

Summer 1984

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Recommended Citation

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NOTES

DOBOSZ v. STATE FARM FIRE & CASUALTY CO.: REPRESENTATIONS IN INSURANCE ADVERTISING BROCHURE AS PART OF THE INSURANCE CONTRACT*

When a descriptive brochure is furnished to an insured individual, that brochure becomes part of the contract of insurance if the insured relies on it in making the purchase, and if the brochure differs from the policy.¹ This holding was reached by the Illinois Appellate Court for the Second District in *Dobosz v. State Farm Fire & Casualty Company*² The case also decided that where the advertising brochure contained a pictorial representation of certain coverage, and where the sales agent orally reinforced such coverage, the insurer was estopped from denying that the policy only covered losses expressed in the policy.³

This article has three purposes: (1) to present the court's analysis in *Dobosz*; (2) to critically analyze the case in light of the precedent relied upon; and (3) to examine the impact of *Dobosz* on the use of brochures from the view of the insurer and the insured. What will become apparent from this article is that the *Dobosz* court validly expanded the appropriate method by which to construe an insurance agreement.

The plaintiffs in *Dobosz* were a husband and wife who purchased a home and obtained a homeowners insurance "All-Risk' Special Policy" from the State Farm Fire and Casualty

* 120 Ill. App. 3d 674, 458 N.E.2d 611 (1983).

1. *Id.* at 679, 458 N.E.2d at 614. The primary cases used by the *Dobosz* court in framing the issue were: *Laib v. Fraternal Reserve Life Ass'n*, 177 Ill. App. 72 (1913); *Weinberg v. Insurance Co. of N. Am.*, 88 Misc. 2d 82, 388 N.Y.S.2d 69 (1976); *Morris v. Travelers Ins. Co.*, 546 S.W.2d 477 (Mo. App. 1976); *Barth v. State Farm Fire & Cas. Co.*, 214 Pa. Super. 434, 257 A.2d 671 (1969).

2. 120 Ill. App. 3d 674, 458 N.E.2d 611 (1983).

3. *Id.* at 680, 458 N.E.2d at 615 (1983). The primary cases relied upon by the court in regarding the estoppel theory were: *Vogel v. American Warranty Home Serv. Corp.*, 695 F.2d 877 (5th Cir. 1983); *INA Life Ins. Co. v. Brundin*, 533 P.2d 236 (Alaska, 1975); *Lewis v. Continental Life & Acc. Co.*, 93 Idaho 348, 461 P.2d 243 (1969); *Craver v. Union Fidelity Life Ins. Co.*, 37 Ohio App. 2d 100, 307 N.E.2d 265 (1973).

Company (State Farm). According to the Doboszes, the purchase was made in reliance on a sales brochure.⁴ In July of 1981, the policy was renewed for another year. During April of 1982, water leaked through the walls of the plaintiffs' basement. Their sump pump had failed to work, thereby permitting water to collect in the basement. The leakage caused damage with a repair cost of \$1,409.66.⁵

The Doboszes then filed a claim under their homeowners insurance policy that State Farm refused to acknowledge. State Farm denied coverage on the ground that the policy excluded their type of water damage.⁶ The trial court entered judgment for State Farm finding that the policy excluded the type of damage claimed, despite the representation in the brochure.⁷ At trial, the evidence showed that Mr. Dobosz, an attorney, contacted Paul Bucholz, an agent of State Farm, in order to learn about obtaining homeowners insurance. Bucholz responded by sending Dobosz a brochure; further, the agent indicated that the brochure described the various types of coverage available.⁸

Bucholz recommended that Dobosz purchase the "All-Risk" policy, stating that it was the "Cadillac of the line." The agent told Dobosz that explaining the policy would take a long time, and that the brochure would show what the policy covered.⁹ After receiving the brochure and reading it, Dobosz told Bucholz to issue the "All Risk" policy. In selecting the policy, Dobosz testified that he relied on the brochure concerning the risks against which his home would be insured.¹⁰

The brochure contained a number of captioned photographs that applied to three different policies. Under the heading "All-Risk Special Policy," the brochure read that, "the 'All-Risk Special Policy' adds these coverages for your home not specifically

4. *Dobosz*, 120 Ill. App. 3d at 677, 458 N.E.2d at 612.

5. *Id.* at 676, 458 N.E.2d at 612.

6. *Id.*, 458 N.E.2d at 613. The policy was placed into evidence, and in relevant part provided a definition of water damage as follows:

Water Damage, meaning:

- a. flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;
- b. water which backs up through sewers or drains, or
- c. natural water below the surface of the ground, including water which exerts pressure on, or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure. * * *

Id. at 678, 458 N.E.2d at 614.

7. *Id.* at 676, 458 N.E.2d at 612. The proceeding was held without a jury in small claims court.

8. *Id.* at 677, 458 N.E.2d at 612.

9. *Id.*

10. *Id.*, 458 N.E.2d at 612-13.

excluded.”¹¹ Among the ten pictures under this heading was one captioned “Water Damage,” which depicted an open window through which rain was falling and collecting in a puddle below. At the bottom of the policy, in small black print, it stated: “This brochure contains only a general description of coverage and is not a statement of contract. All coverages are subject to the exclusions and conditions in the policy itself.”¹²

Dobosz did not read the policy until after the damage occurred, stating at trial that he had not received it until then. Bucholz testified that he had sent the policy to Dobosz. This issue was not resolved at trial.¹³ The trial court found that despite representations in the brochure, “water damage,” as defined by the policy, excluded the type of damage claimed.¹⁴

The appeal taken by Dobosz focused upon the question of whether an advertising brochure, containing a pictorial representation captioned “Water Damage,” distributed by an insurance company through its agent, is part of the insurance contract and controls over inconsistent language in the policy itself. The state court of appeals held that the brochure became part of the contract.¹⁵ In arriving at its decision, the appellate court referred to general principles of contract and insurance law.

The appellate court first noted that in construing an insurance contract, the court should give effect to the intent of the parties, which is determined from the unambiguous language of the policy.¹⁶ Although the court found that the policy in question clearly excluded water damage, it was aware that interpretation of an insurance policy requires consideration of the contract as a

11. *Id.*, 458 N.E.2d at 613.

12. *Id.*

13. *Id.*

14. *Id.* at 676, 458 N.E.2d at 612.

15. *Id.* at 679, 458 N.E.2d at 614.

16. *Id.* at 678, 458 N.E.2d at 613. The court relied on *Seeburg Corp. v. United Founders Life Ins. Co.*, 82 Ill. App. 3d 1034, 1039, 403 N.E.2d 503, 506 (1980) (clause in question using the phrase “in use” was clear and unambiguous). See also RESTATEMENT (SECOND) OF CONTRACTS § 202 (1979), which provides in part:

§ 202. Rules in Aid of Interpretation

- (1) Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.
- (2) A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.
- (3) Unless a different intention is manifested,
 - (a) where language has a generally prevailing meaning, it is interpreted in accordance with that meaning;
 - (b) technical terms and words of art are given their technical meaning when used in a transaction within their technical field.

whole.¹⁷ The court then referred to cases that have considered the contract as a whole and have held that a descriptive brochure given to an insured becomes part of the insurance contract.¹⁸ The principal considerations in those cases were the insured's reliance on the brochure in purchasing the insurance and the differing representations of the brochure and policy.¹⁹

17. 120 Ill. App. 3d 674, 678, 458 N.E.2d 611, 613 (1983). The court relied on *State Farm Mut. Auto. Ins. Co. v. Schmitt*, 94 Ill. App. 3d 1062, 1064, 419 N.E.2d 601, 602 (1981) (construing the policy as a whole, a "sister-in-law" was not considered a part of the insured's family). See also RESTATEMENT (SECOND) OF CONTRACTS § 202 (1979), *supra* note 16.

18. 120 Ill. App. 3d 674, 678, 458 N.E.2d 611, 613 (1983). The court considered: *Laib v. Fraternal Reserve Life Ass'n*, 177 Ill. App. 72 (1913) (discussed *infra* text accompanying notes 47-50); *Weinberg v. Insurance Co. of N. Am.*, 88 Misc. 2d 82, 388 N.Y.S.2d 69 (1976) (discussed *infra* text accompanying notes 51-52); *Morris v. Travelers Ins. Co.*, 546 S.W.2d 477 (Mo. App. 1976) (discussed *infra* text accompanying notes 55-59); *Barth v. State Farm Fire & Cas. Co.*, 214 Pa. Super. 434, 257 A.2d 671 (1969) (discussed *infra* text accompanying notes 60-64).

While the *Dobosz* court relied on the above cases concerning *individual* insureds, the same principles apply in group purchases. The court cited *Hofeld v. Nationwide Life Ins. Co.*, 59 Ill. 2d 522, 322 N.E.2d 454 (1975) and *Winston v. Trustees of the Hotel & Rest. Employees & Bartenders Int'l Union Welfare Fund*, 110 Ill. App. 3d 163, 441 N.E.2d 1217 (1982).

In *Hofeld*, as in most cases concerning the purchase of group insurance, the insured individual only received the certificate issued to him. If, as in the *Hofeld* case, the provisions in the certificate contradict the policy terms, the certificate will control. 59 Ill. 2d 522, 527, 322 N.E.2d 454, 457 (1975). In *Hofeld*, the certificate did not conflict with the master policy, and the insured was charged with knowledge of the terms. *Id.*

In *Winston*, the plaintiff was a union member who was covered by group insurance bought by the union. 110 Ill. App. 3d 163, 164, 441 N.E.2d 1217, 1218 (1982). After the plaintiff became totally disabled, he sought additional coverage pursuant to a policy booklet given to employees by the union. *Id.* The insurance company denied the requested coverage. *Id.* The court held that the booklet's terms were unambiguous, and the denial of coverage was arbitrary and capricious. *Id.* at 166, 441 N.E.2d at 1220. The court did not expressly state that the booklet was part of the contract, but it could be implied through the result. The court held, alternatively, that the defendant who issued the pamphlet was estopped from denying its contents, thereby making the pamphlet a part of the insurance agreement. *Id.* at 167, 441 N.E.2d at 1220.

For a discussion of this area of group insurance, see Annot., 36 A.L.R.3d 541 (1971).

19. 120 Ill. App. 3d 674, 678, 458 N.E.2d 611, 614 (1983). Other cases which recognized the importance of reliance were: *Providential Life Ins. Co. v. Clem*, 240 Ark. 922, 403 S.W.2d 68 (1966) (beneficiaries who purchased insurance based on a pamphlet had a right to rely on the pamphlet); *Aker v. Sabatier*, 200 So.2d 94 (La. App. 1967) (brochure regarding professional liability policy was relied on and thus insurer was estopped from denying its provisions); *Craver v. Union Fidelity Life Ins. Co.*, 37 Ohio App. 2d 100, 307 N.E.2d 265 (1973) (insured who relies exclusively on advertising solicitation in newspaper has a contract of insurance based on the provisions in the solicitation); *Beck v. Southern Oregon Health Serv. Inc.*, 255 Or. 590, 469 P.2d 622 (1970) (representation in insurer's brochure relating to prepaid

The court then confronted Illinois case law which suggested that brochures or other materials which describe coverage cannot vary express terms of the policy.²⁰ The court distinguished this case law on the ground that either the material in the brochures did not differ substantially from the policy itself²¹ or

hospital/doctor policy were part of the insurance agreement, if relied upon).

With regard to the question of reliance on brochures, pamphlets and other soliciting materials, see 13A APPLEMAN, INSURANCE LAW & PRACTICE § 7534 (1976).

20. 120 Ill. App. 3d 674, 679, 458 N.E.2d 611, 614 (1983). Although the court managed to distinguish contrary precedent, *see infra* notes 21 and 22, it pointed to Illinois cases which it believed supported treating a descriptive brochure as part of the insurance agreement. *Dobosz*, 120 Ill. App. 3d at 679, 458 N.E.2d at 614. They were *Winston v. Trustees of the Hotel & Rest. Employees & Bartenders Int'l Union Welfare Fund*, 110 Ill. App. 3d 163, 441 N.E.2d 1217 (1982) and *Van Vector v. Blue Cross Ass'n*, 50 Ill. App. 3d 709, 365 N.E.2d 638 (1977).

In *Winston*, the plaintiff sought additional coverage pursuant to a descriptive booklet. The defendant denied the extension. The court found that the language in the booklet clearly and unequivocally expressed an extension provision. 110 Ill. App. 3d 163, 166-67, 441 N.E.2d 1217, 1219-20 (1982). The court stated that the defendant's denial was arbitrary and capricious. *Id.* at 167, 441 N.E.2d at 1220. In making this determination, the booklet was essentially treated as part of the insurance agreement. *Id.* at 167, 441 N.E.2d at 1220.

The *Winston* case also found for the plaintiff on the theory that the defendant should be estopped from denying the representations in the booklet. *Id.* at 167-68, 441 N.E.2d at 1220-21. The estoppel theory does not expressly hold that the booklet becomes part of the insurance agreement but, in essence and in result, there is no difference.

In *Van Vector*, the brochure and the contract contained similar provisions. The only question before the court was what meaning should be given to the terms since there were ambiguities. 50 Ill. App. 3d 709, 711, 365 N.E.2d 638, 640 (1977). In holding for the insured, the court referred to the rule that ambiguities will be construed against the drafter, especially where the language seeks to limit liability. *Id.* at 715, 365 N.E.2d at 643.

Although *Van Vector* did not involve a situation in which the brochure and the policy differed, as in *Dobosz*, the court analyzed the case as if the brochure was part of the agreement in order to resolve an ambiguity. *Id.* at 711, 365 N.E.2d at 640. The defendant in *Van Vector* argued that a construction of certain language in the master policy excluded the plaintiff's coverage. *Id.* at 714, 365 N.E.2d at 642. The court stated, however, that such a construction of the terms would make their omission from the brochure inexcusable. *Id.* at 716, 365 N.E.2d at 644. The court stated that "significant policy exclusions contained in a master contract but omitted from the brochure distributed to policyholders should not be enforced." *Id.* (citing *Decker v. General Am. Ins. Co.*, 55 Hawaii 624, 525 P.2d 1114 (1974)). The language of *Van Vector* strongly suggested that the brochure become part of the insurance agreement. The brochure and the policy, though similar, were the court's reference points in construing the agreement, and the court refused to place a construction on the brochure that would have created unenforceable policy exclusions. *Id.* at 716, 365 N.E.2d at 644.

21. 120 Ill. App. 3d 674, 679, 458 N.E.2d 611, 614 (1983). Here, the *Dobosz* court pointed to *Kleinman v. Commercial Ins. Co.*, 19 Ill. App. 3d 1004, 313 N.E.2d 290 (1974) (discussed *infra* text accompanying notes 69-72). The *Dobosz* court took the view that if the certificate and the policy do not differ,

even if outside material did differ from the policy, it was not prepared by the insurer.²²

Turning to the facts, the court determined that the Doboszes' reliance on the brochure in procuring the insurance policy, and the brochure's contradiction of the policy itself, warranted a finding that the brochure be treated as part of the insurance contract.²³ From this essential determination, the court proceeded to build its analysis logically and in accord with established contract and insurance law.

The court next addressed the ambiguity created in the terms of the whole contract, now that the brochure was a part thereof.²⁴ Relying on general contract law, the court determined that where an ambiguity is created by the insurer, the terms are construed against the insurer and in favor of the insured.²⁵ The court noted that this principle is particularly applicable where the insurer seeks to limit its own liability.²⁶ This rule of construction is premised on the rationale that because the power to

then the court is constrained to abide by the terms therein. 120 Ill. App. 3d 674, 458 N.E.2d 611, 614 (1983). But if there are representations in brochures or other solicitation materials that differ substantially from the policy, *Kleinman* is distinguishable. *Id.*

22. 120 Ill. App. 3d 674, 458 N.E.2d 611, 614 (1983). The court referred to *Gross v. University of Chicago*, 14 Ill. App. 3d 326, 302 N.E.2d 444 (1973) (discussed *infra* text accompanying notes 39-42 and 73-76). The *Gross* decision did not pose a precedential threat to the holding announced in *Dobosz*. The analysis is very different when, as in *Dobosz*, the insurer places materials into the hands of the insured which contain provisions differing from the written policy. There, the insurer assumes responsibility for its solicitation. Contrary to the arrangement in *Gross*, the insurer in *Dobosz* was at no one else's mercy but its own.

23. 120 Ill. App. 3d 674, 679, 458 N.E.2d 611, 614 (1983). *See also* *Weinberg v. Insurance Co. of N. Am.*, 88 Misc. 2d 82, 388 N.Y.S.2d 69 (1976) (brochure relied on by insured held part of the insurance agreement); *Barth v. State Farm Fire & Cas. Co.*, 214 Pa. Super. 434, 257 A.2d 671 (1969) (if the defendant reasonably relied on a brochure in procuring insurance, it will become part of the insurance contract).

24. 120 Ill. App. 3d 674, 679, 458 N.E.2d 611, 614 (1983). The court noted that although it should not create an ambiguity where none exists (citing *State Farm Fire & Cas. Co. v. Moore*, 103 Ill. App. 3d 250, 430 N.E.2d 641 (1981)), the policy and the brochure in this case clearly differed in substance. 120 Ill. App. 3d 674, 679, 458 N.E.2d 611, 614 (1983).

The court also determined that the ambiguity existed even though the brochure contained a statement that the brochure was subject to the policy. *Id.* citing *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 647 P.2d 1127, *cert. denied*, 103 S. Ct. 490 (1982) (if insurer wishes to limit liability under a policy, it should use language that clearly and distinctly communicates to insured the nature of limitations); *Barth v. State Farm Fire & Cas. Co.*, 214 Pa. Super. 434, 257 A.2d 671 (1969) (crucial question of fact in determining reasonable reliance was whether insurer informed insured of coverage limitations).

25. 120 Ill. App. 3d 674, 679, 458 N.E.2d 611, 614 (1983). *See also* *State Farm Fire & Cas. Co. v. Moore*, 103 Ill. App. 2d 250, 430 N.E.2d 641 (1981).

26. 120 Ill. App. 3d 674, 679-80, 458 N.E.2d 611, 614 (1983).

draft terms in a brochure is within the domain of the issuer/drafter, any resulting ambiguity should be resolved in favor of the insured.²⁷ The court then held that the policy, with the brochure, provided coverage for the Doboszes' loss.²⁸

In addition to resolving the case on contract principles, the court relied on an estoppel theory. Under estoppel analysis, the insurer is estopped from relying on exclusionary clauses in the policy when misleading descriptive brochures or other solicitation materials relating to coverage are distributed by the insurer.²⁹ When the representations of sales agents or brochures induce the purchase of a policy, the company should be bound by reasonable expectations of coverage that were created.³⁰

In determining what constitutes "reasonable expectations," the language of the policy is to be construed in light of the natural response that would be expected in any prospective holder.³¹ The court determined that even though Mr. Dobosz was an attorney, he should be entitled to the same protection afforded the ordinary lay person; that is, protection according to his or her

27. *Id.*

28. *Id.* at 680, 458 N.E.2d at 614-15.

In our view, and in recognition of the complications of insurance policy provisions, it is not too much to ask of the insurer who markets policies by the use of attractive and illustrative brochures to give fairly equal prominence to exclusions and coverages. Given these principles, we construe this policy with the brochure as providing coverage for the claimed damage.

Id.

29. *Vogel v. American Warranty Home Serv. Corp.*, 695 F.2d 877 (5th Cir. 1983) (discussed *infra* text accompanying notes 80-81); *Lewis v. Continental Life & Accident Co.*, 93 Idaho 348, 461 P.2d 243 (1969) (discussed *infra* text accompanying notes 82-85).

30. *INA Life Ins. Co. v. Brundin*, 533 P.2d 236 (Alaska 1975); *Craver v. Union Fidelity Life Ins. Co.*, 37 Ohio App. 2d 100, 370 N.E.2d 265 (1973). The *INA* case candidly discussed insurance agreement formation. The court recognized that a person forms his decision on factors other than the written policy. Salesmen who explain the terminology of the policy play a significant role. Advertising flyers and brochures often serve as the inducement for a purchase. The court took a realistic view that these representations generate the purchase expectations with regard to coverage. *INA*, 533 P.2d at 242. The court relied on the rule of interpretation, that a policy holder's reasonable expectations as to coverage control, and bind the insurer. *Id.*

31. 120 Ill. App. 3d 674, 679, 458 N.E.2d 611, 615 (1983). *Weinberg v. Insurance Co. of N. Am.*, 88 Misc. 2d 82, 388 N.Y.S.2d 69 (1976) (discussed *infra* text accompanying notes 87-91); *Craver v. Union Fidelity Life Ins. Co.*, 37 Ohio App. 2d 100, 307 N.E.2d 265 (1973). In *Craver*, 37 Ohio App. 2d 100, 307 N.E.2d 265 (1973), the court stated that the language of the advertising solicitation should be interpreted according to the understanding of the audience to which it was directed. *Id.* at 106, 307 N.E.2d at 269. The court also stated that even though certain caveats would have alerted a sophisticated or suspicious reader, this would not erase the effect which the solicitation had on the average reader. *Id.*

own reasonable understanding.³²

Applying the facts to the rules espoused above, the court found that the terms of the State Farm brochure, coupled with the representations of the agent, Buchold, created Dobosz' reasonable expectation that the damage suffered was within the terms of the insurance contract.³³ As a result, the defendant was estopped from denying that the policy covered the damage suffered.³⁴ State Farm argued, however, that a provision in the brochure conditioned all representations in the brochure to the terms of the policy. State Farm also sought to avoid liability on the ground that the plaintiffs failed to read the policy.³⁵

The exclusionary clause in the brochure provided that the policy "adds these coverages for your home plus others not specifically excluded."³⁶ The court noted that language in a descriptive brochure can limit liability only where the exclusions are clearly referred to.³⁷ In the court's view, the general statement

32. *Dobosz v. State Farm Fire & Cas. Co.*, 120 Ill. App. 3d 674, 680, 458 N.E.2d 611, 615 (1983). See also *Puritan Life Ins. Co. v. Guess*, 598 P.2d 900 (Alaska 1979) (fact that plaintiff was a lawyer does not effect his reasonable expectations with regard to coverage). Cf. *Weinberg v. Insurance Co. of N. Am.* 88 Misc. 2d 82, 388 N.Y.S.2d 69 (1976).

33. *Dobosz v. State Farm Fire & Cas. Co.*, 120 Ill. App. 3d 674, 680, 458 N.E.2d 611, 615 (1983). One fact which the court considered was that the plaintiff bought a policy called the "All-Risk Special Policy." It was described as including specified coverage under the protections of the *basic* and *broad* type policies, "plus many others not specifically excluded." In addition, the brochure made general reference to "Water Damage" under the "All Risk" policy. Even though the sales agent and the plaintiff never specifically discussed water damage, the agent stated that the policy covered everything, and that the brochure showed exactly what the policy covered. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 681, 458 N.E.2d at 615-16. See *Standard of Am. Life Ins. Co. v. Humphreys*, 257 Ark. 618, 519 S.W.2d 64 (1975); *Kleinman v. Commercial Ins. Co.*, 19 Ill. App. 3d 1004, 313 N.E.2d 290 (1974); *Morris v. Travelers Ins. Co.*, 546 S.W.2d 477 (Mo. App. 1976).

In *Standard*, the plaintiff was insured under a group plan and was in possession of a certificate of insurance. The certificate stated that the schedule of benefits was "subject to the provisions and limitations of the master policy." The certificate did not contain, as did the master policy, a statement that the insurance covered only non-occupational hazards (plaintiff was killed on the job). However, the certificate clearly referred to the limitations in the master policy. As the court found, "the certificate issued to the employee recites that the certificate is subject to the terms and limitations of the master policy; recites that the certificate is mere evidence of insurance provided by the master policy; and refers to the master policy's provision for nonoccupational coverage." *Standard of Am. Life Ins. Co. v. Humphreys*, 257 Ark. 618, 621, 519 S.W.2d 64, 67 (1975) (emphasis added). Thus the court held that the master policy controlled. *Id.*

In *Kleinman*, the certificate of insurance under a group plan provided that the member "is insured under and subject to all conditions and limita-

alluding to the policy was inadequate.³⁸

The court considered *Gross v. University of Chicago*,³⁹ which suggested that a brochure's general reference to the policy can be sufficient to give the insured notice that the policy is the controlling document.⁴⁰ The court noted that in *Gross* there was no estoppel theory advanced, and the brochure was *not prepared* by the insurer.⁴¹ The court also determined that any construction of *Gross* to the effect that an inconsistent policy provision would dominate representations in a brochure drafted by the insurer and relied upon by the insured, would not be permitted.⁴²

Finally, the court noted that an insured is generally charged with notice of the terms of an insurance policy.⁴³ This is true even when the policy is made available to the insured, but is

tions of said Group Disability Policy." Most importantly, the certificate recited that coverage would terminate at the member's 73rd birthday (the issue in the case). Since the exclusions were clear and specific, the court was constrained to rule against the insured. *Kleinman v. Commercial Ins. Co.*, 19 Ill. App. 3d 1004, 1007, 313 N.E.2d 290, 292 (1974).

In *Morris*, the plaintiff was insured under a group plan and had a certificate of insurance. There was a dispute as to the effective date of coverage. The certificate and the brochure clearly and explicitly provided the terms as to when coverage would begin. As the court stated, "[t]he intent to place conditions upon the existence of coverage is manifest." *Morris v. Travelers Ins. Co.*, 546 S.W.2d 477, 487 (Mo. App. 1977).

The above cases held that a brochure which clearly called attention to coverage limitations in the policy subjected the insured to the policy. The implication is that absent a clear expression of coverage limitations, the disclaimer would be ineffective.

38. *Dobosz v. State Farm Fire & Cas. Co.*, 120 Ill. App. 3d 674, 682, 458 N.E.2d 611, 616 (1983). *Accord Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 535, 647 P.2d 1127, 1133 (an insurer who wishes to limit liability should employ language which *clearly and distinctly* communicates the limitations to the insured), *cert. denied*, 103 S. Ct. 490 (1982); *Barth v. State Farm Fire & Cas. Co.*, 214 Pa. Super. 434, 444, 257 A.2d 671, 676 (1969) (factual question as to whether the insured knew of a *specific* coverage exclusion was critical in determining if brochure was to be part of agreement).

39. 14 Ill. App. 3d 326, 302 N.E.2d 444 (1973).

40. *Dobosz*, 120 Ill. App. 3d at 682, 458 N.E.2d at 616.

41. *Gross*, 14 Ill. App. 3d at 337-38, 302 N.E.2d at 453.

42. *Dobosz*, 120 Ill. App. 3d at 682, 458 N.E.2d at 616. The court also referred to cases where there was a dominant theme of coverage through solicitations, and an inconspicuous and general caveat that coverage was subject to the policy was held inadequate to overcome the impression made by the solicitations. *Id.* See *Craver v. Union Fidelity Life Ins. Co.*, 37 Ohio App. 2d 100, 106, 307 N.E.2d 265, 269 (1973) (dominant theme and overall effect of advertising solicitations could not be biased by one or more caveats); *Barth v. State Farm Fire & Cas. Co.*, 214 Pa. Super. 434, 442, 257 A.2d 671, 675 (1969) (brochure which stated in fine print that the representations were subject to the policy held insufficient to overcome the clear representations in the brochures).

43. *Dobosz v. State Farm Fire & Cas. Co.*, 120 Ill. App. 3d 674, 682, 458 N.E.2d 611, 616 (1983).

never read.⁴⁴ Under the facts of the case, there was an unresolved issue at trial as to whether Dobosz received a copy of the policy. However, the court stated that there was enough communication between Dobosz and State Farm to charge Dobosz with notice that the policy should have been received by him.⁴⁵ Nevertheless, the court stated that the negligence on Dobosz' part was not a barrier to a determination that State Farm be estopped from denying coverage under the facts. This was especially so in light of the contrary representations in the brochure and the resulting ambiguities. The appellate court then reversed the trial court and entered judgment for the plaintiffs for the amount sued.⁴⁶

The *Dobosz* decision rests on two separate legal theories. The first theory was acceptance of the descriptive brochure as part of the insurance agreement. The second theory was estoppel.

BROCHURE AS PART OF THE AGREEMENT

In deciding that a brochure can become part of an insurance contract, the *Dobosz* court relied on *Laib v. Fraternal Reserve Life Association*.⁴⁷ In *Laib*, a 1913 Illinois case, the beneficiary of the policy wanted to put a *pamphlet* into evidence which was relied upon and which supported her claim. The trial court de-

44. *Id.* See *Florsheim v. Travelers Indem. Co. of Illinois*, 75 Ill. App. 3d 298, 307, 393 N.E.2d 1223, 1231 (1979).

45. *Dobosz*, 120 Ill. App. 3d at 682, 458 N.E.2d at 616.

46. *Id.* For the proposition that negligent failure to read the policy does not preclude the estoppel theory, the court relied on *Barth v. State Farm Fire & Cas. Co.*, 214 Pa. Super. 434, 257 A.2d 671 (1969). In *Barth*, a factual issue remained as to whether the insured had been informed of certain exclusions. If he had, the court stated, the plaintiff's reliance on the brochure would not have been reasonable. *Id.* at 439, 257 A.2d at 676. Implied in *Barth* was that the plaintiff could still rely on the brochure even though he was charged with knowledge of the policy limitations. The brochure could be part of the agreement since any statements of coverage limitations were not sufficient to charge the plaintiff with actual knowledge. The factual issue of whether the plaintiff had specific knowledge of policy exclusions was remanded for trial. *Id.*

The *Dobosz* court also referred to *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 647 P.2d 1127, *cert. denied*, 103 S. Ct. 490 (1982) for the proposition that plaintiff's negligence would not preclude a finding that the brochure became part of the agreement. *Dobosz*, 120 Ill. App. 3d at 682, 458 N.E.2d at 616. In *Sparks*, the insured only read the brochures issued by the insurer before purchasing. 132 Ariz. at 529, 647 P.2d at 1127. The court stated that the brochures should be considered because of the effect they have on the ordinary person as to the meaning of the policy. *Id.* at 538, 647 P.2d at 1134. Again, through implication, the *Dobosz* court extracted *Spark's* reasoning that even though the plaintiff never read the policy, the terms of the brochure would be considered.

47. 177 Ill. App. 72 (1913).

nied its admissibility. The appellate court, relying on a Kentucky case,⁴⁸ stated that the pamphlet was part of the contract so long as the contract was entered into "upon the faith of the representations therein."⁴⁹ The court, however, focused on the question of whether the certificate issued to the insured was issued under proper authority. Unlike the *Dobosz* court, the *Laib* court did not engage in construction of the terms of the pamphlet and policy.⁵⁰ *Laib* alone could not justify the proposition that the terms of a brochure could determine the obligations of the parties, although its implications were seized by the *Dobosz* court.

The other cases which persuaded the *Dobosz* court were from other jurisdictions. The facts in *Weinberg v. Insurance Company of North America*,⁵¹ a New York case, were most analogous to those in *Dobosz*. *Weinberg* involved an attorney who purchased a personal catastrophe insurance policy after reading a brochure describing the policy as providing "umbrella" coverage. The brochure and the policy each made statements that created an ambiguity as to whether the insurer would defend the insured in a slander action. Applying a rule of construction to the ambiguity, the court construed the brochure and the policy in order to provide coverage.⁵²

In *Dobosz*, the insured was an attorney who relied on a brochure describing an "All-Risk" policy in making the purchase. The brochure and the policy differed, creating an ambiguity which was resolved in favor of the insured.⁵³ The *Dobosz* court tracked the legal framework of *Weinberg*, which insisted upon *reliance* on the brochure. After allowing the brochure to be read with the policy, any resulting *ambiguity* was construed against the drafter.⁵⁴

Unlike *Laib*, the *Weinberg* decision was exactly that type of case which the *Dobosz* court could rely upon in determining that the brochure became part of the insurance agreement; in *Weinberg*, the brochure was issued under proper authority. The *Dobosz* court looked not only to New York case law, but also to Missouri and Pennsylvania case law.

48. *Southern Mut. Life Ins. Co. v. Montague*, 84 Ky. 653, 2 S.W. 443 (1887).

49. *Laib v. Fraternal Reserve Life Ass'n*, 177 Ill. App. 72, 75 (1913).

50. *Id.*

51. 88 Misc. 2d 82, 388 N.Y.S.2d 69 (1976).

52. *Id.*

53. *Dobosz v. State Farm Fire & Cas. Co.*, 120 Ill. App. 3d 674, 678-80, 458 N.E.2d 611, 612-13 (1983).

54. *Id.* at 679, 458 N.E.2d at 614. *See also* *Weinberg v. Insurance Co. of N. Am.*, 88 Misc. 2d 82, 84, 388 N.Y.S.2d 69, 70 (1976).

In *Morris v. Travelers Insurance Company*,⁵⁵ the insured was covered under a group plan of insurance, and was issued a certificate of insurance.⁵⁶ There was also a brochure which described coverage.⁵⁷ The Missouri Court of Appeals determined that the brochure and certificate constituted part of the insurance agreement.⁵⁸ Under the facts, however, no ambiguity was created and, as a result, the insured was not covered.⁵⁹ The importance of *Morris* lies in its acceptance of the certificate and the policy as part of the insurance agreement.

Similarly, in *Barth v. State Farm Fire & Casualty Company*,⁶⁰ a grocery store owner sought coverage for his business. In reaching an agreement with a sales agent, the insured relied on a six-page descriptive "All-Risk" brochure.⁶¹ The policy stated that coverage was only for business hours; the brochure did not. The insured did not read the policy.⁶² The Pennsylvania Superior Court determined that if the insured reasonably relied on the brochure, its contents would be considered terms of the agreement.⁶³ The reliance question was left unresolved and the case was remanded.⁶⁴

Weinberg, Morris and *Barth* established what the *Dobosz* court considered the key factors in determining whether an insurance agreement should be construed in accordance with representations in a brochure: reliance on the brochure, and terms in the brochure which differ from the policy itself.⁶⁵ These cases take a pragmatic approach to the relationship between the insurer and the insured. They recognize that insurance policies are often written in incomprehensible language, and agents' representations and written solicitations are the primary sources of information upon which the insured makes his decision.⁶⁶ The well-reasoned approach taken by these courts does justice to insurance purchasers.

55. 546 S.W.2d 477 (Mo. App. 1976).

56. *Id.* at 480.

57. *Id.* at 479.

58. *Id.* at 486.

59. *Id.* at 486-87.

60. 214 Pa. Super. 434, 257 A.2d 671 (1969).

61. *Id.* at 436, 257 A.2d at 672.

62. *Id.* at 438, 257 A.2d at 673.

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

64. *Id.*

65. *Weinberg v. Insurance Co. of N. Am.*, 88 Misc. 2d 82, 84, 388 N.Y.S.2d 69, 70 (1976); *Morris v. Travelers Ins. Co.*, 546 S.W.2d 477, 486 (1976); *Barth v. State Farm Fire & Cas. Co.*, 214 Pa. Super. 434, 444, 257 A.2d 671, 676 (1969).

66. *E.g.*, *Barth v. State Farm Fire & Cas. Co.*, 214 Pa. Super. 434, 441, 257 A.2d 671, 674 (1969).

The most significant impediments to the *Dobosz* court in determining that the brochure was part of the insurance agreement were two Illinois cases: *Kleinman v. Commercial Insurance Company*⁶⁷ and *Gross v. University of Chicago*.⁶⁸ In *Kleinman*,⁶⁹ the plaintiff, an attorney, received a certificate of insurance pursuant to a group plan. The *certificate* and the *policy* both provided that coverage terminated at age 73. However, the application for insurance was silent on this matter. The plaintiff alleged that the application was a rider to the contract; but the court decided that it was not part of the contract, but simply an application.⁷⁰ The *Dobosz* court rightfully distinguished *Kleinman* on the grounds that the documents considered in *Kleinman*, the certificate and the policy, were materially the same.⁷¹ Because the terms did not differ, the *Kleinman* court did not have to reach the issue of which document, the policy or the certificate, was controlling. The *Kleinman* case was also distinguishable in that, in *Dobosz*, there was no *application* at issue, but a brochure used to induce a purchase.⁷² Nothing in *Kleinman* suggested that a brochure could *not* become part of an agreement.

The *Dobosz* court also distinguished *Gross v. University of Chicago*.⁷³ In *Gross*, the insured was covered under a group policy. During the course of coverage, the insured's representative made statements to the insured which conflicted with the terms of the policy. The *Gross* court held that the insurer was not bound by the acts of the insured's representative. To hold otherwise would leave the insurer at the mercy of independent agents who could vary the terms of a binding written agreement.⁷⁴

The facts in *Gross* differ strikingly from those in *Dobosz*. In *Gross*, the court refused to hold the insurer to representations it did not make in the marketplace. In *Dobosz*, the insurer was responsible for placing the brochure in the hands of the insured. Having done so, the insurer in *Dobosz* had to bear the consequences of any ambiguity created.⁷⁵ The *Dobosz* court did not have to strain in distinguishing the clearly different situation in *Gross*.⁷⁶

67. 19 Ill. App. 3d 1004, 313 N.E.2d 290 (1974).

68. 14 Ill. App. 3d 326, 302 N.E.2d 444 (1973).

69. 19 Ill. App. 3d 1004, 313 N.E.2d 290 (1974).

70. *Id.* at 1006, 313 N.E.2d at 292 (1974).

71. *Dobosz*, 120 Ill. App. 3d at 679, 458 N.E.2d at 614.

72. *Id.* at 679, 458 N.E.2d at 614.

73. 14 Ill. App. 3d 326, 302 N.E.2d 444 (1973).

74. *Id.* at 335, 302 N.E.2d at 453.

75. *Dobosz*, 120 Ill. App. 3d at 680, 458 N.E.2d at 614.

76. *Id.*

After the *Dobosz* court determined that the brochure was part of the insurance agreement, it was only a matter of construction to determine the terms of the policy. Because State Farm had drafted the brochure, the ambiguity it created as to water damage was construed in favor of coverage. This rule of construction is the most equitable where the policy is complicated and the provision is an attempt to limit coverage.⁷⁷ As Justice Taft stated over 100 years ago:

Policies are drawn by the legal advisers of the company, who study with care the decisions of the courts, and, with those in mind, attempt to limit as narrowly as possible the scope of the insurance. It is only a fair rule, therefore, which courts have adopted, to resolve any doubt or ambiguity in favor of the insured and against the insurer.⁷⁸

ESTOPPEL

Holding State Farm liable for water damage coverage was also based on estoppel theory. By distributing the brochure to *Dobosz*, the insurer was estopped from denying the exclusionary clause in the policy because the brochure was relied on by the insured.⁷⁹

The estoppel theory in the insurance context was recently held applicable in *Vogel v. American Warranty Home Service Corporation*⁸⁰ In that federal case applying Mississippi law, the court held that the insurer was estopped from denying that an insurance policy incorporated certain provisions in a brochure after the insured relied on them.⁸¹ The reasoning was the same in *Lewis v. Continental Life and Accident Company*,⁸² an Idaho case. In *Lewis*, a nonworking employee was covered under a group plan issued to the employer. The insurer was succeeded by another insurer who made assurances that all employees covered under the prior policy would be covered under the new policy.⁸³ After the employee died, the beneficiary sought recovery under the policy and the insurer refused, stating that the new policy covered only working employees.⁸⁴ The *Lewis* court held that the successor insurer was estopped from denying that

77. *Id.*

78. *Lewis v. Continental Life and Acc. Co.*, 93 Idaho 348, 350, 461 P.2d 243, 245 (1969) (quoting *Manufacturers Acc. Indem. Co. v. Dorgan*, 58 F. 945, 956 (6th Cir. 1893)).

79. *Dobosz v. State Farm Fire & Cas. Co.*, 120 Ill. App. 3d 674, 680, 458 N.E.2d 611, 615 (1983).

80. 695 F.2d 877 (5th Cir. 1983).

81. *Id.* at 880-81.

82. 93 Idaho 348, 461 P.2d 243 (1969).

83. *Id.* at 349, 461 P.2d at 244.

84. *Id.* at 350, 461 P.2d at 245.

coverage existed for only working employees.⁸⁵

The estoppel theory is a viable means to bind an insurer to its representations in brochures when they are relied upon by the insured. This estoppel argument is all the more applicable in the insurance context because of the complexity of insurance policies. Insurance policies, even when read, can only be understood by a limited group of people. Brochures, however, provide a comprehensible summary of what the particular policy contains. If an insurer supplies a summary of its policy in a brochure in order to induce a purchase, the insurer should suffer the consequences of its representations.

An integral part of the estoppel argument is the insured's reasonable reliance. Courts consider reliance in terms of the insured's reasonable expectations. Language used in an insurer's representations is construed in a manner consistent with the natural response which the words would evoke in an insured.⁸⁶

The *Dobosz* court considered *Weinberg v. Insurance Company of North America*⁸⁷ in determining whether *Dobosz's* reliance was reasonable.⁸⁸ In *Weinberg*, as in *Dobosz*, the plaintiff was an attorney. In both cases, the insureds received brochures which, in effect, stated that coverage extended to "All-Risks" or gave "umbrella" protection. Neither brochure discussed specific exclusions from coverage in the policy. The dominant theme of the brochures was in favor of coverage.⁸⁹ As the court in *Weinberg* stated, "The natural response to the brochure of a prospective policy holder, lawyer or non-lawyer, would be to expect that the policy would embody the coverage described in the brochure."⁹⁰ Recognizing the similarities between *Weinberg* and *Dobosz*, the *Dobosz* court did not hesitate in concluding that plaintiff's reliance on the brochure was reasonable.⁹¹

Related to the issue of reasonableness was the fact that the *Dobosz* brochure contained a statement in small print at the bottom of a page stating that coverage was subject to the terms of the policy.⁹² The court disregarded this warning because it

85. *Id.* at 352, 461 P.2d at 247.

86. *See infra* text accompanying notes 87-91.

87. 88 Misc. 2d 82, 388 N.Y.S.2d 69 (1976).

88. *Dobosz v. State Farm Fire & Cas. Co.*, 120 Ill. App. 3d 674, 680, 458 N.E.2d 611, 615 (1983).

89. *Id.* at 680-81, 458 N.E.2d at 615; *Weinberg v. Insurance Co. of N. Am.*, 88 Misc. 2d 82, 84, 388 N.Y.S.2d 69, 70 (1976).

90. 88 Misc. 2d 82, 84, 388 N.Y.S.2d 69, 70 (1976).

91. *Dobosz v. State Farm Fire & Cas. Co.*, 120 Ill. App. 3d 674, 681, 458 N.E.2d 611, 615 (1983).

92. *Id.*

was not specific.⁹³ The cases which have held that the warning was sufficient to put the plaintiff on notice involved brochures which specifically and clearly made reference to the limitation on which the plaintiff sought to rely.⁹⁴ In situations where there were only general references to policy exclusions, the warning was held to be inadequate.⁹⁵

This analysis is consistent with the realities of complex insurance policies. Because the policy is so complex and unreadable, it is useless to refer the insured to the policy in a general manner; once there, the insured is no better off than without the reference. Because a brochure often serves as the inducement for agreement, and is often the only document the insured will ever read, the insurer must make clear in the brochure what is excluded. The logic of the law is born out by the reality of the negotiations.

It was at this time that the court again distinguished *Gross v. University of Chicago*.⁹⁶ The *Dobosz* court was concerned that *Gross* could be interpreted to mean that general reference in the brochure to policy exclusions would be adequate.⁹⁷ The *Dobosz* court correctly noted, however, that there was no estoppel theory advanced in *Gross* and thus the question was never squarely resolved.⁹⁸ Coupling that factor with the fact that the misleading representations in *Gross* were not made by the insurer, the *Dobosz* court was satisfied that general exclusions are not adequate warnings.⁹⁹

The last issue which the court addressed within its estoppel analysis was whether *Dobosz*' failure to read the policy, his negligence, precluded application of the estoppel theory.¹⁰⁰ The court did not take issue with the principle that an insured is charged with knowledge of the policy, whether it was read or not.¹⁰¹ The court, however, was of the opinion that because of the ambiguities between the brochure and the policy, the princi-

93. *Id.*

94. *Standard of Am. Life Ins. Co. v. Humphreys*, 257 Ark. 618, 621, 519 S.W.2d 64, 67 (1975); *Kleinman v. Commercial Ins. Co.*, 19 Ill. App. 3d 1004, 1007, 313 N.E.2d 290, 292 (1974); *Morris v. Travelers Ins. Co.*, 546 S.W.2d 477, 487 (Mo. App. 1976).

95. *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 647 P.2d 1127, 1133, *cert. denied*, 103 S. Ct. 490 (1982); *Barth v. State Farm Fire & Cas. Co.*, 214 Pa. Super. 434, 442-43, 257 A.2d 671, 675 (1969).

96. 14 Ill. App. 3d 326, 302 N.E.2d 444 (1973).

97. *Dobosz v. State Farm Fire & Cas. Co.*, 120 Ill. App. 3d 674, 681, 458 N.E.2d 611, 616 (1983).

98. *Id.* at 681, 458 N.E.2d at 616.

99. *Id.* at 681-82, 458 N.E.2d at 616.

100. *Id.* at 682, 458 N.E.2d at 616.

101. *Id.* (citing *Florsheim v. Travelers Indem. Co.*, 75 Ill. App. 3d 298, 307, 393 N.E.2d 1223, 1231 (1979)).

ple would not impede the application of the estoppel theory.¹⁰² In a sense, the ambiguity dominated the negligence.

The court was correct in finding that the insured's negligence would not preclude the estoppel theory. As previously mentioned, most insurance policies are basically unreadable to the layman. An ambiguity emerges when the insured, who is charged with knowledge of the policy, relies on a brochure that substantially differs from the policy. The ambiguity can not be "washed away" merely because the insured is charged with notice of the policy when, in fact, the insured has actual notice of the brochure. Because the insurer created the ambiguity, it will be estopped from denying that the policy covers the damage in question.¹⁰³

IMPACT OF DOBOSZ

The *Dobosz* decision is of major importance to insurers, insureds and lawyers. The principles of the case will affect the use of brochures in sales, as well as in settlement or litigation. There is also reason to believe that the *Dobosz* principles can be extended to other business transactions.

Use of Brochures

The descriptive brochure is an important sales tool in the highly competitive insurance industry. Because insurance policies can be extremely complex, brochures are used to explain coverage. If insurance companies were to stop using brochures, sales agents would need to expend much more time explaining coverage through the policy itself. Further, future insureds wishing to examine the coverage at their leisure with, for example, their spouses or business associates, could only refer to the complex policy. The decision to purchase a particular insurance policy would be more difficult and less informed. The amount of insurance purchases would decrease. Furthermore, because the selection of an insurance company can depend on the strength of its established reputation, and because brochures can make the company more visible, discontinued use of brochures could mean financial disaster. Considered in this competitive light, the brochure is an indispensable document at the sales level and is here to stay.

When a claimant seeks the help of an attorney, the document predominantly considered is the policy. The lawyer's ex-

102. *Dobosz v. State Farm Fire & Cas. Co.*, 120 Ill. App. 3d 674, 682, 458 N.E.2d 611, 616 (1983).

103. *Id.*

perience with the common law tells him that the policy embodies the terms of the agreement and that the brochure is not to be considered. In fact, in consulting *American Jurisprudence on Trials* for suggestions on how to properly depose an insurer, seek discovery of documents, draft a bill of particulars or determine the scope of coverage, the policy is the focus of attention.¹⁰⁴ Nowhere is it suggested that the lawyer ask the insurer if brochures were ever issued, or for that matter, to ask the insured if brochures were received. Nor are there any suggestions to make the brochure the subject of discovery, a bill of particulars, or a *subpoena duces tecum*. These factors permit the inference that if a brochure was issued to an insured, the attorney could neglect it as a source for settlement or litigation. After the *Dobosz* decision, this should be very unlikely in Illinois.

Since the *Dobosz* court has held that, under certain circumstances, the brochure becomes part of the agreement,¹⁰⁵ the brochure should be one of the attorney's prime considerations. No longer should the attorney have tunnel vision with respect to the policy, but he should view coverage through a wider angle, considering the brochure on an equal level with the policy. The attorney should do the most possible to discover the existence of a brochure, and it should be considered throughout settlement or litigation on par with the policy. By doing so, the attorney can make positive use of either theory announced by the *Dobosz* court. But the insurance industry is going to react to the case, probably through the single opening the court left them.

Content of Brochures

Because the descriptive brochure is here to stay and because attorneys will make use of them in settlement and litigation, insurance companies will likely change the language in their brochures. Specifically, disclaimers or references to the policy as the sole document expressing the terms of the agreement will change. Because the *Dobosz* court affirmed the notion that a general reference to the policy exclusion is inadequate,¹⁰⁶ the clause must specifically list the exemptions in order to avoid the representation of the brochure. If the brochure lists exclusions, however, it will be similar to the policy and will completely defeat its intended purpose. If insurance companies try to comport with the opening in *Dobosz* by specifically listing ex-

104. 12 AM. JUR. TRIALS, *Actions on Life Insurance Policies* 553 *et seq.* (1964); 9 AM. JUR. TRIALS, *Health and Accident Insurance* 185-88 (1964); 4 AM. JUR. TRIALS, *Selling the Case—Plaintiff* 353-54 (1964).

105. *Dobosz*, 120 Ill. App. 3d at 680, 458 N.E.2d at 614.

106. *Id.* at 681, 458 N.E.2d at 615.

clusions, they could lose sales. There is always the alternative of having the brochure clearly and accurately portray coverage as stated in the policy. But due to the competitiveness of the insurance industry, the content of the descriptive brochure will probably not change for fear of defeating the brochure's persuasive powers. This conflict can only be overcome by brochures that are honest and accurate with respect to exclusion.

Dobosz and Other Sales Transactions

The *Dobosz* case announced that if a seller makes a descriptive representation which is relied on by the buyer, the representation will control over an inconsistent term embodied in a written contract.¹⁰⁷ This will be true unless the descriptive document specifically and clearly lists all the material variations from the written contract.¹⁰⁸ There is no reason why this principle should not apply to other business transactions. For example, if a condominium is advertised in a newspaper with the following language, "facilities including: sauna, parking (monthly charge) . . ." what would be the consequences if the buyer moves in and finds out that a use of the sauna costs \$5 per visit? The advertisement specifically indicates that parking is for a fee, but no sauna fee is mentioned. If the buyer can prove reliance on the ad, this ad should become part of the agreement or the seller should be estopped from denying that sauna use was free. This is the *Dobosz* analysis. There is no reason to treat analysis under an insurance context different from sales or rentals of real estate where descriptive advertisements are utilized. In fact, whenever descriptive brochures or advertisements are used to sell goods or services, whether it be real estate, securities, commodities, furniture, automobiles, vacation packages, or insurance, the *Dobosz* reasoning should be applicable. In settings other than insurance, misleading references should not be controlling when the advertisement serves to induce, and does induce, a subsequent purchase. Business advertisers should be required to specifically list all material facts, exclusions or charges when they use descriptive solicitations in the same manner that insurance companies must. This practice will greatly enhance the honesty and integrity of commercial transactions.

107. *Id.*

108. *Id.*

CONCLUSION

*Dobosz v. State Farm Fire & Casualty Company*¹⁰⁹ held that a descriptive brochure furnished by an insurer will become part of an insurance agreement if relied upon by the insured and that the insurer will be estopped from denying that the policy excludes coverage represented in the brochure. The decision creates a principle in Illinois which conforms with the reasonable expectations of insurance buyers. The decision is not a fatal attack on contract law but, rather, a well-reasoned opinion which does justice to our adaptive and responsive legal system. *Dobosz* will prove useful, not only in the insurance setting in which it arose, but in all commercial transactions where descriptive solicitations are involved.

Michael Lowe

109. 120 Ill. App. 3d 674, 458 N.E.2d 611 (1983).