Group Insurance Brochures and Certificates and the Demise of the Master Policy

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Government and other group employees often secure insurance coverage through group insurance policies.[1] A single contract called the master policy covers the entire group.[2] Though the individual group member employees are the insureds, the employer is generally the policyholder.[3] Since only one master policy covers the entire group, individual group members typically never see the master policy.[4] Instead, the insurer provides group members with explanatory certificates or brochures.[5] In addition to being explanatory, the brochures often serve to induce individuals to join the group plan.[6]

In this situation, then, two documents are essential: the master policy, which is normally considered the contract,[7] and explanatory or promotional literature in the form of a certificate or brochure. Disputes arise when the certificate or brochure seemingly provides greater coverage than the master policy.[8] In such a dispute, the employee will argue that the

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1. Gregg, "Fundamental Characteristics of the Group Technique," in GROUP INSURANCE HANDBOOK 34-35 (R.D. Eilers ed. 1965). Generally, the groups that are eligible for group insurance are: 1) individual employer groups, 2) multiple employer groups, 3) labor union groups, 4) creditor-debtor groups, and 5) other miscellaneous groups. *Id.* at 33.

2. Hill, *Master Contracts and Certificates*, in GROUP INSURANCE HANDBOOK 485-86 (R.D. Eilers ed. 1965).

3. *Id.* This arrangement probably stems from the traditional view that group insurance is a third-party beneficiary contract between the employer and the insurer. W. MEYER, LIFE AND HEALTH INSURANCE LAW § 20.1 at 636 (1972).

4. *See, e.g.*, Krauss v. Manhattan Life Ins. Co. of N.Y., 700 F.2d 870 (2d Cir. 1983); Sparks v. Republic Nat'l Life Ins. Co., 132 Ariz. 529, 647 P.2d 1127, *cert. denied*, 103 S. Ct. 490 (1982); and Linn v. North Idaho Dist. Medical Serv., 102 Idaho 679, 638 P.2d 876 (1981).

5. *See* cases cited *supra* note 4. *See also* Hill, "Master Contracts and Certificates," in GROUP INSURANCE HANDBOOK 485-86 (R.D. Eilers ed. 1965).

6. *See, e.g.*, Sparks v. Republic Nat'l Life Ins. Co., 132 Ariz. at 532-33, 647 P.2d at 1130-31; Barth v. State Farm Farm Fire and Casualty Co., 214 Pa. Super. 434, 437, 257 A.2d 671, 675 (1969); Craver v. Union Fidelity Life Ins. Co., 37 Ohio App. 2d 100, 103-105, 307 N.E.2d 265, 267-68 (1973).

7. The traditional rule is that the master policy, along with applications, constitutes the contract. *See* W. MEYER, LIFE AND HEALTH INSURANCE LAW § 20.1, at 635-38 (1972).

8. *See, e.g.*, Krauss v. Manhattan Life Ins. Co. of N.Y., 700 F.2d 870 (2d Cir. 1983); Clark v. Union Mut. Life Ins. Co., 692 F.2d 1370 (2d Cir. 1982); Sparks v. Republic Nat'l Life Ins. Co., 132 Ariz. 529, 647 P.2d 1127, *cert. denied*, 103 S. Ct. 490 (1982). A certificate or brochure may appear to provide greater coverage than the policy in two ways. First, it may make positive representations as to the coverage provided in the policy which, in truth, are absent from the policy. *See* Barth v. State Farm Fire and Casualty Co., 214 Pa. Super. 434, 257 A.2d 671 (1969); Aker v.

broader terms of the brochure or certificate should control, while the insurer will maintain that the master policy is the complete contract between the parties.[9]

This Note examines cases granting recovery based upon language of group insurance brochures and certificates. This examination concentrates upon several theories courts use in finding for the plaintiffs. Though different courts use different theories, the Note suggests that these theories have the same central elements. The Note then examines Arizona law regarding the status of group insurance brochures as contractual documents and proposes a clearer and more predictable rule. Finally, strategies for lawyers representing parties in such cases are discussed.

It has been suggested that two broad principles should apply to cases where an insured makes claims at variance with policy terms: 1) that the insurance company should be denied any unconscionable[10] advantage and 2) that the reasonable expectations of the insured should be honored.[11] While these principles have been analyzed in other contexts, they have not been examined in the case of an employee who under a group plan makes claims based on the terms of a brochure or certificate.

Though courts often state the general rule that only the group policy and attached documents constitute the contract,[12] many cases have granted

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Sabatier, La., 200 So.2d 94 (La. App.), *application denied*, 251 La. 49, 202 So. 2d 657 (1967); Craver v. Union Fidelity Life Ins. Co., 37 Ohio App. 2d 100, 307 N.E.2d 265 (1973). For example, in *Craver*, the advertising brochure promised potential insureds $100.00 per week for hospital stays "without any qualifications whatsoever." In reality, the policy excluded coverage for preexisting conditions. The insurance company attempted to deny recovery based on that exclusion. Though *Craver* did not involve a group policy, it is similar to cases involving group policies in that the insured was induced to purchase the insurance on the basis of only the advertising brochure. 37 Ohio App. 2d at 105, 307 N.E. at 269.

A second way a certificate or brochure can overstate coverage is by omitting policy exclusions from its summary. *See* Vogel v. American Warranty Home Serv., 695 F.2d 877 (5th Cir. 1983); Sparks v. Repub. Nat. Life Ins. Co., 132 Ariz. 529, 647 P.2d 1127, *cert. denied*, 103 S. Ct. 490 (1982); Lewis v. Continental Life & Casualty Co., 93 Idaho 348, 461 P.2d 243 (1969); Barth v. State Farm Fire and Casualty Co., 214 Pa. Super. 434, 257 A.2d 671 (1969). For example, in *Lewis v. Continental Life & Casualty Co.*, a brochure explaining a group life insurance policy stated that if employment were terminated because of total disability before age 60, the group life insurance would continue without any cost during such disability. 93 Idaho at 354, 461 P.2d at 249. The brochure represented that the insured would be "required to submit evidence [of continued disability] from time to time." *Id.* The master policy, which only the insured's employer held, however, excluded coverage during disability unless the insured provided yearly proof of total disability. *Id.* at 353, 461 P.2d at 248. The insured failed to supply such yearly proof, and the insurer attempted to deny recovery. *Id.* at 349, 461 P.2d at 244.

9. *See supra* note 8.

10. As Robert Keeton stated, " 'Unconscionability' is by nature an elusive standard." R. KEETON, INSURANCE LAW—BASIC TEXT § 36.2 at 349 (1971). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 208 comment (a) (1979) where it is stated: "The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose, and effect. Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud, and other invalidating causes. . . ." In addition, an imbalance in the consideration exchanged and the relative strength and weaknesses of bargaining position of the parties is taken into account. *See id.* comments (c) and (d).

11. R. KEETON, INSURANCE LAW—BASIC TEXT § 341 (1971). Parts of the cited chapter appear as a two-part article, Keeton, "Insurance Law Rights of Variance with Policy Provisions," 83 HARV. L. REV. 961, 1281 (1970).

12. *See* Vogel v. American Warranty Home Serv. Corp., 695 F.2d 877 (5th Cir. 1983); Blos v. Banker's Life Co., 133 C.A.2d 147, 151, 283 P.2d 744, 746-47 (1955); Lecker v. General Am. Life

recovery to plaintiffs based upon brochure and certificate language.[13] These cases loosely apply one or more of several theories in finding for the plaintiffs.[14] Indeed, it often appears that courts use these theories to arrive at a desired result. All these cases, however, reflect the common perception that it is unfair for an insurer to invoke a master policy exclusion never revealed to a group insured through explanatory literature. The effect of decisions based upon this notion of fairness is often to render master policies meaningless.

THEORIES OF RECOVERY

Estoppel

Chief among the theories courts recognize to nullify master policies is promissory estoppel.[15] The requirements of estoppel are: 1) a promise by the promisor which 2) the promisor should reasonably expect the promisee or a third person to rely and act upon and which 3) the promisee or third person actually detrimentally relies upon.[16] In the case of group insurance, an insured employee may assert that an insurance company is estopped to deny coverage based on a policy exclusion when the insured has detrimentally relied on language in a brochure or certificate indicating broader coverage.[17]

In cases granting group insureds recovery on the basis of estoppel, however, courts have often required less than the traditional showing of detrimental reliance.[18] Indeed, in some cases, the most a plaintiff has had to show has been a right to rely upon a representation appearing in a

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Ins. Co., 525 P.2d 1114, 1117 (Haw. 1974). *See also* 13 A.J. APPLEMAN, INSURANCE LAW & PRACTICE § 7528 (1976).

13. *See* Vogel v. American Warranty Home Serv., 695 F.2d 877 (5th Cir. 1983); Sparks v. Republic Nat'l Life Ins. Co., 132 Ariz. 529, 647 P.2d 1127, *cert. denied*, 103 S. Ct. 490 (1982); Lewis v. Continental Life & Casualty Co., 93 Idaho 348, 461 P.2d 243 (1969); Barth v. State Farm Fire and Casualty Co., 214 Pa. Super. 434, 257 A.2d 671 (1969).

14. These theories can be grouped into two general categories: 1) estoppel and 2) the courts' protection of the insured's reasonable expectations based on a brochure or certificate or the courts' refusal to enforce policy exclusions not listed in outside documents. For cases involving estoppel, *see* Providential Life Ins. Co. v. Clem, 240 Ark. 922, 403 S.W.2d 68 (1966); Lawrence v. Providential Life Ins. Co., 238 Ark. 981, 385 S.W.2d 936 (1965); and Linn v. North Idaho Dist. Medical, 102 Idaho 679, 638 P.2d 876 (1981). For cases involving the insured's reasonable expectations or a court's refusal to enforce policy exclusions not listed in brochures or certificates, *see* Van Orman v. American Ins. Co., 680 F.2d 301 (3d Cir. 1982); Jones v. Crown Life Ins. Co., 86 Cal. App. 636, 150 Cal. Rptr. 375 (1978); and Van Vactor v. Blue Cross Ass'n, 50 Ill. App. 3d 709, 365 N.E.2d 638 (1977).

15. Most cases where insureds attempt to recover on the terms of a brochure or certificate have been decided on the basis of estoppel. *See* Vogel v. American Warranty Home Serv., 695 F.2d 877 (5th Cir. 1983); Prudential Life Ins. Co. v. Clem, 240 Ark. 922, 403 S.W.2d 68 (1966); Linn v. North Idaho Dist. Medical, 102 Idaho 679, 638 P.2d 876 (1981); Lewis v. Continental Life & Casualty Co., 93 Idaho 348, 461 P.2d 243 (1969); Barth v. State Farm Fire and Casualty Co., 214 Pa. Super. 434, 257 A.2d 671 (1969); Craver v. Union Fidelity Life Ins. Co., 37 Ohio App. 2d 100, 397 N.E.2d 265 (1973).

16. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

17. *See* R. KEETON, INSURANCE LAW—BASIC TEXT 343-44 (1971).

18. *See* Krauss v. Manhattan Life Ins. Co. of N.Y., 700 F.2d 870 (2d Cir. 1983); Providential Life Ins. Co. v. Clem, 240 Ark. 922, 403 S.W.2d 68 (1966); Lawrence v. Providential Life Ins. Co., 238 Ark. 981, 385 S.W.2d 936 (1965); Lecker v. General Am. Life Ins. Co., 523 P.2d 1114 (Haw. 1974).

brochure or certificate.[19] In allowing plaintiffs to recover without showing actual reliance, courts often fall back on basic notions of fairness. One court based its finding on a right to rely upon two considerations: 1) that the brochure provided greater coverage than the master policy and 2) that, according to the court, the insurance company had no right to add exclusions to a policy the insured had never seen.[20] No facts, however, revealed any actual detrimental reliance.[21]

In another recent case, the court applied basic notions of fairness in recognizing that when a right to rely exists actual reliance will be presumed to exist as well. In *Krauss v. Manhattan Life Insurance Company of New York*,[22] the court found that since a group insured "had every right to believe" representations in a certificate, he had "undoubtedly relied" on those representations.[23]

In *Krauss*, the insured was a part-time officer of Lettercraft, Inc., a printing company.[24] He had life insurance under a group policy with Lettercraft for which Lettercraft paid all premiums.[25] Lettercraft payments covered the full $100,000 coverage, and the certificate Krauss received stated his coverage to be $100,000.[26] When Krauss died, however, the insurer denied this full coverage, citing a master policy provision limiting coverage on part-time employees to $25,000.[27]

The court found several reasons supporting Krauss' right to rely.[28] First, the insurance company application did not ask Krauss about his full or part-time status, and the company accepted his application for full coverage and sent Krauss certificates documenting his coverage.[29] In addition, Krauss never saw the master policy,[30] nor did the insurer ever inform

19. *See* cases cited *supra* note 18.

20. Providential Life Ins. Co. v. Clem, 240 Ark. 922, 403 S.W.2d 68 (1966). In *Clem*, the pamphlet-application of a group policy stated that the policy covered any student killed while traveling to and from school-sponsored activities. Though the brochure stated that such travel had to be adult-supervised to qualify for coverage, it never mentioned the more specific policy limitation requiring adult school employees or parents in each school vehicle. The plaintiffs never saw the master policy and were not aware of this limitation. When the plaintiffs' son died in a car accident during a school-sponsored trip, the plaintiffs claimed life insurance benefits, but the insurer denied recovery because no adult school employee or parent was present in the vehicle involved in the accident. The court ruled in favor of the plaintiffs, holding they had a right to rely on the representations in the brochure. *Id.* at 923, 403 S.W.2d at 69.

21. *Id.* at 922-24, 403 S.W.2d at 69-71. The facts do not reveal any promise from the insurer to the insured or any actual detrimental reliance. The insureds simply expected coverage based on the representations in the pamphlet-application.

22. 700 F.2d 870 (2d Cir. 1983).

23. *Id.* at 873.

24. *Id.* at 871.

25. *Id.* at 872. Krauss began working for Lettercraft in 1966. At that time, full coverage was $50,000. The coverage was increased to $100,000 in 1967. Krauss received certificates verifying both the $50,000 and the $100,000 coverage. *Id.*

26. *Id.*

27. *Id.* at 872-77.

28. *Id.* at 873. The case was decided under Illinois law. The court determined that Illinois courts employ the doctrine of equitable estoppel to enforce performance of insurance contracts. This estoppel is usually based on an insurer's conduct and/or representations which mislead an insured to his detriment. *Id.* at 872. *See also* Sallocum Foods & Liquor Inc. v. Parliament Ins. Co., 69 Ill. App. 3d 422, 427-29, 388 N.E.2d 23, 27-28 (1979).

29. *Id.*

30. *Id.* Krauss worked at Lettercraft's home office in Chicago, while the master policy re-

Krauss of its contents.[31] Finally, and most importantly, Lettercraft paid for the full coverage, and Manhatan Life accepted these payments for ten years without ever questioning whether Krauss qualified for full coverage.[32] The court held that this combination of factors had unreasonably misled the insured into believing that he had full coverage.

Once the court found that Krauss had a right to believe he had full coverage, Krauss was deemed to have actually relied as a matter of law.[33] The court required no evidence of any positive action or forbearance on Krauss' part. Rather, the court simply presumed that since Krauss was misled into believing he had $100,000 coverage, he had refrained from seeking that coverage from other sources. Thus, the court found that the insurer was estopped from denying coverage.[34]

Other cases, however, have required plaintiffs to show some degree of actual reliance.[35] Despite this requirement, the level of actual reliance courts have considered sufficient often does not surpass the level of reliance required in *Krauss*, where actual reliance was presumed. In one case, for example, the court held that a plaintiff could recover if he showed actual reliance upon an insurance brochure.[36] Instead of discussing what factors might show actual reliance, the court merely stated that an insured could not justifiably rely if he knew of the policy exclusion.[37] A court requiring only a showing of the right to rely, however, would also deny that right if the insured were aware of the policy exclusion.

The Eleventh Circuit, in a recent case, *Clark v. Union Mutual Life Insurance Company*,[38] though setting out specific indicia of actual reliance required no stronger showing of reliance than was present in *Krauss*.[39] The insured in *Clark* was given a certificate under a group health policy.[40] This certificate failed to state that the master policy would not cover pre-

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mained with the Master Printers Management Group Life Insurance Trust Fund headquartered in Buffalo, New York. Krauss v. Manhattan Life Ins. Co. of N.Y., 643 F.2d 98, 99 (1981).

31. Krauss v. Manhattan Life, 700 F.2d at 873.

32. *Id.*

33. *Id.* at 873.

34. *Id.* at 874.

35. *See infra* notes 36-47 and accompanying text.

36. Barth v. State Farm Fire and Casualty Co., 214 Pa. Super. 434, 257 A.2d 671 (1969). *Barth* did not involve a group insurance contract, but the scenario was similar because the insured purchased the insurance based solely upon reading an informative brochure, and the insured never read the actual policy. In *Barth*, the business insurance brochure indicated coverage for losses resulting from thefts occurring during non-business hours. The policy which the insured never read, however, excluded such losses. After a robbery occurred during non-business hours, the insured made a claim under the policy, but the insurer refused payment. The court held that if the insured in fact had relied on the brochure's representations, these representations should be considered the terms of the insurance contract. *Id.* at 438-42, 257 A.2d at 673-75.

37. *Id.* at 444, 257 A.2d at 676.

38. 692 F.2d 1370 (2d Cir. 1982).

39. *Id.* at 1377-78.

40. *Id.* at 1371. From 1970 to 1976, Clark was executive director of the Georgia Chapter of the Leukemia Society. The society provided its employees with major medical benefits, together with disability and life insurance, under a group plan with Union Mutual. Clark was covered by the plan. In 1976, Clark contracted multiple-sclerosis. He ceased active work in December 1976, but was continued on the payroll until mid-1977. Clark was also continued as a covered employee. *Id.*

existing conditions.[41] After paying out $75,000 to the plaintiff for treatment of multiple sclerosis, Union Mutual cut off payments for the reason that the condition pre-dated the start of plaintiff's coverage under the policy.[42] The district court dismissed the insured's action for wrongful termination of insurance benefits because the plaintiff failed to show detrimental reliance.[43]

The Eleventh Circuit reversed the district court's granting of a summary judgment in favor of the insurance company. While affirming the need for the plaintiff to show detrimental reliance,[44] the court of appeals found that a jury question existed regarding whether the plaintiff in fact detrimentally relied.[45] The court regarded two of the plaintiff's actions as especially important in establishing a question regarding reliance: 1) Clark had contacted his employer and the agencies responsible for his care to confirm his coverage, and 2) Clark had failed to exercise an option to convert to a direct pay plan with Blue Shield, an option that was available without physical examination, because he was told he was covered under the new plan.[46]

Thus, the indicia of reliance the *Clark* court considered important are no more than those found in *Krauss*. In both cases, the fact that the insured presumably or actually refrained from purchasing additional insurance because of certificate language was sufficient to indicate actual reliance.[47] In almost any case, however, an insured could successfully argue reliance based upon such facts. Once an insured expects a certain amount or kind of insurance coverage, it is reasonable to conclude that he will refrain from obtaining insurance from other sources. The reliance requirement in group insurance brochure and certificate cases, therefore, is often a formality, easily proven.

Disregarding Disclaimers in Brochures and Certificates

Adding even more strength to insureds' claims based on group insurance brochures and certificates are cases which ignore clear language in the explanatory literature stating that the provisions of the master contract, not the brochures, apply.[48] Arguments that such disclaiming language should nullify the contractual effects of a brochure or certificate would ap-

41. *Id.* When the group policy was amended in 1978 to increase major medical coverage to $1,000,000, the amendment excluded coverage for disabilities commencing before the effective date of the amendment, June 1, 1978. The certificate of insurance failed to state the exclusion. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 1374, 1377-78.

45. *Id.* at 1376-78.

46. *Id.* at 1377-78.

47. Krauss v. Manhattan Life Ins. Co. of N.Y., 700 F.2d 870, 873 (2d Cir. 1983); Clark v. Union Mutual Life Ins. Co., 692 F.2d 1370, 1377-78 (11th Cir. 1982).

48. *See, e.g.*, Clark v. Union Mutual Life Ins. Co., 692 F.2d 1370 (11th Cir. 1982); Sparks v. Republic Nat. Life Ins. Co., 132 Ariz. 529, 647 P.2d 1127, *cert. denied*, 103 S. Ct. 490 (1982); Lecker v. General Am. Life Ins. Co., 525 P.2d 1114 (Haw. 1974); Linn v. North Idaho Dist. Medical, 102 Idaho 679, 638 P.2d 876 (1981); Halverson v. Med. Life Ins., 286 N.W.2d 531 (S.D. 1979); Colvin v. Louisiana Hospital Serv. Inc., 321 So. 2d 416 (La. App.), *cert. denied*, 323 So. 2d 476 (La. 1975).

pear to be strong since: 1) the brochure or certificate clearly referred the insured to the master policy, there could be no justifiable reliance or reasonable expectations based on the brochure or certificate; and 2) the brochure or certificate stated that it was not the contract, it should not be treated as such.

Indeed, such arguments have been successful in several cases.[49] Courts in these cases have acknowledged that the certificates or brochures provide broader coverage than the master policy. Because of the disclaiming language, however, these courts have felt bound to follow the master policy terms.[50]

In numerous cases, however, courts have ignored clauses in brochures or certificates referring the insured to the master policy.[51] Like the cases involving the insured's right to rely, these cases are based upon the court's perception of fairness.[52] Generally, courts ignoring disclaiming language hold that it is unfair for insurers to issue misleading brochures or certificates without redress.[53]

Estoppel Based Upon Statutes Requiring Insurance Certificates

Many states have statutes requiring group insurers to furnish a holder of group insurance with a certificate summarizing the policy terms.[54] In

49. *See, e.g.*, Standard of Am. Life Ins. Co., v. Humphreys, 257 Ark. 618, 519 S.W.2d 64 (1975); Morrison Assurance Co. v. Armstrong, 152 Ga. App. 885, 264 S.E.2d 320 (1980); Transport Life Ins. Co. v. Karr, 491 S.W.2d 446 (Tex. Civ. App. 7th Dist. 1973).

50. *See* cases cited *supra* note 49.

51. *See infra* note 53.

52. *See infra* note 53.

53. *See, e.g.*, Clark v. Union Mutual Life Ins. Co., 692 F.2d 1370 (11th Cir. 1982) (since certificate involved contained significant discrepancies from master policy, the certificate should apply if the insured detrimentally relied on the certificate); Linn v. North Idaho Dist. Medical Serv. Bureau, 102 Idaho 679, 638 P.2d 876 (1981) (court refused to recognize a disclaimer or to give effect to Idaho statute requiring group insurance summaries. For a discussion of such summaries, *see infra* notes 54-76 and accompanying text); Colvin v. Louisiana Hosp. Serv. Ins., 321 So. 2d 416 (La. App.), (court rejected as unfair the prospect that insurer could issue misleading certificate without redress so long as certificate refers insured to master policy), *cert. denied*, 323 So. 2d 476 (La. 1975). *But see* Halverson v. Metropolitan Life Ins. Co., S.D., 286 N.W.2d 531 (S.D. 1979), where the court held the insured to the more restrictive certificate despite language in the certificate stating that the master policy controlled. *Id.* at 534. The court stated that the "*quid pro quo* of a rule which allows insureds to rely on statements in the certificate is a rule that insureds have the concomitant duty to satisfy the terms and conditions imposed by the terms of the certificate." *Id.*

54. *See, e.g.*, ARIZ. REV. STAT. ANN. § 20-1265 (1956); IDAHO CODE § 41-2203 (1949); 73 ILL. ANN. STAT. § 843 (1965); 27 N.Y. STAT. ANN. § 142; 36 OKL. STAT. ANN. § 4502 (1976). These statutes are modeled after the MODEL BILL GROUP LIFE INSURANCE DEFINITION AND GROUP LIFE INSURANCE STANDARD PROVISIONS (National Ass'n of Ins. Comm'rs, 1956). *See* W. MEYER, LIFE AND HEALTH INSURANCE LAW 875 app. C (1972). The Model Bill provides in part:

> No policy of group life insurance shall be delivered in this state unless it contains the following provisions, or provisions which in the opinion of the Commissioner are more favorable to the persons insured. . . .
>
> (7) A provision that the insurer will issue to the policy holder for delivery to each person insured an individual certificate setting forth a statement as to the insurance protection to which he is entitled, to whom the insurance benefits are payable, and the rights and conditions set forth [in (8), (9), and (10) of this bill].

Id.

The Arizona statute is identical to section (7) of the Model Bill. ARIZ. REV. STAT. ANN. § 20-1265 (1956). Further, as in the Model Bill, the Arizona statute requires the certificate to list the

several cases, courts have held that these statutes give group insureds a statutory right to rely upon certificates and brochures.[55]

In one case, the court, upon finding a statutorily-based right to rely on a certificate, held that the insurer was estopped from enforcing the terms of the master policy.[56] Further, the court did not require the plaintiff to show actual reliance.[57] Thus, once the plaintiff established a statutorily-based right to rely on the certificate, the terms of the certificate, not those of the policy, controlled.

In states where certificates are required by statute, then, a court may find that an insured has a right to rely on the certificate. No statute requires the insurer to provide a brochure; however, courts may find that insureds have a right to rely on brochures based on a statutory requirement for certificates. In at least two cases courts have used statutes requiring certificates or summary statements of policy coverage to bind the insurer to the terms of a brochure.[58]

In *Linn v. North Idaho District Medical Service*,[59] the court found that a group insurer was estopped from asserting a master policy provision against the insured.[60] The insured in *Linn* received a booklet purporting to explain a group health policy and to list any exclusions.[61] This booklet failed to explain that, pursuant to the master policy, benefits under the policy would be reduced by the amount Linn received from any other policy he carried.[62] The court, therefore, held that since Linn was not informed of this exclusion in the booklet, the insurer was estopped from relying on it.[63]

The court reasoned that Idaho statutes referring to summaries and certificates supported this finding of estoppel.[64] The Idaho statute in question required insurers to furnish each group insured a summary statement

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insured's rights after termination of employment and his rights regarding conversion to individual insurance and death pending conversion. ARIZ. REV. STAT. ANN. §§ 20-1266, -1267, -1268.

55. *See infra* notes 56-76 and accompanying text.

56. Lecker v. General Am. Life Ins. Co., 525 P.2d 1114, 1118 (Haw. 1974). The certificate in *Lecker* listed several exclusions, but it failed to mention an additional exclusion set forth in the policy to the effect that there was no coverage for accidental injuries arising out of or in the scope of employment. The insured died as a result of such injuries, and the insurer denied recovery to his widow because of the clear policy exclusion. The court held that since the Hawaii statute required the insurer to furnish the insured a certificate informing the insured of his coverage, the insured had a right to rely on the representations made in the certificate. *Id.* at 1116-18. The Hawaii statute is virtually identical to the Model Bill, *supra* note 54. HAWAII REV. STAT. § 431-518 (1976).

57. *Id.* at 1118.

58. *See* Linn v. North Idaho Dist. Medical Serv., 102 Idaho 679, 638 P.2d 876 (1981); Evans v. Lincoln Income Life Ins. Co., 585 P.2d 407 (Okla. App. 1978).

59. 102 Idaho 679, 638 P.2d 876 (1981).

60. *Id.* at 691, 638 P.2d at 888.

61. *Id.*

62. *Id.* at 681-82, 638 P.2d at 878-79.

63. *Id.* at 691, 638 P.2d at 888.

64. The Idaho statutes involved were IDAHO CODE §§ 41-2203 and -3417 (1977). *See* Linn, 102 Idaho at 688-89, 638 P.2d at 886-87. Section 41-3417(5) provides that service corporations may issue contracts to groups under a master contract. Each subscriber under the master contract must receive an individual certificate setting forth the services and benefits to which the subscriber is entitled and all other terms and conditions of the agreement between the parties. IDAHO CODE § 41-3417(5) (1977).

of coverage. The court apparently considered the booklet furnished Linn the kind of summary required in the statute.[65] The *Linn* court ruled that to effectuate the purpose of the statutes, the insured must be entitled to rely on the booklet supplied to him by the insurer.[66] The court further held that, under the statute, the insurer could not furnish the booklet and subsequently insert a disclaimer in the booklet to the effect that the master policy controlled in all controversies.[67] Once the plaintiff asserted a statutorily-based right to rely and showed that he was covered under the terms of the brochure, he was entitled to recovery.[68]

Thus, certificate statutes may provide a powerful weapon to the insured who seeks recovery. Once a court finds a statutorily-based right to rely, a plaintiff need not show actual reliance or even a right to rely based on some other ground. Rather, the certificate statute will effectively enforce the terms of the brochure or certificate. The court, therefore, ultimately gives the brochure or certificate full contractual force while nullifying the master policy.

OTHER THEORIES OF RECOVERY

Refusal to Enforce Inconsistent Policy Terms

In a recent Illinois case, *Van Vactor v. Blue Cross Association*,[69] the court refused to enforce policy provisions inconsistent with language in a brochure.[70] The group master policy stated that Blue Cross would pay for medical procedures it considered medically necessary.[71] The insured, however, never saw this master policy, and the brochure furnished by Blue Cross did not mention that Blue Cross had to verify the medical necessity of all procedures.[72] Citing a Hawaii case,[73] the *Van Vactor* court flatly

65. *Linn*, 102 Idaho at 688-89, 638 P.2d at 886-87.

66. *Id.* at 689-90, 638 P.2d at 886-87.

67. *Id.*

68. *Id.* at 690-91, 638 P.2d at 887-88. *See* Humphrey v. Equitable Life Assurance Soc'y of Am., 67 Cal. 2d 527, 63 Cal. Rptr. 50, 432 P.2d 746 (court based decision that certificate providing broader coverage than master policy prevailed in part upon statute requiring certificate) (1967); Colvin v. Louisiana Hosp. Serv. Inc., 321 So. 2d 416, 419 (La. App.) (terms of certificate required by law bind when such terms conflicted with or differed from master policy), *cert. denied*, 323 So. 2d 476 (La. 1975); Evans v. Lincoln Life Ins. Co., 585 P.2d 407 (Okla. App. 1978) (cited a similar statute in holding that an insured had a right to rely on an insurance brochure). *See also* the concurring opinion of Krauss v. Manhattan Life Ins. Co. of New York, 700 F.2d 870 (2nd Cir. 1983), where the concurring judge said that in order to give the Illinois statute requiring the issuance of certificates meaning, the insurer should not be allowed to misrepresent the amount of coverage without redress. *Id.*

69. 50 Ill. App. 3d 709, 365 N.E.2d 638 (1977).

70. *Id. Cf.* Krauss v. Manhattan Life Ins. Co. of N.Y., 700 F.2d 870 (2d Cir. 1983), where the court applying Illinois law used estoppel theory.

71. Van Vactor v. Blue Cross Ass'n, 50 Ill. App. 3d at 711, 365 N.E.2d at 642. The master policy provided that Blue Cross had the right to verify the medical necessity of any medical procedure. *Id.*

72. *Id.* at 715, 365 N.E.2d at 643. The court explained the practice of Blue Shield regarding its master policy and its brochure: "The brochure is the main source of information for policyholders. The 65 page master contract is seldom, if ever, seen by the insured. The master contract can be amended continually, so long as a new brochure is issued advising policyholders of material changes." *Id.* In regard to the medical necessity requirement, the brochure simply listed an exclusion from coverage for services and supplies: "[n]ot medically necessary for the diagnosis of treatment of an illness, injury or bodily malfunction. . . ." *Id.*

stated that significant policy exclusions contained a master contract but omitted from the brochure distributed to policyholders should not be enforced.[74]

The *Van Vactor* court did not discuss either the plaintiff's reliance on the brochure or any reasonable expectations of the plaintiff which may have been based upon the brochure.[75] The fact that the brochure failed to adequately notify the insured of the master policy provisions was enough to make the differing clauses in the master policy unenforceable.[76]

The Illinois approach may seem the most expansive of any discussed thus far. It does not require the plaintiff to show reliance or even a right to rely. As long as significant differences appear between a master policy and the brochure, the court will refuse to enforce the conflicting master policy provisions.

Since the previously discussed right to rely cases[77] require only minimal reliance, however, the Illinois approach differs little from those cases. Like the right to rely cases, *Van Vactor* depends upon one fundamental idea: it is unfair for an insurer to represent something to an insured in a brochure or certificate and later to deny coverage based upon contradictory and undisclosed policy terms.

Reasonable Expectations

In a recent California case, application of the reasonable expectations doctrine rendered the terms of a master contract unenforceable.[78] In *Jones v. Crown Life Insurance Company*,[79] the insured participated in a group life policy provided by his employer. The insured was provided with a booklet explaining the benefits under the policy and was notified that a copy of the master policy was available in the employer's office.

Under the policy, the insurer would pay twice the amount of the ordinary death benefits if death was caused by accident, but the insurer excluded from this double indemnity clause death resulting from the commission of a crime. The insured's booklet failed to include this exclu-

73. Lecker v. General Am. Life Ins. Co., 525 P.2d 1114 (Haw. 1974).

74. So. Ill. App. 3d at 716, 365 N.E.2d at 644.

75. *Id.* One could infer from the court's discussion that because the insured saw only the brochure, which made no mention of the policy exclusion, the insured had no reasonable expectation of such an exclusion.

76. *Id.* The court also cited a federal statute governing group insurance policies for Civil Service employees. *Id. See* 5 U.S.C. § 8907 (1970). This statute is similar to the Model Bill, *supra* note 54. It requires the issuance of an "appropriate document" to summarize coverage, including "maximums, limitations, and exclusions." 5 U.S.C. § 8907 (1970). The court, however, did not hold that violating the language of the statute rendered the brochure unenforceable. *See Van Vactor*, *id.* at 717, 365 N.E.2d at 644.

77. *See supra* notes 15-68 and accompanying text.

78. Jones v. Crown Life Ins. Co., 86 Cal. App. 630, 639, 150 Cal. Rptr. 375, 379 (1978). For other cases applying the doctrine of reasonable expectations, *see* Sur v. Glidden Durkee, 681 F.2d 490 (7th Cir. 1982); and Van Orman v. American Ins. Co., 680 F.2d 301 (3d Cir. 1982). Since the 1960s, many courts have accepted the argument that the reasonable expectations of insureds should be honored despite policy provisions denying coverage. *See* Abraham, *Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151, 1152-53 (1981). The insurer usually is held liable because it somehow misinformed the insured concerning the coverage actually in the policy. *Id.* at 1169.

79. 86 Cal. App. 630, 150 Cal. Rptr. 375 (1978).

sion. The insured was killed in an accident in which he was driving while intoxicated. As driving while intoxicated was a crime, the insurer denied double indemnity benefits.[80]

The California Court of Appeals first held that the group life policy was an adhesion contract.[81] The court then ruled that coverage for adhesion contracts should be based on the insured's reasonable expectations. Because the booklet made no mention of the criminal offense exclusion, the court ruled that the insured could have reasonably expected the accidental death coverage when death occurred as a result of driving while intoxicated.[82]

By employing the reasonable expectations doctrine, the court avoided any determination of actual reliance. Since the brochure apparently provided broader coverage, it controlled over the master policy. Thus, the master policy had no effect because a different document—the brochure—failed to completely summarize its contents.[83]

Though it applies the reasonable expectations doctrine, *Jones* differs little from the previously discussed reliance cases. Just as in the estoppel cases, the insured in *Jones* built up expectations based upon explanatory material. Further, as in previous cases, the insurer attempted to nullify those expectations by relying on unseen master policy exclusions. Finally, the court again apparently based its decision on the basic unfairness inherent in such a situation.[84]

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80. *Id.* at 634-35, 150 Cal. Rptr. at 376-77.

81. *Id.* at 636, 150 Cal. Rptr. at 377. The finding that the contract was one of adhesion was important because the court applied a rule whereby contracts of adhesion are enforced differently from normal contracts. *Id.* at 636-37, 150 Cal. Rptr. at 378. Specifically, under the California rule, insurance contracts which are deemed adhesion contracts are interpreted based upon the insured's reasonable expectations of the policy, and notice must be given of non-coverage where coverage may be normally expected. *Id.* at 639, 150 Cal. Rptr. at 379.

82. *Id.* at 640, 150 Cal. Rptr. at 380.

83. *See* Van Orman v. American Ins. Co., 680 F.2d 301, 308 (3d Cir. 1982). The court, in describing the doctrine of reasonable expectations, stated that "[t]he doctrine differs from estoppel in that it does not require proof of reliance; rather, courts examine contractual language from the point of view of the 'average member of the public.'" *Id.* (citing Kiewit v. Loyal Protective Life Ins. Co., 34 N.J. 475, 488, 170 A.2d 22, 26 (1961)).

See also, Darner Motor Sales v. Universal Underwriters Ins. Co., No. 16551-PR (Ariz. March 29, 1984) (discussed *infra* notes 102-126 and accompanying text); Sparks v. Republic Nat'l Life Ins. Co., 132 Ariz. 529, 536-37, 647 P.2d 1127, 1134-35, *cert. denied*, 103 S. Ct. 490 (1982) (discussed *infra* at notes 85-101 and accompanying text). *See also* Riordan v. Automobile Club of New York, Inc., 100 Misc. 638, 422 N.Y.S.2d 811 (1979); Lachs v. Fidelity & Casualty Co. of N.Y., 306 N.Y. 357, 118 N.E.2d 555 (1954). The doctrine of reasonable expectations can render an insurance contract meaningless. In *Riordan*, the plaintiffs had enrolled in a mail order auto insurance plan. The general impression imparted by the application form was that for auto club members the insurance began as soon as the application was mailed. Smaller print, however, informed prospective insureds that the insurance began when the company issued a certificate. The insureds suffered their loss before the issuance of the certificate but after mailing the application. Despite the clear language of the enrollment form, the court held that general impression of the application form gave the insureds a reasonable expectation of coverage. *Id.*

In *Lachs*, a more striking case, the court applied the reasonable expectation doctrine to determine a case where the insureds bought flight insurance from a machine for a "non-scheduled" airline flight. Although the policy clearly excluded coverage for "non-scheduled" airline flights, the court held that the fact that the machine was located directly in front of an airline's non-scheduled flight counter created reasonable expectations of coverage. *Id.*

84. *Jones*, 86 Cal. App. at 640, 150 Cal. Rptr. at 380. The court stated that since the booklet provided to the employees failed to mention the exclusion, "Jones could have reasonably expected

The Arizona Approach—Sparks v. Republic National Insurance Co. *and Beyond*

In *Sparks v. Republic National Life Insurance Co.*,[85] the Arizona Supreme Court held that a sales brochure was part of the contract between a group insurer and an insured.[86] The plaintiffs, Mr. and Mrs. Sparks, purchased a group health insurance policy for their family and for the employees of their small business.[87] The plaintiffs purchased this insurance solely on the basis of a sales brochure. The brochure contained several exclusions, and it informed the plaintiffs that all benefits listed in the sales brochure were subject to the terms of the master policy. Shortly after purchasing the insurance, the Sparks family was involved in a private plane accident in which Mr. Sparks suffered severe injuries.[88] It was only at this time that Republic supplied Mr. and Mrs. Sparks with the master policy.[89] Because of Mr. Sparks' inability to continue to manage his business, the business went bankrupt, and the plaintiffs stopped paying the insurance premiums.[90]

Republic then informed the plaintiffs that it was not obligated to pay any benefits for medical expenses incurred after the termination of premium payments. According to Republic, the policy was a "medical expense" policy wherein the covered event was the incurring of medical expenses, not the occurrence of a sickness or injury. Under such a plan, the insurer would be required to pay benefits for continuing medical expenses only so long as the insured paid premiums. The brochure, however, failed to inform the plaintiffs that the policy was a "medical expense" policy.[91] In addition, the court found the policy ambiguous regarding its medical expense provisions.[92]

The Arizona Supreme Court stated that because of this ambiguity in the master policy and because the brochure was the only document the insured ever saw before purchasing the policy, the brochure should be examined to determine its effect upon the ordinary consumer as to the meaning of the policy.[93] The court stated that such an examination should

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that the accidental death provision would afford coverage when death occurred in an accident while he was intoxicated."

85. 132 Ariz. 529, 647 P.2d 1127, cert. denied, 103 S. Ct. 490 (1982).

86. *Id.* at 536, 647 P.2d at 1134. *Sparks* differs slightly from other group insurance brochure cases because the plaintiff in *Sparks* was an employer, not an employee. Mr. and Mrs. Sparks owned an air conditioning business in Mesa, Arizona, which was managed entirely by Mr. Sparks. *Id.* at 532, 647 P.2d at 1130.

87. *Id.* at 533, 647 P.2d at 1134. Thus, *Sparks* differs from other group insurance brochure cases where plaintiffs never bargained for and purchased policies. In one important respect, however, *Sparks* is similar: the plaintiffs did not see the master policy they bargained for until after the denial of coverage. *Id.*

88. *Id.* at 531, 647 P.2d at 1131. Mr. Sparks suffered permanent brain damage. In addition, a five-year old son was rendered paraplegic. *Id.*

89. *Id.*

90. *Id.* at 533, 647 P.2d at 1121.

91. *Id.* at 536, 647 P.2d at 1134. According to the testimony of Mrs. Sparks, it was her understanding from the brochure that " [w]hen the business closed the insurance would no longer cover it, if we had another accident the next day. But I expected coverage for injuries incurred in the accident while the policy was in force." *Id.* at 533, 647 P.2d at 1131.

92. *Id.* at 535-36, 647 P.2d at 1133-34.

93. *Id.* According to the court, such an examination of a group insurance brochure was

occur in conjunction with an examination of the master policy. The court found that these two documents, when read together, gave the impression that coverage would continue as long as the insurance was in effect at the time the insured incurred the injury or sickness. The plaintiffs, therefore, recovered under the terms of the policy.[94]

The supreme court sustained the trial court's finding of Republic's bad faith in denying insurance benefits.[95] The court ruled that since Republic knew of the grievous nature of Mr. Sparks' injuries, denying the insurance benefits based on patently ambiguous and undisclosed terms of an insurance contract at least presented a jury question as to bad faith.[96]

Thus, if a group insurer denies coverage based upon unseen, ambiguous policy provisions, the insurer may be acting in bad faith. The brochure is therefore a prime importance to both the insurer and the insured. Unless a group insurer discloses all important policy provisions in a brochure, the insurer may later be liable not only for coverage but for substantial damages based on a bad faith denial of coverage.

The Concurring Opinion in Sparks*—An Indicator of Future Arizona Trends*

Though the majority opinion in *Sparks* went a long way in rendering an insurance brochure the decisive document in the group insurance contract, Justice Feldman's concurring opinion went even further.[97] The majority limited its ruling to cases where master policy provisions are ambiguous or undisclosed.[98] Further, even if such cases, the majority would continue to read the policy in conjunction with the brochure.[99]

According to Justice Feldman, however, since the insured did not receive a copy of the master policy prior to purchasing the insurance, no reason existed to consider it as part of the contract.[100] Under this view,

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required wherever the insured had no notice of unambiguous policy terms. *See id.* at 1134, n.2. In this footnote, the court discussed its previous decision in Sahlin v. American Casualty Co. of Reaching, 103 Ariz. 57, 436 P.2d 606 (1968). There, the plaintiff asserted that an insurer was estopped to deny coverage because the group insurance brochure prepared by the insurer contained an ambiguity as to the date of coverage. Holding for the insurer, however, the Arizona Supreme Court refused to consider the brochure because the insured had ample notice of unambiguous provisions of the policy before his death. *Id.* at 60, 436 P.2d at 609. Thus, had the plaintiffs in *Sparks* had notice of unambiguous master policy provisions indicating the policy was a medical expense policy, the court would not have considered the brochure. *Sparks* at 536, 647 P.2d at 1134, n.1. The court did not discuss the fact that the sales brochure stated that all benefits were subject to the terms of the master policy. *Id.* at 534-37, 647 P.2d at 1132-35.

94. *Id.* at 534, 647 P.2d at 1132. The plaintiffs received $1,551,000 in compensatory damages.

95. *Id.* at 537-39, 647 P.2d at 1135-37. The plaintiffs received $3,000,000 in punitive damages for a bad faith termination of insurance benefits. *Id.* at 534, 647 P.2d at 1132.

96. *Id.* at 539, 647 P.2d at 1137.

97. *See id.* at 545, 647 P.2d at 1193.

98. *See supra* note 98.

99. See *supra* note 101. In a recent case, however, the Arizona Supreme Court, again speaking through Justice Feldman, stated that *Sparks* recognized the doctrine of reasonable expectations. This statement, however, was merely dicta. Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., No. 16551-PR, slip op. at 12 (Ariz. Mar. 29, 1984).

100. *Sparks*, 132 Ariz. at 545, 647 P.2d at 1193. Justice Feldman stated:

> Because the insurer advertised and sold the coverage through the brochure, and provided the insured with no other information, I would simply hold that the insurer is bound by the writing which contains all the coverage agreements given its insured. The

therefore, the insurer would be bound by the brochure, and the master policy would have no meaning. Though Justice Feldman did not state what kind of notice an insured must have a master policy's terms before such terms would have contractual effect, it appears Justice Feldman would require at least that an insured see or have access to a master policy before it would be given any force.[101]

Justice Feldman's view of the group insurance contract may eventually prevail in Arizona. After *Sparks*, the court, speaking through Justice Feldman, decided two cases involving individual insurance policies which support the *Sparks* concurrence.[102]

In *Zuckerman v. Transamerica Insurance Co.*,[103] the court held that it would grant the insured's reasonable expectation that coverage would not be defeated by unbargained-for and ordinarily unknown provisions.[104]

Zuckerman concerned an individual fire policy that the insured possessed from the time of purchase of the insured property. The policy explicitly barred recovery for any loss for which an insured had not brought an action within one year of the time the claim arose. Zuckerman waited more than one year to file such an action, and Transamerica claimed that the policy's one-year limitation provision barred the action.[105]

The Arizona Supreme Court ruled that, although the policy's one-year limitation provision was valid, an insurer could be estopped from raising the limitation defense in certain situations. Specifically, the court would prohibit the defense where the following three elements were shown: 1) the provision was an unbargained-for adhesion clause, 2) the insurer would not be prejudiced by a delay in filing suit,[106] and 3) an unjust forfeiture would result if the defense were allowed. The court reasoned that the consumer should be granted his reasonable expectation that coverage would not be defeated by unbargained-for and unknown provisions. Rather, the "basic intent" of the parties would be respected.[107]

In a more recent case, *Darner Motor Sales Inc. v. Universal Underwriters Insurance Company*,[108] the court provided even stronger support for the Sparks concurrence. *Darner Motors* involved an individual liability policy issued to a car leasing agency. The insured claimed the insurance agent told him coverage for leased cars would be the same as the umbrella policy covering other aspects of the business. The agent denied making

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insurer cannot defeat coverage by raising unusual exclusions or termination rights not contained in the information given the insured. It cannot rely upon the provisions of the master policy never shown the insured—and from a practical standpoint not even available to him—in order to subtract from the coverage reasonably to be expected by the insured after reading the sales material and information which was given him.

Id. at 545, 647 P.2d at 1143.

101. *See id.* at 545, 647 P.2d at 1143.

102. *See* Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co. No. 16551-PR, slip op. (Ariz. Mar. 29, 1984) and Zuckerman v. Transamerica Ins. Co., 133 Ariz. 139, 650 P.2d 441 (1982).

103. 133 Ariz. 139, 650 P.2d 441 (1982).

104. *Id.*

105. *Id.* at 140-41, 650 P.2d 442-43.

106. *See infra* notes 118-19 and accompanying text.

107. Zuckerman v. Transamerica Ins. Co., 133 Ariz. at 145-47, 650 P.2d at 447-49.

108. No. 16551-P.R., slip op. (Ariz. Mar. 29, 1984).

such a representation, and, indeed, the policy contained drastically lower coverage for leased cars than the umbrella policy provided for other parts of the business. When a coverage question arose concerning a leased car, Universal refused to provide greater coverage than that stated in the leased car policy.[109]

In overruling the lower court's granting of a summary judgment for Universal, the court adopted the Restatement view of the reasonable expectations doctrine.[110] Though it never ruled an insured could recover based upon reasonable expectations alone, the court's decision allows an insured to show reasonable expectations in an effort to prove estoppel or other contract theories.[111]

Before the court ruled on the case, it first examined a large body of Arizona insurance law. During this examination, the court criticized the "mischief" often resulting when courts apply ordinary contract law to insurance policies.[112] According to the court, though the judiciary has struggled to find sensible results within the bounds of contract law, a more realistic and logical approach is found in the doctrine of reasonable expectations.[113] Indeed, the court stated that Arizona had previously recognized the doctrine of reasonable expectations.[114]

With the stated purpose of bringing needed logic and predictability into the insurance field, then, the court adopted the Restatement (Second) of Contracts § 211, calling it a codification of the reasonable expectations doctrine.[115] By granting an insured his reasonable expectations of the contract's meaning based upon all the facts and circumstances surrounding the forming of the contract, this Restatement rule allows for liberal admission of evidence from outside the four corners of the insurance contract. Consequently, it nullifies unbargained-for boiler-plate provisions unknown or beyond the reasonable expectations of the insured.[116] Thus, this rule con-

109. *Id.* at 3-6. The umbrella policy provided coverage of 100/300 while the leased car policy provided coverage of 15/30.

110. *Id.* at 15-16.

111. *Id.* at 23-25.

112. *Id.* at 8.

113. *Id.* at 10-12.

114. *Id.* The court merely said it "recognized the doctrine of 'reasonable expectations'" in *Sparks* and *Zuckerman*. It never stated, however, that *Sparks* or *Zuckerman* applied the doctrine.

115. *Id.* at 15. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 (1979) which provides:

> Standardized Agreements
>
> (1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.
>
> (2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.
>
> (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

116. Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co. No. 16551-P.R., slip op. at 16. (Ariz. Mar. 29, 1984). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 211 Comment (f) (1974) which provides

> f. *Terms excluded*. Subsection (3) applies to standardized agreements the general principles stated in §§ 20 and 201. Although customers typically adhere to standardized

centrates on the intent of the parties, "in so far as intent existed, and attempts to ascertain the real agreement so far as it was expressed or conveyed by implication."[117]

Thus, based upon an insured's reasonable expectations in view of all the circumstances surrounding the forming of the contract, a court can estop an insured from enforcing unbargained-for terms of a policy.[118] Furthermore, because the court considered all negotiations and resulting representations outside the policy as part of the contract, the court placed no premium on the failure of the insured to read the policy.[119] Indeed, the court questioned the possibility that industries using standardized contracts expect customers to read such contracts.[120] Thus, the court adopted a rule which, "in proper circumstances, will relieve the insured from certain clauses of an agreement which he did not negotiate, probably did not read, and probably would not have understood had he read them."[121]

Though *Zuckerman* and *Darner Motor Sales* both concern individual policies, their holdings could apply to group insurance cases where brochures or certificates provide broader coverage than master policies. Undoubtedly, master policy exclusions undisclosed in a brochure and unavailable to an insured are unbargained-for. Based upon *Zuckerman*, if no prejudice would result to the insurer by failing to enforce the exclusion, and if an unjust forfeiture would result by applying the unseen exclusion, the court would refuse to accept the insurer's defense based upon the exclusion.[122] Since the insured never saw the master policy, only the brochure would have bearing on the insured's rights.[123]

The *Darner Motor Sales* reasoning more directly leads to the conclusion that a court considering facts similar to *Sparks* would refrain from reading the master policy. Since the insured never saw the master policy, no expectations could be based upon that instrument. The only represen-

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agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation. A debtor who delivers a check to his creditor with the amount blank does not authorize the insertion of an infinite figure. Similarly, a party who adheres to the other party's standard terms does not assent to a term if the other party has reason to believe that the adhering party would not have accepted the agreement if he had known that the agreement contained the particular term. Such a belief or assumption may be shown by the prior negotiations or inferred from the circumstances. Reason to believe may be inferred from the fact that the term is bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction. The inference is reinforced if the adhering party never had an opportunity to read the term, or if it is illegible or otherwise hidden from view. This rule is closely related to the policy against unconscionable terms and the rule of interpretation against the draftsman. See §§ 206 and 208.

The Restatement rule applies to all standardized contracts, not only insurance contracts. This Note, however, does not consider the effect of Arizona's adoption of this rule upon other kinds of standardized contracts.

117. Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co. No. 16551-P.R., slip op. at 20 (Ariz. Mar. 29, 1984).

118. *Id.* at 23-25.

119. *Id.* at 21.

120. *Id.* at 21 n.9.

121. *Id.* at 21.

122. Zuckerman v. Transamerica Ins. Co., 133 Ariz. at 146, 650 P.2d at 448.

123. *See id.*

tations of coverage the insured could know about would be found in the sales brochure or certificate. A court following *Darner*, therefore, would refuse to consider master policy provisions the insured did not negotiate nor know about. Indeed, the court could easily classify the *Sparks* situation as one where the insurance industry does not expect its customers to read the master policies.[124]

Even if, as in some cases, the insured had access to the master policy but failed to read it, *Darner* would nonetheless permit a court to ignore the master policy. Unless the insured had actual notice of the excluding provisions in a master policy, a court following *Darner* would decide the insured's rights under the policy based entirely on the representations made in the brochure or certificate. The insured's failure to read the policy would be excusable because of the clear representations in the explanatory material.[125]

A Modest Proposal for a Less Ambiguous Rule

The examination of group insurance brochure and certificate cases in this Note reveals that modern courts consider it unfair to enforce master policy provisions an insured neither saw not could have known about. To reach a result fair to an insured, a court will often loosely apply one of several theories to grant relief to group members. This loose application of formal rules makes it difficult to predict which rules will apply and what a court may do in the future.

A better approach would be for the courts to adopt a rule requiring insurers to supply group members with explanatory literature fairly representing what is actually contained in the master policy. If a master policy contains any exclusions undisclosed in the explanatory literature, courts should simply refuse to enforce those exclusions. Moreover, unless an insurer can prove that the insured had actual notice of a master policy exclusion not disclosed in the explanatory literature, a court should not inquire into whether the insured detrimentally relied on explanatory literature.[126] The basis of the court's refusal to enforce should simply be the fact that the policy differed significantly from the explanatory literature.[127]

Though this rule seemingly favors insureds, it would also benefit insurers. Since the rule would force insurers to publish explanatory literature consistent with master policies, insureds would know more precisely what coverage is available, and insurers could avoid litigation caused by a failure to fully inform group members of coverage rights.

While such a rule could ultimately nullify the effect of the master policy, this may be a desirable result. In reaction to the demise of the master policy as it now exists, insurers could either distribute master policies for each group member or disseminate explanatory literature identical to the

124. *See supra* notes 110-122 and accompanying text.
125. *See id.*
126. Such a rule already exists in some jurisdictions. *See supra* notes 70-77 and accompanying text.
127. *See id.*

master policy. Thus, all information defining an insured's rights and duties would be before him at the time insurance coverage began. Such a result appears not only fair but practical.

STRATEGIES FOR LAWYERS REPRESENTING PARTIES IN GROUP INSURANCE CASES

Though a new rule may be desirable, at present no new rule exists. Thus, this Note will conclude with a discussion of basic strategy for Arizona lawyers representing parties in group insurance cases.

Representing Group Insurers

Lawyers representing group insurers must consider the implications of *Sparks*, *Zuckerman* and *Darner Motor Sales*. In addition, these lawyers should be aware of out-of-state cases recognizing in insureds a right to rely on certificates and brochures when a statute requires those documents.[128] At a minimum, then, such lawyers should advise their clients to write brochures and certificates that conform to the terms of the master policy. Thus, all exclusions that appear in the master policy must appear in the brochure or certificate.[129] Similarly, these exclusions must be explicit, not only as to the items included, but as to their presentation as exclusions.[130] By writing uniform and explicit exclusions, the insurer may avoid the problem of a court enforcing a brochure instead of a master policy. Since both will make the same representations regarding exclusions, it will make no difference whether a court reads the brochure or the master policy.

Representing Group Insureds

Because conflicts in group insurance cases arise when coverage is denied, suggestions for Arizona lawyers representing group insureds will be addressed to the litigation setting.[131]

In any situation where a group insurer denies coverage to a group member based on a master policy exclusion, the insured must argue that the certificate or brochure provides coverage. To persuade the court to consider the brochure or certificate as part of the contract, the insured must convince the court that the case falls within *Sparks*. Further, to persuade the court to consider the brochure or certificate alone as the contract,

128. *See supra* notes 55-69.

129. *See* Sparks v. Republic Nat'l Life Ins. Co. at 535, 647 P.2d at 1134. Since the brochure in *Sparks* failed to alert the insured of the policy exclusion, the court found that the insured could not have contemplated the exclusion. Had the brochure alerted the insured of the exclusion, the insured could have anticipated it and acted accordingly. *See id.*

130. *See id.* The *Sparks* court held that where a master policy exclusion is ambiguous, and the insured sees only a brochure, the brochure must be read in conjunction with the policy to construe the true meaning. If both the policy and the brochure are explicit, therefore, a court may refrain from reading the brochure. *See id.*

131. Undoubtedly, lawyers representing insurers will also be involved in the litigation setting. Their strategy in litigation, however, involves disproving the insured's claims rather than planning to avoid future litigation.

the insured must convince the court that *Zuckerman* and *Darner Motor Sales* apply to the case.

To bring the case within *Sparks*, the insured must show two factors. First, the insured must prove that he did not see the master policy prior to purchasing the insurance contract. Second, the insured must show that the master policy exclusion is ambiguous. Based upon *Sparks*, the court will then read the brochure or certificate in conjunction with the master policy exclusion and determine how both documents affect the ordinary person as to the meaning of the words in the policy.[132]

To avoid any consideration of an exclusion in the master policy, the insured should argue that *Zuckerman* also applies. If the insured shows the three elements required in *Zuckerman*, a court may disregard the master policy exclusion in question, basing coverage upon the "basic intent" of the parties to the insurance contract.[133] In this situation, the insured should argue that the explanatory literature alone reveals the basic intent of the parties.

Even if an insured cannot show the three *Zuckerman* requirements, he should argue that *Darner Motor Sales* applies to the case. If the insured never saw the master policy at the time the agreement was made, he should argue that nothing in the policy should apply to the case. The insured's understanding of the insurance agreement was based entirely upon the brochure or certificate. Thus, only those documents should be considered in deciding the insured's rights. Further, even if the policy were available to the insured and the insured failed to read it, he should argue that because the insurer provided him with explanatory material, there was no reason to read the policy.[134]

Finally, the insured could pursue a line of argument based upon statutes which require group insurance certificates. Cases construing such statutes have acknowledged in a group insured the right to rely upon the certificates.[135] As Arizona has such a statute, lawyers for insureds should argue that the same result obtains in Arizona.[136]

132. *See supra* notes 88-99.
133. *See supra* notes 105-112.
134. *See supra* notes 110-122 and accompanying text.
135. See *supra* notes 55-69.
136. *See* ARIZ. REV. STAT. ANN. § 20-1265 (1956).