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Applied Underwriters Defeats Motion for Summary Judgment in Suit Over Breach of Reinsurance Participation Agreement

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Applied Underwriters Captive Risk Assurance Company, Inc. (Applied) defeated a motion for summary judgment filed by Beemac Driver Management, LLC (Beemac), in a lawsuit precipitated by Beemac's alleged failure to pay either the \$142,797.91 due under a "reinsurance participation agreement," or the \$253,287 early cancellation fee that resulted when Beemac refused to pay the amount due. The court stated it was "apparent that calculation of the amount due pursuant to the parties' agreement is not [] simple ... [nor was it] at all apparent from the pleadings and evidence how the plaintiff calculated the amount due - only that the plaintiff claims there is an amount due and owing." The court noted that Beemac's argument rested on the premise that miscalculating the amount due "was a prior material breach of the agreement, excusing their own subsequent failure to perform," but that Beemac offered no authority to support that position. In addition, Beemac offered no calculation of the correct amount it contended was due under the contract. On these facts, the court could not conclude as a matter of law that Applied's billing, even if inaccurate, was a material breach.

Beemac also sought to strike the affidavit of Applied's chief actuary regarding the factors Applied used to determine the amount due under the reinsurance participation agreement. Beemac argued that Applied either failed to disclose the expert witness prior to the expert disclosure deadline or, if the witness was not an expert, that her testimony concerned contract interpretation, which is determined by the court as a matter of law. The court disagreed, stating that although Applied's chief actuary might be an expert, in this particular matter she was not providing her opinions and conclusions based on her experience, skill and training, as an "expert witness" would testify. Rather, she was testifying regarding her personal knowledge of her employer's business practices, rendering her a lay opinion witness. As a result, the motion to strike her affidavit was denied. [Applied Underwriters Captive Risk Assurance Co., Inc. v. Beemac Driver Mgmt., LLC](#), Case No. 8:16-CV-382 (USDC D. Neb. Dec. 6, 2018).

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