II. Background Facts

Plaintiff Newberg is an Illinois corporation with its headquarters in Chicago. It is engaged in the heavy construction business throughout the United States and has offices in Miami, Florida and Los Angeles, California.

Defendant Crump is a Tennessee corporation with its principal place of business in Memphis, Tennessee. Crump is engaged in the insurance brokerage business and has subsidiary or affiliate offices in a number of cities throughout the United States. Crump, however, does not have an office in Miami, Florida. A subsidiary corporation of Crump operates an insurance brokerage business in Naples, Florida. That is the only office in [4] the State of Florida affiliated with the Crump organization.

A. Newberg's and Crump's Business Relationships and Practices

The business relationship between Newberg and Crump goes back to at least 1975 when Newberg began obtaining bid bonds and performance bonds through the brokerage services of Crump. A bid bond is a bond that must be deposited with the owner at the time of making a bid to insure that if the bidder is the low bidder it will not withdraw its bid without penalty. A performance bond is a similar instrument to insure performance of the contract.

During the period January 1, 1975 through April 17, 1980, Newberg bid on 57 different construction projects throughout the United States and Crump procured for Newberg all of the bid bonds required for these construction projects on which Newberg submitted bids. Crump likewise procured performance bonds on every Newberg project requiring a performance bond. Crump received a commission for its bond work for Newberg.

Although Crump was the exclusive broker for Newberg on bid and performance bond procurement, the relationship between Newberg and Crump was not exclusive as to Newberg's insurance requirements. During 1975 through [5] 1980 Newberg purchased all of its general casualty insurance from McManus & Pellouchoud, Inc. of Chicago, Illinois. Crump attempted unsuccessfully in both 1976 and again in 1978 to solicit this insurance business of Newberg's which included comprehensive insurance liability and workmen's compensation insurance. Newberg, however, continued to rely on McManus & Pellouchoud to procure insurance coverage for these needs. In 1977, Crump, through its representatives suggested that Newberg investigate the possibility of forming a captive insurance company and in connection with making that proposal Crump made an extensive investigation of how such an insurance company could be of benefit to Newberg. Newberg rejected the idea and continued to rely on McManus & Pellouchoud for its general insurance needs.

Newberg followed the practice of obtaining builders' risk insurance on a project-by-project basis. Generally, the insurance requirements for each particular job were spelled out in the job's contract specifications which were prepared by the owner or the owner's representative. In the construction industry, a contractor is free to obtain additional insurance coverage greater than the coverage [6] provided in the owner's specifications.

Newberg's business practice, when it decided to bid on a proposed project, was generally to request two or three insurance brokers to submit bids to Newberg for the builders' risk insurance required for the project. When Newberg received these bids and the bids from other construction sub-contractors for work on a project which Newberg was sub-contracting, it would assemble the cost information necessary to prepare and submit its bid to be general contractor for a project.

It was Crump's business practice as an insurance broker always to recommend and attempt to procure "all risk" builders' risk coverage when builders' risk insurance was required on a project even if the owner's specification requirements for insurance were less. "All risk" builders' risk policies, however, usually contain some exclusions.

Of the 57 construction projects on which Newberg bid from January 1975 through April 17, 1980, Crump was given the opportunity to bid the builder's risk insurance on all of them along with one or two other insurance brokers. Newberg was the successful low bidder on 16 of the 57 construction projects. Of those 16, Crump was asked to procure [7] builders' risk insurance for Newberg on 7 of them. Crump procured builders' risk insurance on those 7 projects and consequently received an insurance broker's commission upon the procurement of the insurance on those 7 projects. On the remaining 9 construction projects, Newberg purchased its builders' risk insurance through a broker other than Crump. Crump received no compensation for its work bidding the insurance on these 9 projects. Crump was not paid any sums by Newberg for its insurance brokerage services other than a standard brokerage commission.

B. The Transaction Resulting in this Litigation.

The Newberg construction project which gives rise to this litigation is the "Final Clarifiers for South District Waste Water Treatment Plant" owned by the Miami-Dade Water and Sewer Authority in Miami, Dade County, Florida.

Crump's involvement with that project commenced on November 8, 1979, when T. M. Dakin of Newberg sent a memorandum to Crump requesting a bid bond for the final clarifier project. That memorandum also stated "also please quote on the Builders' Risk for the job." (PX 2). Attached to that memorandum were five pages of contract specifications which dealt with insurance [8] requirements for the Miami-Dade clarifier job. The specifications provided in part:

The Contractor shall procure and shall maintain during the life of the contract, Builders' Risk Insurance, with 100% co-insurance clause, adequate to cover all damages by fire, lightening, the hazards included in extended coverage, vandalism and malicious mischief.

The term "extended coverage" is generally understood to include certain perils such as windstorm and hail, not generally included in a standard fire insurance policy. The term extended coverage does not include the peril of sub-surface water. The specifications sent to Crump by Newberg did not mention sub-surface water or the need for de-watering on the project.

A few days after Crump received the November 8, 1979 memorandum from Newberg, Clyde Beaumont, Vice President of National Accounts for Crump and Jack Dibie, the Vice President of Newberg had a telephone conversation, the substance of which was that: Beaumont inquired as to the location of the project and was told by Dibie that it would be in Miami, Dade County, Florida at Southwest 232d Street and 97th Avenue S.W. Beaumont was told that the ocean was approximately two [9] miles away and no flood coverage was desired. Dibie stated that the value of the machinery and equipment to be used on the job would be between $2 million and $3 million.

After that phone conversation, Crump contacted the Hartford Insurance Company which offered to provide the insurance at a rate of $.179 per $100 of value insured. Crump also received a quotation from the American International Group of Insurance Companies which offered to provide the coverage for $.08 per $100 of value for an "All Risk" policy. Crump communicated only the American Insurance Group quote to Newberg.

When Newberg was a successful low bidder on the Miami-Dade clarifier project, it ordered its builders' risk insurance from Crump. Other than the procurement of builders' risk insurance and

the bid and performance bond service, Crump was asked to provide no other service for Newberg on the Miami-Dade project.

The builders' risk policy for the Miami-Dade job was issued by the National Union Fire Insurance Company of Pittsburg, Pennsylvania, one of the American International Group of Insurance Companies. The original policy was sent by Crump to Newberg's Miami office along with an invoice for the policy [10] premium on or shortly after April 21, 1980. The premium was thereafter paid. The original policy was maintained by Roberta Johnson, Assistant Corporate Secretary of Newberg at the Newberg office located in North Miami, Florida. A copy of the policy was given to the owner of the project, the Miami-Dade Water and Sewer Authority.

At no time prior to the loss did Newberg or the Miami-Dade Sewer and Water Authority communicate to Crump any dissatisfaction with the form of the insurance policy or indicate to Crump any desire for insurance to cover perils in addition to those covered by the builders' risk policy procured by Crump for Newberg. There was no proof that Newberg read the policy.

The insurance policy procured by Crump for Newberg on the project met or exceeded all of the insurance requirements of the contract between Newberg and the Miami-Dade Water and Sewer Authority. The contract specifications required insurance against the perils of fire, lightening, extended coverage and vandalism and malicious mischief, whereas the policy form issued by National Union Fire Insurance Company was an "All Risk" policy which insured against "all risks of direct physical loss or damage to [11] the property insured from any external cause, subject to the exclusions, limitations, terms and conditions of this policy." One of the perils excluded from the coverage provided by the National Union All Risk policy was as follows:

(o) Loss or damage directly or indirectly caused by or resulting from water below surface of ground, tidal water, tidal wave or tsunami, all whether or not driven by wind.

On August 1, 1981, Newberg had completed the first three tanks and the first layer of the concrete base for Clarifier Tank No. 4. A decision was made by Newberg personnel to switch off the de-watering pumps which had been used to keep ground water out of the construction site. August 1, 1981 was a Saturday.

The following Monday, August 3, 1981 Newberg personnel returned to the project site to discover that ground water pressure had caused a crack in the concrete base of one of the tanks, and the tank had filled with water.

Newberg made claim against National Union Fire Insurance Company for the cost of repairing the crack. National Union denied the claim for the reason that Exclusion (o) of its policy excluded loss or damage caused by sub-surface water. National Union [12] brought suit against Newberg for declaratory judgment in the United States District Court for the Southern District of Florida, National Union Fire v. Gust K. Newberg Construction Co., No. 83-5258 (S.D. Fla.). National Union obtained a summary judgment in its favor in that suit. That judgment was appealed to the Eleventh Circuit Court of Appeals and affirmed, National Union Fire v. Newberg Const., 719 F.2d 405 (11th Cir. 1983). The parties in this litigation agree that the damage was the result of sub-surface water and the risk of sub-surface water was excluded from the policy procured by Crump for Newberg on the project.

There are numerous insurance companies which write Builders' Risk Insurance. Many companies use their own policy forms. Some companies provide insurance against the risk of sub-surface water in their standard "all risk" policies and some do not.

III. Discussion of Law

The key question posed by this case is whether Newberg could reasonably expect Crump to do more than it did in procuring the builders' risk insurance for Newberg on the Miami-Dade project.

A. Choice of Law

As an initial matter, the Court must determine what substantive law governs [13] the issues in this lawsuit. Since HN1 the Court's jurisdiction is founded on diversity, it is required to apply the choice of law rules of the state in which the Court sits. Klaxon v. Stentor Electric Manufacturing Co., 313 U.S. 487, 61 S. Ct. 1020 (1941). HN2 With respect to tort law claims, Illinois courts have adopted the "most significant contacts" test. Ingersoll v. Klein, 46 Ill. 2d 42, 262 N.E.2d 593 (1970). Four factors must be considered under this test: (a) the place of injury; (b) the place where the conduct causing the injury occurred; (c) the domicil or place of business of the parties; and (d) the place where the relationship between the parties is centered. See R & L Grain Co. v. Chicago Eastern Corp, 531 F. Supp. 201, 204-05 (N.D. Ill. 1981). The place of injury, however, is given presumptive importance only to be supplanted when another state has a more significant interest in the outcome of the lawsuit. See DP Service, Inc. v. AM International, 508 F. Supp. 162, 165 (N.D. Ill. 1981).

Plaintiff's position is that the law of Florida is the appropriate law to apply. (Tr. 4). Defendant concurs that there is no genuine conflict between the laws of the various [14] relevant states and that as to the question of "the standard of care that must be exercised by a broker would be substantively the same in Tennessee [where defendant is headquartered] or in Illinois [where plaintiff is headquartered], or, indeed throughout the country." (Tr. 6). Consequently, the Court will look to the law of Florida as the law to be applied regarding issues where the law is in conflict. Both parties have, however, cited authorities from various states in the legal memoranda they have submitted to the Court in this case including the briefs filed post-trial.

B. The Law Regarding the Duty Owed

1. Florida Appellate Decisions

A review of Florida law provided by counsel reveals that the Supreme Court of Florida has not spoken on the subject of the duty an insurance broker owes to an insurance consumer in procuring insurance. Lower appellate courts of Florida which have recently addressed the topic do appear to follow the majority view across the country that HN3 a broker who agrees to provide insurance can be held liable under certain circumstances for the negligent failure to provide coverage and can be held liable under certain circumstances for the failure [15] to accurately advise an insurance consumer of the coverage available. See e.g., Seascape of Hickory Point Condominium Association, Inc., Phase III v. Associated Insurance Services, Inc., 443 So.2d 488 (2d Dist. Fla. 1984); Woodham v. Moore, 428 So.2d 280 (4th Dist. Fla. 1983).

In Seascape of Hickory Point Condominium Association, Inc., Phase III v. Associated Insurance Services, Inc., 443 So.2d 488 (2d Dist. Fla. 1984), the plaintiff alleged that for four years it had purchased all of its insurance through defendant insurance broker and that defendant held itself out as providing "professional insurance planning." Plaintiff alleged that it had relied on

defendant to provide it insurance planning advice. Plaintiff alleged that on three occasions during those four years it had sought to purchase insurance from defendant's agents to cover the plaintiff's seawall from storm damage. On each occasion defendant's agents advised plaintiff that seawall insurance was not available and could not be acquired.

Two weeks after plaintiff's last inquiry, its seawall was destroyed by a storm. Plaintiff alleged in its complaint that contrary to defendant's advice, seawall insurance [16] was available and that its availability was widely known among insurance professionals. Plaintiff sought damages from defendant insurance broker for negligently breaching its duty to provide competent insurance planning services by repeatedly advising plaintiff that seawall insurance was not available. The trial court dismissed plaintiff's complaint and the Florida appellate court reversed the dismissal holding that, even though defendant could not be held liable for negligent failure to procure insurance (since defendant never agreed to acquire seawall insurance for plaintiff), defendant did owe a duty to provide accurate insurance advice to plaintiff. The appellate court held that the duty existed even though plaintiff did not pay for the advice.

The Seascape appellate court discussed two often cited opinions, among others, from outside Florida which address an insurance broker's duty: Hardt v. Brink, 192 F. Supp. 879 (M.D. Wash. 1961); and Nowell v. Dawn-Leavitt Agency, Inc., 127 Ari. 48, 617 P.2d 1164 (Ct. App. 1980). These cases and others from outside of Florida that have been cited by the parties will be discussed Part B, infra.

The Seascape court went [17] on to liken the relationship between the defendant insurance broker and plaintiff Seascape to the relationship which exists when an injured person seeks advice from a lawyer regarding a cause of action for damages. The Seascape court discussed the Minnesota Supreme Court decision in Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980), in which a lawyer was held liable for negligence in giving erroneous legal advice to plaintiff regarding the statute of limitations even though no fee was charged to plaintiff for the advice. The Togstad court held that even in the absence of a fee, an attorney-client relationship existed nonetheless and plaintiff had relied upon the lawyer's negligent advice.

The Seascape court in reversing the trial court's dismissal stated that the plaintiff's complaint:

sufficiently alleges a relationship between the parties from which it could be said that the appellees [defendants] owed a duty to appellant [plaintiff] to exercise reasonable care in rendering advice on insurance matters. The appellees held themselves out as professional insurance planners. They had served appellant's insurance needs for several years. [18] The appellant came to them for specific advice. A statement that no seawall insurance is available is manifestly different from one which says that appellees cannot obtain seawall insurance. If appellees reasonably should have known their advice to be incorrect and appellant relied upon such advice to its detriment, appellant has a valid claim for damages.

443 So. 2d at 491.

The Seascape court also discussed Woodham v. Moore, 428 So.2d 280 (4th Dist. Fla), in which the Florida appellate court reversed and remanded to the trial court an appeal from the trial court's decision granting summary judgment exonerating the defendant insurance agent from liability for breach of a duty to procure "adequate" insurance. The alleged breach of duty was the agent's failure to advise certain policyholders of the agent as to the availability and desirability of obtaining higher limits of automobile liability insurance.

In Woodham, plaintiffs were defendants' insurance clients who had previously had higher limits but were forced to obtain assigned risk coverage at lower limits because of their record of accidents. Later, plaintiffs became eligible for coverage with higher limits [19] outside the

assigned risk plan, but were not advised of the opportunity to obtain higher limits by defendant insurance agent. The agent acknowledged that he had a policy of periodically reviewing his clients' files presumably to apprise clients when higher limits became available so that the clients could then obtain those higher limits if they desired.

Three other, less recent, Florida appellate decisions bear mentioning Monogram Products, Inc. v. Berkowitz, 392 So.2d 1353 (2d Dist. Fla. 1980); Burns v. Consolidated American Insurance Company, 359 So.2d 1203 (3rd Dist. 1978); Neida's Boutique, Inc. v. Gabor & Co., 348 So.2d 1196 (3rd Dist. Fla. 1977).

In Monogram Products, plaintiff sued an insurance agent and four insurance companies for breach of an oral contract which resulted in inadequate fire insurance being provided to cover a loss at plaintiff's warehouse. The trial court awarded summary judgment to all four defendants holding the Statute of Frauds barred enforcement of the oral contract concerning insurance and that the insurance agent owed no duty to the insured to provide coverage above the limits of the policies actually issued. The Florida appellate [20] court reversed.

Plaintiff in Monogram Products manufactured imported and distributed novelty and souvenir merchandise. In early 1977, it leased a second warehouse to store such items. Realizing that the value of its inventory in the second warehouse could fluctuate so much as $200,000 in a month, plaintiff Monogram asked its defendant insurance agent to procure "adequate insurance for the inventory" and allegedly told defendant agent that $100,000 insurance coverage would not be adequate for the second warehouse due to the fluctuating inventory. Plaintiff requested that the insurance coverage be flexible. According to plaintiff's president the defendant agent suggested that since the initial inventory of the second warehouse would only be $50,000 to $60,000 during the first year the limit on the coverage should be set at $100,000 and that plaintiff should submit monthly inventory reports and proper premiums could be calculated at year's end. The agent said that when monthly reports indicated an inventory exceeding $100,000, the policies obtained would cover the excess value so long as the inventory value in both of Monogram's warehouses did not exceed $700,000 total.

The policies [21] actually obtained by the agent, however, limited coverage to $100,000 at the second warehouse regardless of the value of inventory at both warehouses.

A fire subsequently destroyed the second warehouse and $180,000 worth of inventory. At the time the total inventory at both of plaintiff's warehouses was worth less than $700,000. The four defendant insurance companies honored plaintiff's claim only to the extent of $100,000. Plaintiff sued to recover the deficit claiming the defendant's agent's failure to maintain adequate insurance for plaintiff and for breach of the alleged oral contract to provide the insurance agreed to.

Initially, the Court in Monogram Products noted that HN4 Florida recognizes an insurance agent's liability for failure to procure coverage as agreed citing First National Insurance Agency v. Leesburg Transfer and Storage, Inc., 139 So.2d 476 (2d Dist. Fla. 1962). The Court also stated that HN5 Florida recognizes both oral contracts to procure insurance and oral contracts of insurance. The Monogram Products court went on to say that HN6 the Statute of Frauds did not apply if the alleged oral contract was intended to be performed within one year. It was alleged [22] that the oral contract between plaintiff and defendant insurance agent to procure insurance was to be performed immediately so the Statute of Frauds did not apply and summary judgment for defendants based on the Statute of Frauds was not proper.

Plaintiff alleged it had relied upon the defendant agent to obtain proper coverage. The Monogram court noted that there were facts indicating a history of plaintiff relying on defendant

agent to handle. plaintiff's insurance needs and on that basis reversed the trial court's summary judgment determination.

Defendants had additionally argued against liability because the policies defendants provided to plaintiff stated the $100,000 limitation. Plaintiff conceded it had not read the policies because it had relied on defendant insurance agent's representation. The Monogram court held plaintiff's failure to read the policies did not bar plaintiff's claim citing Blumberg v. American Fire & Casualty, 51 So.2d 182 (Fla. 1951).

In Burns v. Consolidated American Insurance Company, 359 So.2d 1203 (3rd Dist. Fla. 1978), without even addressing the fact that the insurance policy which was delivered to the plaintiff-insured unequivocally [23] excluded the peril of theft during construction from a homeowner's policy issued to plaintiff on a home being constructed (of which plaintiff should have been aware, had he read the policy), the court reversed the trial court's granting summary judgment in favor of defendants, an insurance company and an insurance agent.

Plaintiff in Burns was building a second home. While the construction proceeded, he asked his agent to obtain a home owner's policy insuring against "all perils" for the home under construction. Defendant agent obtained a policy for plaintiff which was identical to plaintiff's home owner's policy on his first home which insurance policy defendant agent had previously sold to plaintiff. Both policies excluded from coverage theft "in or to a dwelling which is under construction . . .." 359 So.2d at 1205. Defendant insurance company asked the agent to specifically notify plaintiff of that exclusion. Defendant agent failed to make that notification until after plaintiff had first incurred a theft loss at the home under construction.

After the first theft loss, defendant agent told plaintiff of the exclusion and a second loss occurred at the home while still under [24] construction. Plaintiff sued to recover for both theft losses. The court affirmed summary judgment for defendant on the second loss stating:

Burns is not entitled to any recovery on this loss when he admittedly knew the policy he owned did not cover the risk encountered. HN7 An agent who agrees to obtain insurance, and, through his own fault, or neglect, fails to do no [sic], may be liable in damages, but if, after diligent effort, the agent is unable to procure the requested coverage, his only duty is to inform the party of his inability within a reasonable time. Cat ' N Fiddle, Inc. v. Century Insurance Company, 200 So.2d 208 (Fla.3d DCA 1967), vacated on other grounds, 213 So.2d 503 (Fla.3d DCA 1968). HN8 Failure of an insured to take appropriate action when he becomes aware that the coverage he thought he had was not obtained by the agent constitutes both a waiver of his right to performance under an alleged oral contract and an estoppel against his right to assert the claim under the alleged oral agreement. First National Insurance Agency, Inc. v. Leeseburg Transfer & Storage, Inc., 139 So.2d 476 (Fl.2d DCA 1962).

As to the summary judgment in favor of defendants [25] on the first loss, the Florida appellate court reversed because there existed a disputed material fact as what coverage was actually requested by plaintiff. The court stated:

The record reveals that the insurer requested that Willits notify Burns of the theft exclusion before any loss occurred. This fact raised two unresolved questions of fact: Whether the company's notice to Willits was in fact conveyed to Burns. See generally, Cat 'N Fiddle, Inc. v. Century Insurance Company, 213 So.2d 701 (Fla. 1968); Whether the company itself was aware of the coverage allegedly requested by Burns. HN9 While estoppel cannot be invoked to create coverage clearly excluded by a written contract of insurance, the concept may be utilized against an insurer when its conduct has been such as to induce action in reliance on it. Mutual of Omaha Insurance Company v. Eakins, 337 So.2d 418 (Fla.2d DCA 1976).

359 So.2d at 1207.

In Neida's Boutique, Inc. v. Gabor & Co., 348 SO.2d 1196 (3d Dist. Fla. 1977), plaintiff sought damages against defendant insurance agent for the agent's alleged negligent failure to procure both a renewal of a prior fire insurance policy and alleged [26] negligent failure to procure an increase in coverage on that policy. The primary substantive ground upon which the trial court dismissed plaintiff's complaint and the Florida appellate court affirmed that dismissal was plaintiff's failure to allege an agreement by defendant to procure the requested insurance for plaintiff. On this point the Florida appellate court stated:

The amended complaint did not state a cause of action against either appellee in that, among other things, the complaint did not allege an agreement between the parties to secure a policy of insurance nor did said complaint specify the terms and conditions of the allegedly requested additional insurance. Hettenbaugh v. Keyes-Ozon-Fincher Insurance, Inc., 147 So.2d 328 (Fla.3d DCA 1962). The allegations show only a request by appellant for additional insurance which falls short of a contract to obtain or supply such insurance. Leonard Taylor Jewelers, Inc. v. Hartnett, Inc., 222 So.2d 243 (Fla.3d DCA 1969).

Although some of the circumstances in the two recent Florida appellate decisions discussed above are similar to certain facts present in this case, neither is precisely on point. [27] Both Seascape and Woodham dealt with defendants' failure to provide accurate information regarding available insurance which the defendants knew or clearly should have known plaintiffs desired. The perils to be insured against in both Seascape and Woodham, respectively, seawall storm damage and automobile collisions, were clearly identified and made known to the defendants by plaintiffs. The defendants' liability arose from their failure to provide information as to the insurance available to cover those identified perils. Here the issue is should Crump have known of the peril which was not clearly identified when requested to provide insurance protection for other perils that were identified by Newberg.

In the less recent Florida appellate decision of Monogram Products, the peril sought to be insured against--fire--and plaintiff's desire for the insurance was made clearly known to the defendant agent by the plaintiff, but the defendant agent failed to obtain the requested coverage. The Burns case is a little closer to the facts here. There the defendant agent failed to obtain insurance covering "all perils", which was allegedly plaintiff's request, for the [28] home under construction and the defendant agent also failed to inform the plaintiff that the peril of theft was excluded from the insurance coverage provided. Again, defendant was put on notice of the peril plaintiff desired to be covered. In Neida's Boutique, the plaintiff's request for renewal and increased coverage was held to be insufficient to raise duty of defendant agent to provide the insurance requested because the defendant agent did not agree to comply with plaintiff's request, hence no contract to provide insurance was entered into.

Here it is clear that Crump agreed to provide the insurance coverage that was specifically requested and did, in fact, provide that insurance in compliance with the specific terms of the contract. The issue raised here, however, is the extent, if any, of Crump's duty to provide insurance coverage to Newberg beyond that specifically requested.

Since none of the Florida decisions answer the precise questions posed by this litigation, both counsel and the Court have looked beyond Florida law for assistance.

2. Pertinent Decisions Outside Florida

The most recent decision cited by parties is Sobotor v. Prudential Property & Casualty [29] Ins. Co., 200 N.J. Supr. 333, 491 A.2d 737 (1984) which both parties discussed in their supplemental trial briefs filed post-trial.

In Sobotor, which was a suit seeking reformation of an insurance policy, plaintiff, who had recently moved to New Jersey from New York, requested defendant insurance company's agent $100,000/$300,000 automobile liability coverage. In addition, plaintiff either told the defendant's agent that he wanted to be "fully covered with whatever Personal Injury Protection (PIP) and Uninsured-Underinsured Motorist Insurance (UMI) coverage that was available or told the defendant's agent to obtain "the New Jersey package that is the best available" of that insurance. (The trial court made no finding as to which request was actually made by plaintiff.)

The agent, without advising plaintiff about the existence options available under PIP and UMI, provided plaintiff with the minimum such insurance required by New Jersey law. Thereafter, plaintiff sustained serious injuries and permanent disabilities as the result of a car accident in which the other driver was underinsured. The trial court found that "an insurance agent has an affirmative duty to advise his client [30] of the availability of higher monetary limits for the coverage requested" (491 A.2d at 739) and held that the agent breached that duty.

The Sobotor appellate court affirmed quoting an earlier New Jersey opinion Rider v. Lynch, 42 N.J. 465, 201 A.2d 561 (1964) as follows:

HN10↑ One who holds himself out to the public as an insurance broker is required to have a degree of skill and knowledge requisite to the calling. When engaged by a member of the public to obtain insurance, the law holds him to the exercise of good faith and reasonable skill, care and diligence in the execution of the commission. He is expected to possess reasonable knowledge of the types of policies, their different terms, and the coverage available in the area in which his principle seeks to be protected. If he neglects to procure the insurance, or if the policy is void or materially deficient, or does not provide the coverage he undertook to supply, because of his failure to excercise the requisite skill of diligence, he becomes liable to his principal for the loss sustained thereby. [42 N.J. at 476, 201 A.2d 561]

491 A.2d at 739. See also, Bates v. Gambino, 72 N.J. 219, 370 A.2d 10 [31] (1977).

In sum, the Sobotor court held that because the plaintiff asked for the "best available" insurance, the defendant was put on notice that plaintiff was relying on defendant's "expertise to obtain the desired coverage."

Among the decisions discussed by the Sobotor court is the seminal case of Hardt v. Brink, 192 F.Supp. 879 (W.D. Wash. 1961) upon which plaintiff relies and the often-cited decision of Nowell v. Dawn-Leavitt Agency, Inc., 127 Air. 48, 617 P.2d 1164 (Ct. App. 1980) upon which defendant relies.

In Hardt v. Brink, 192 F. Supp. 879 (W.D. Wash. 1961) defendant insurance broker's failure to advise his plaintiff client of eight years of the need for additional insurance coverage for newly leased premises constituted negligence. In deciding upon the appropriate standards of care owed to the client, the court stated:

HN11↑ Whether or not an additional duty is assumed will depend upon the particular

relationship between the parties. Each case must be decided on its own peculiar facts. The law here involved is not particularly startling nor is it necessarily an extension over previous cases. This is an age of specialists and as more occupations divide [32] into various specialties and strive towards "professional" status, the law requires an even higher standard of care in the performance of their duties. 192 F. Supp. at 881.

The court in Hardt concluded that the defendant broker was "under a duty to advise the plaintiff of his potential liability (for loss as a result of fire) under the lease and to recommend insurance protection therefor." Id. at 882.

Prior to reaching this conclusion the Hardt court stated:

Clearly, HN12↑ the ordinary insurance solicitor only assumes those duties normally found in any agency relationship. In general this includes the obligation to deal with his principal in good faith and to carry out his instructions. No affirmative duty to advise is assumed by the mere creation of an agency relationship. Id. at 880.

Following the above quoted language, the Hardt opinion went on to state:

However, this does not mean that the agent cannot assume additional duties either by express contract or a holding out. Id. at 881.

In Nowell v. Dawn-Leavitt Agency, Inc., 127 Ariz. 48, 617 P.2d 1164 (Ct.App.1980), the court also recognized that certain circumstances [33] may give rise to an affirmative duty on the part of an insurance agent to inform a client of the availability of various coverages. In Nowell, after her home was damaged by a torrential rainstorm, plaintiff sued her insurance agent for failure to inform her of the availability of flood insurance. Plaintiff had never requested flood insurance, but testified that she had asked defendant for "the best policy they had." In response to this, defendant procured a standard Homeowner's policy which excluded damage caused by the risk of flood.

The trial court in Nowell granted summary judgment in favor of the defendant insurance agent and the Arizona appellate court affirmed stating:

[t]he fundamental legal question posed by this appeal is whether there is a cause of action for an insurance agent's failure to advise or impart information to a purchaser, as distinguished from a failure by the agent to procure insurance ordered by the principal. Appellees contend that there should be no duty to inform, and argue in their brief as follows:

To impose such a duty would create a virtually unmanageable situation. Agents would be subject to lawsuits and liability in each case [34] in which a client suffered a loss for which the agent did not have insurance coverage, in spite of the fact that the client never requested or even mentioned the coverage in question. The agent would be obligated, absent any request by the insured, to read each policy to the insured, line by line, advising the insured, not only of each exclusion or limitation, but advising him with regard to all other coverages which might cover items which are not covered in the policy which was requested and procured.

It has been the long-established rule that it is the insurance consumer's responsibility to educate himself concerning matters of insurance coverage.

Id. at 1166-1167.

The appellate court in Nowell considered at length the exception to the general rule established in Hardt v. Brink, supra, stating:

Hardt vs. Brink has been viewed as a somewhat revolutionary authority. See Harnett, Responsibility Of Insurance Agents And Brokers (Matthew Bender & Company, 1979), §3.12. Indeed it is, because within the professional relationship in which its rule of liability is operative,

it eliminates the principal's duty of self-education and places [35] the onus upon the insurance counsellor.
Id. at 1168.
The Nowell court went on to state:
Hardt v. Brink should be confined to situations where an insurance counsellor is receiving a consideration for his services apart from a premium to be paid for a long-established relationship of entrustment between insurance counsellor or agent and client from which it clearly appears that the insurance counsellor appreciated that there was a duty to take the initiative in giving comprehensive advice to his client on insurance matters. Hardt vs. Brink appears to fall within the latter category. We emphasize that no failure to follow instructions or active misrepresentation is involved in this case.
Id. at 1168.
As mentioned earlier, the Florida appellate court in Seascape of Hickory Point Condominum Association, Inc. Phase III v. Associated Insurance Services, Inc., 443 So.2d 488, 490 (2d Dist. Fla. 1984) discussed both Hardt and Nowell and interpreted the Nowell Court's analysis of the Hardt opinion as:
suggesting that HN13☛ in the absence of separate consideration apart from the premium, the rationale of Hardt v. Brink should [36] be limited to cases involving "a long-established relationship of entrustment between insurance counselor or agent and client from which it clearly appears that the insurance counselor appreciated that there was a duty to take the initiative in giving comprehensive advice to his client on insurance matters." 127 Ariz. at 52, 617 P.2d at 1168. See also 16A J Appleman, Insurance Law and Practice § 8845(1981). 443 So.2d at 490 (emphasis added).
The Sobotor court in New Jersey, cited supra, construed the Nowell decision to turn on the fact that,
Because plaintiff had an extensive background in construction and real estate and because the prior conduct of the parties negated the inference of a fiduciary relationship, the court declined to find the agent in breach.
491 A.2d at 740.
In 1984, the Arizona Supreme Court in Darner Motor Sales v. Universal Underwriters, 682 P.2d 388, 403 (1984), an en banc decision, stated of Nowell that
Nowell limited liability of an insurance agent to situations where there was separate consideration for his advice or where he appreciated there was a duty to give his client comprehensive [37] advice. Id. at 52, 617 P.2d at 1168. The first ground confuses contract and tort principles and is irrelevant to the allegation of negligence. The second ground was construed in excessively narrow fashion by the Nowell court:
We are nation which prides itself in its literacy. With our courts straining to dispose of a mass of litigation, including a greatly increased increment in the malpractice field in situations where it may not be the economic self-interest of the defendant to impart as much information as possible to his client, we fail to see that sound policy requires that we reinforce the typical insurance agent's self-interest with a potential legal liability.
Id.
Defendant Crump states that it "has no quarrel with the holding of the Darner case based upon its facts." (Defendant's Reply to Plaintiff's Supplemental Trial Brief, p. 1). Those facts were that Darner, who was in the business of leasing automobiles, testified that he specifically requested limits of liability insurance in the amount of $100,000/$300,000 for the lessees of his

automobiles, and was assured by the defendant insurance agent, that the umbrella policy written by Universal [38] Underwriters contained such coverage. The trial court granted summary judgment in favor of the insurance company and its agent on the basis that Darner's failure to read the insurance policy was a bar to recovery under any theory. That judgment was affirmed by the Arizona Court of Appeals but reversed by the Arizona Supreme Court, which found a triable issue of fact as to ". . . the reasonableness of an insured's failure to read the policy and his reliance on statements made by the agent." Darner, supra, at 403.

As Arizona's Chief Justice Holohan's vigorous dissent in Darner clearly. points out, the law established by the Darner majority opinion is not the majority rule across the country, but an adoption of the minority position on insurance broker liability. 682 P.2d at 406.

Bearing in mind the holdings and discussions of the various cases mentioned above and the others cited by counsel, the Court turns to analyze the facts of this case and the law to be applied.

IV. Analysis of Facts and Law

When Newberg asked Crump to "quote on the Builder's Risk for the job" (PX 2) in November 1980 it attached only the contract specifications dealing with the insurance [39] requirements for the Miami-Dade clarifier job. Those partial specifications did not mention sub-surface water or the need for de-watering the project during construction. Crump complied with Newberg's request to quote. When it did, Crump quoted in accordance with its prior practice which, as the parties agreed in the Statement of Uncontested Facts, was that "[E]ven if owner requirements were less, Crump always recommends All Risk Builders' Risk Coverage and the policy quoted was for an All Risk policy." (Uncontested Fact No. 5).

The fact that Newberg had possession of the insurance policy and, therefore, should have been aware of the sub-surface water exclusion does not appear to be a legally viable defense Crump can raise on the question of liability because an insured's failure to read an insurance policy does not appear to be a recognized defense under Florida law. See Monogram Products, Inc. v. Berkowitz, 392 So.2d 1353 (2d Dist. Fla. 1980); Blumberg v. American Fire & Casualty, 51 So.2d 182 (Fla. 1951).

When Newberg was requesting Crump's services, however, at no time--not when it requested the quote and not when it asked Crump to provide the builders' risk insurance--did [40] it request Crump to provide insurance covering sub-surface water. Moreover, Newberg did not ask Crump to examine the perils of the Miami-Dade job for insurance purposes. At no time did Crump assure Newberg that Crump would examine or had examined the perils of that job.

There was no evidence adduced at trial that Crump and Newberg explicitly agreed, see Neida's Boutique, Inc. v. Gabor & Co., 348 So.2d 196 (3d Dist. Fla. 1977), that Crump's responsibility in quoting builders' risk insurance for Newberg jobs included performing analysis beyond the specifications provided to Crump by Newberg. Crump never received payment from Newberg for undertaking any additional responsibility beyond properly analyzing the specifications provided by Newberg and making sure that insurance was obtained to cover the needs articulated in the specifications.

Based upon Crump's "holding out" and Crump's and Newberg's long-standing relationship, Newberg argues it relied upon the expertise of Crump in the construction insurance industry. The key question is the reasonable extent of that reliance. To answer that key question the Court must decide whether from that relationship between Newberg and Crump [41] regarding insurance services, it "clearly appears that [Crump] appreciated that there was a duty to take the initiative

in giving comprehensive advice," Seascape, supra at 490, quoting Nowell v. Dawn-Leavitt Agency, Inc., 127 Ariz. 48, 52, 617 P.2d 1164, 1168 (Ct. App. 1980), regarding perils beyond those listed in the partial specifications provided Crump by Newberg.

Newberg never requested such advice from Crump and Newberg took no action to make Crump believe that Newberg looked to Crump for such advice. Crump was not the exclusive provider of insurance to Newberg. In fact, attempts by Crump to become Newberg's comprehensive insurance provider or Newberg's exclusive builders' risk provider were spurned by Newberg. Newberg could reasonably rely upon Crump's expertise to obtain the insurance coverage called for in the job's contract specifications provided to Crump plus the additional insurance coverage usually furnished by Crump consistent with Crump's regular business practice. There is no proof that insurance covering sub-surface water fell into this category. The reasonableness of Newberg's reliance beyond that is tenuous.

Newberg never asked Crump for insurance [42] against "all perils" as the plaintiff did in Burns v. Consolidated American Insurance Company, 359 So.2d 1203 (3rd Dist. Fla. 1978) or for the "best available" coverage as the plaintiff did in Sobotor v. Prudential Property & Casualty Ins. Co., 200 N.J.Supr. 333, 491 A.2d 737 (1984). Furthermore, the relationship between Newberg and Crump regarding insurance did not contemplate comprehensive Peril analysis by Crump. Therefore, based upon their relationship, Newberg could not have reasonably relied upon Crump for that.

Newberg perhaps would have had a better case against Crump if it had asked Crump for "all perils" or the "best available" insurance coverage on the Miami-Dade job. Obviously, Newberg's case would be stronger also if it had asked Crump for an analysis of the job's perils. Newberg, however, did none of these things.

Moreover, Newberg would have more support for its position if it had sent the "full specifications" (DX 15) to Crump. Then, Newberg, at least, could argue that Crump was informed of the need for de-watering on the Miami-Dade job and, as an experienced construction insurance broker, should have realized the presence of the peril of sub-surface water [43] on the job. The fact that the job was in the Miami area is not sufficient by itself to have put Crump on notice of the sub-surface water peril especially since Newberg did not give even a hint to Crump of the existence of such a peril on the job.

Additionally, by furnishing the "full specifications" to Crump, Newberg could have raised an inference that it reasonably expected some analysis of the job's perils at least what could be derived from those "full specifications." Since Newberg, however, did not furnish Crump with the "full specifications," Newberg could not have expected analysis of the potential perils of the job. Therefore, based upon what Newberg did, it could not have reasonably expected Crump to provide the service of "peril analysis" on the Miami-Dade job. Newberg did not ask for it, did not pay for it and did not provide the most rudimentary tools--the full contract specifications--to allow Crump to perform it.

Crump, and all insurance brokers, are entitled to rely to some extent upon an insurance consumer to provide at least basic information from which the broker can reasonably ascertain the insurance consumer's desires and needs. The more sophisticated the insurance [44] consumer is the more the broker should be able to reasonably expect to receive by way of pertinent, accurate and complete information. Crump should have been able to rely upon the information furnished by Newberg, which is certainly a sophisticated consumer of construction insurance, as pertinent, accurate and complete.

When, after Newberg was awarded the contract, and it asked Crump to obtain the insurance which Crump had previously quoted, Newberg again did not furnish to Crump any additional information from which the peril of sub-surface water could have been detected. If Newberg had been an unsophisticated construction insurance consumer, then perhaps Crump may have had a duty to inquire about other perils not covered by the policy which Crump quoted for bidding purposes. Crump, under the circumstances here, however, cannot be held liable for not inquiring about other unlisted perils. It is up to the sophisticated consumer to make known its needs. Newberg had an office in the Miami area and could be considered to be more knowledgeable than Crump about the perils of construction in the Miami area. Moreover, Newberg had the full specifications and was aware of the de-watering requirements, [45] Crump did not and was not. Crump was not negligent for believing that if Newberg desired coverage against perils beyond those set forth in the partial specifications, Newberg would ask. When the partial specifications were sent by Newberg to Crump, it can be inferred that both parties believed that those partial specifications were all Crump needed to be able to procure the proper insurance coverage for the job. It was certainly reasonable for Crump to have believed that. As stated earlier, had Newberg asked for peril analysis or provided the full contract specifications, this would be a closer case. See Woodham v. Moore, 428 So.2d 280, 281 (4th Dist. Fla. 1983).

To use the Seascape court's analogy to the attorney-client relationship, HN14 an attorney cannot be held liable for failing to ascertain and deal with the legal needs of a client who does not inform the lawyers of those needs, for example, a client who comes to the lawyer for the drafting of a will, but fails to mention a potential personal injury claim the client may have. Neither lawyers nor insurance brokers can be expected to be mind readers and certainly should not be held liable for negligence when they are not. HN15 [46] At a minimum to hold an insurance broker liable, the plaintiff insurance consumer must have informed the broker of the coverage desired and the broker agreed to provide that coverage either explicitly or implicitly because of the relationship of the parties. If proof of agreement is based upon their. relationship, that relationship must be such that it clearly appears that the broker appreciated its duty and the fact that its expertise is being relied upon by the insurance consumer to ascertain the needed insurance coverage.

Under Newberg's theory of reliance, Crump could be held liable for any uninsured loss Newberg may have suffered on the Miami-Dade job such as loss from termites, mildew, rust, nuclear radiation or any of the other uninsured perils for which Newberg never requested coverage. Numerous cases from across the country have held that under such circumstances no liability exists. See e.g., Bohn v. Abbott, 44 Oh. Misc. 102, 339 N.E.2d 253 (1975) (where plaintiff insured requested "builder's risk" insurance and insurance agent obtained a builders' risk policy that excluded foundation collapse. Plaintiff insured's basement wall collapsed. Agent held not liable because [47] foundation collapse coverage was not requested by plaintiff.); Ethridge v. Associated Mutuals, Inc., 160 Ga.App. 687, 288 S.E.2d 58 (1981)(where the insured requested "full coverage" from the agent for a boat which insured told the agent was kept in a fresh water lake. When the boat sank in salt water, the agent was not liable for the uninsured loss.); Nowell v. Grandey, 132 Vt. 460, 321 A.2d 28 (1974)(where the insured requested liability insurance for a poultry farm the agent had no duty to procure insurance for an off-premises barbecue business); Callahan v. American Motorists Ins. Co., 56 Misc.2d 734, 289 N.Y.S.2d 1005, (1968)(where the insured requested a homeowner's policy, the agent had not duty to procure liability coverage for a business operated on the premises even though he knew of its existence); Boston Camping Distributor Co. v. Lumbermens Mutual Casualty Co., 282 N.E.2d 374 (Mass.

1972)(where the insured requested "coverage from A to Z, second to none" the broker had no duty to procure a liability policy which did not exclude damage caused by sprinkler leakage).

V. CONCLUSION

For the reasons stated above, under the facts presented at the trial of [48] this case, the Court finds in favor of defendant Crump and against plaintiff Newberg on the issue of liability. Judgment will be entered for defendant Crump. Costs and attorney fees are to be borne by each respective side due to the nature of the parties and complexity of the issues raised in this litigation.

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http://www.wsj.com/articles/hackers-breach-cravath-swaine-other-big-law-firms-1459293504

MARKETS

Hackers Breach Law Firms, Including Cravath and Weil Gotshal

Investigators explore whether cybercriminals wanted information for insider trading

It isn't clear what information, if any, hackers stole from Cravath Swaine & Moore, Weil Gotshal & Manges and other law firms. *PHOTO: DANIEL ACKER/BLOOMBERG NEWS*

By NICOLE HONG and ROBIN SIDEL
Updated March 29, 2016 9:14 p.m. ET

Hackers broke into the computer networks at some of the country's most prestigious law firms, and federal investigators are exploring whether they stole confidential information for the purpose of insider trading, according to people familiar with the matter.

The firms include Cravath Swaine & Moore LLP and Weil Gotshal & Manges LLP, which represent Wall Street banks and Fortune 500 companies in everything from lawsuits to multibillion-dollar merger negotiations.

Other law firms also were breached, the people said, and hackers, in postings on the Internet, are threatening to attack more.

It isn't clear what information the hackers stole, if any, but the focus of the investigation is on whether confidential data were taken for the purpose of insider trading, according to a person familiar with the matter.

The Manhattan U.S. attorney's office and Federal Bureau of Investigation are conducting the probe, which began in the past year and is in its early stages, the people said. Representatives for both declined to comment.

Cravath said the incident, which occurred last summer, involved a "limited breach" of its systems and that the firm is "not aware that any of the information that may have been accessed has been used improperly." The firm said its client confidentiality is sacrosanct and that it is working with law enforcement as well as outside consultants to assess its security.

A spokeswoman for Weil Gotshal declined to comment.

The cyberattacks show what law-enforcement officials have been warning companies about for years. As hacking tools and hackers for hire proliferate in certain corners of the Internet, it has become easier for criminals to breach computer networks as a way to further a range of crimes, from insider trading to identity theft.

In recent years, a number of major retailers have been breached, as was J.P. Morgan Chase & Co., the country's biggest bank by assets. In those cases, hackers stole data such as credit-card numbers and email addresses that they could use to make fraudulent purchases or entice customers into scams.

The attacks on law firms appear to show thieves scouring the digital landscape for more sophisticated types of information. Law firms are attractive targets because they hold trade secrets and other sensitive information about corporate clients, including details about undisclosed mergers and acquisitions that could be stolen for insider trading.

Hackers often steal large amounts of information indiscriminately and then analyze it later to see how it could be useful, making it difficult to determine early on in these types of investigations whether any information was actually used for insider trading, observers said.

The potential vulnerability of law firms is raising concerns among their clients, who are conducting their own assessments of the firms they hire, according to senior lawyers at a number of firms.

A case last year shows that hackers have gone after sensitive material to fuel illegal trading. In that case, brought by federal prosecutors in New Jersey and Brooklyn, N.Y., hackers in Ukraine allegedly breached newswires companies in the U.S. and stole news releases about corporate earnings before they became public. Stock traders then made lucrative bets based on the releases, prosecutors said. At least three of the defendants have pleaded guilty, and the case is pending.

The federal investigation into the law firms is one of several recent cyber-related incidents that have affected the legal industry.

In February, a posting appeared on an underground Russian website called DarkMoney.cc, in which the person offered to sell his phishing services to other would-be cyberthieves and identified specific law firms as potential targets. In phishing attacks, criminals send emails to employees, masked as legitimate messages, in an effort to learn sensitive information like passwords or account information.

Security firm Flashpoint issued alerts to law firms in January and February about the threats and has acquired a copy of a phishing email that is aimed at law firms, according to a person familiar with the alerts. "It has definitely picked up steam," this person said.

The FBI also issued an alert in recent weeks that warned law firms about potential attacks, according to people familiar with the alert. The FBI declined to comment.

Law firms said they have double-checked their cybersecurity defenses in response to the posting and raised more awareness about the issue internally. It isn't clear if the hacker's efforts have resulted in any breaches. A Flashpoint spokeswoman declined to comment on the alerts.

One senior partner at a top law firm said he often receives suspicious emails from people who pretend to be seeking legal representation. "Law firms are being deluged with attempts to crack their systems," he said.

Law firms last year formed an information-sharing group to disseminate information about cyberthreats and other vulnerabilities. It is modeled after a similar organization for financial institutions.

So far, 75 law firms have joined the group, said Bill Nelson, chief executive officer of the Financial Services Information Sharing and Analysis Center, which oversees the legal group and similar entities that focus on other industries, such as retail.

One of the trickiest questions for law firms is when they are required to publicly disclose a data breach. Forty-seven U.S. states have their own breach-notification laws, forcing law firms and other companies to navigate a patchwork of different rules.

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