guidance to achieve plain-language in insurance contracts. From a plain-language perspective, therefore, the book deserves high marks and is a recommended read for anyone seeking to draft or negotiate clear and unambiguous contracts. ■

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