



## 4<sup>th</sup> Quarter 2014

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# Florida Gold Coast Chapter

JOIN US FOR OUR ANNUAL GATHERING OF INSURANCE PROFESSIONALS SPONSORED BY CPCU FLORIDA GOLD COAST CHAPTER FEBRUARY 18, 2015.

## Next Chapter Meeting on Wednesday, February 18, 2015

Reserve your place today for a special cocktail hour & h'ordeuvres on **Wednesday, February 18, 2015.**

Our speaker is Seth Hyman with Kelley Kronenberg. Over the past 4 years, Seth has become one of the most visible faces in Florida's burgeoning medical cannabis industry. His daughter Rebecca has a severe genetic disorder which causes her to have frequent daily seizures. Oil extracted from a non-euphoric strain of cannabis has been shown to treat children with his daughter's condition of intractable epilepsy. He has been instrumental in lobbying for the Florida legislation to help his daughter and others thwart seizures and comfort those with epilepsy. Seth was a key figure throughout the lawmaking process for both House Bill 843 and Senate Bill 1030 in the 2014 Florida legislative session. He worked closely with legislators by providing input on the drafting of language for both bills and delivered powerful testimonies to the governmental committees. Seth has advocated for the state's Compassionate Medical Cannabis Act in legislative and other public forums. He will speak regarding legislative and regulatory issues around medical marijuana, including the issues faced by legal cannabis operations. The CPCU Florida Gold Coast Chapter welcomes other groups of insurance professionals to join us at this event, including, but not limited to, other CPCU chapters, IAASF, RIMS, CLU, PRIMA, NAIW, and CASE.

**Time:** Cocktails & h'ordeuvres at 6:00 pm. Speaker at 6:30pm.

### Location:

NCCI  
901 Peninsula Corporate Circle  
Boca Raton, FL 33487

**Cost:** \$35 per person—includes cocktails and h'ordeuvres! Cash or check payable at the door. Checks should be made payable to CPCU.

**To RSVP for this special event, contact**

**Shani Oulton**

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## President's Message by Dawn Ingham, CPCU, ARM

Happy New Year! As we begin 2015, let's recap our Chapter's 2014 accomplishments:

- Achieved the Gold Level CPCU Society Circle of Excellence and recognized for that achievement during the 2014 Leadership Summit
- Three Chapter members attended the 2014 Leadership Summit in Phoenix, Arizona
- Established a Florida Gold Coast Chapter LinkedIn site
- Added new CPCU designees to our Chapter membership
- Awarded a \$1,000 Florida Gold Coast CPCU Chapter Scholarship
- Conducted quarterly Chapter meetings that included presentations from the following guest speakers:
  - Sam Miller, Executive Vice President of the Florida Insurance Council
  - Kurtis Suhs, VP and Technology E&O & Privacy National Practice Leader for Ironshore Insurance Services, LLC
  - Firststat Nursing Services
- Published quarterly Chapter newsletters
- Re-elected our Chapter officers to serve for another term
- Held a holiday toy drive and donated the toy to Jack & Jill Children's Center

Thanks to all of you for continuing to support the Florida Gold Coast Chapter! During 2015, your Chapter officers will endeavor to enhance our Chapter activities, so that you continue to find value in your Chapter membership.



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Lastly, just another reminder to mark your calendars to attend the **2015 CPCU Society Leadership Summit**, which will be held in **Ft. Lauderdale** from April 22- 25. It's a great opportunity for you to learn first-hand how you can get involved with our chapter.

## Report from the Vice President-Communications Officer by Shani Oulton, CPCU

I hope you all enjoyed the holiday season and that this newsletter finds you well.

I will be continuing my duties as Vice President-Communications Officer for the Florida Gold Coast Chapter in 2015. I look forward to getting more involved and I encourage you all to do the same.

There are a lot of newly designated CPCUs in our direct area, and I would love work with you all and help with some fresh ideas for the chapter. Whether it be gatherings, or charity events, I look hope that you will consider reaching out to me and we can work together to coordinate some new events for the Chapter.

## Tiara vs. Marsh—Agent E&O Implications By Brent Winans, CPCU, ARM Vice President, Clear Advantage Risk Management

*Editor's note: The CPCU Gold Coast Chapter thanks Mr. Winans for this article, which reflects his view on the Tiara court case.*

I believe E&O cases against Florida agents are about to become more frequent and expensive. Why? Not because the law has changed, but because the "game" has changed. A recent ruling in the case of *Tiara Condominium Association vs. Marsh* has given Florida policyholder attorneys clear guidelines on what it will take to hold an agent responsible for failing to advise an insured on what types and amounts of coverage they should have purchased. The ruling describes the factors which a jury is to weigh to decide if the agent had a "special relationship" with their client—the type of relationship that increases an agent's duty to advise.

As a result, policyholder attorneys are more likely to allege that there was a special relationship. As long as there are some credible facts supporting the policyholder's position, that allegation cannot be decided by a judge. It must be heard by a jury. When faced with a jury trial, E&O insurers will usually make a payment to settle the case or, in rare instances, will take the case to trial. Either way, the agency will have to pay all or part of its self-insured retention and will suffer a paid claim against its E&O loss experience.

What can an agency do to protect itself against this rising tide of E&O claims? Here are some thoughts as someone who frequently serves as an expert witness in these types of claims, testifying for—and sometimes against—agents.

First let me address some commonly held assumptions that I do not believe are accurate. You may believe that you always have the duty to advise your clients about the coverages and limits they should carry. While that may be the best practice, my non-attorney understanding of Florida law is that in an "ordinary" agent-client relationship, you do not. In ordinary circumstances, the responsibility of a Florida agent is to use reasonable skill, care, and diligence to procure the insurance which the client requested or which is clearly warranted by their expressed needs, and to inform the client promptly if the agent cannot procure that coverage. That is what is called the agent's "duty to procure."

As Judge Daniel T.K. Hurley stated in his recent ruling in *Tiara vs. Marsh*, "As a general proposition, an insurance agent has no duty to advise the insured as to the insured's insurance coverage needs." In Florida, the agent's responsibility in ordinary circumstances is only to do a reasonable job of getting what the client asks for. Florida case law does add that an agent also has a duty to procure coverage that is "clearly warranted by the insured's expressed needs." So, for example, I believe that an agent would have a responsibility to inquire about workers' compensation insurance for a business owner with 10 employees, whether the client specifically requested it or not, because the client is required to carry it by statute; it is "clearly warranted by his expressed needs." But that does not mean that, under "ordinary" circumstances his agent has a duty to advise him to purchase higher liability limits, cyber coverage, or key man life insurance.



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But Florida courts have said that some agent/client relationships are not “ordinary.” In *Adams vs. Aetna Casualty and Surety Company*, Florida’s First District Court of Appeal said that, depending on “the scope of the agent’s undertaking” with the client, an agent has a general duty “to exercise due care in correctly advising the insured of the existence and availability of particular insurance, including the availability and desirability of obtaining higher limits...” Until the *Tiara* ruling, however, no court had spelled out exactly what factors a jury should consider in determining whether “the scope of the agent’s undertaking” obligated a Florida agent to give such advice. The *Tiara* ruling does that, and that is the game changer.

As a brief background, the Tiara Condominium is a 43-story tower condominium on the beach in Palm Beach County. In 2002, Tiara’s insurance committee selected Marsh USA, Inc., as its insurance broker. Marsh placed windstorm coverage with Citizens. The Tiara building was hit by Hurricane Frances on September 4, 2004, and by Hurricane Jeanne three weeks later. Tiara claimed total costs of restoration of approximately \$130,000,000. After litigation, Citizens and Tiara settled the claim for \$89,000,000. Tiara then sued Marsh, alleging that it had breached its duty to properly advise Tiara about the coverage it should have purchased.

Marsh has defended its actions vigorously under several legal theories, and most recently sought to have Judge Hurley of the U.S. District Court, Southern District of Florida, to rule in its favor by “summary judgment.” In addition to other legal arguments, Marsh contended that it had no extra-contractual duty to:

- Advise Tiara on its full coverage needs;
- Advise it to obtain an updated building appraisal on which to base its insurance limits
- Warn it of the danger of under-insurance; or,
- Provide it with recommendations on reasonable, prudent policy limits.

Judge Hurley ruled against Marsh’s request to have the case against it dismissed and stated that whether an insurance broker has a duty to advise its clients depends on whether or not the broker has a “special relationship” with the client. He concluded that only a jury can make that determination. He then listed, for the first time in a Florida case, factors to be considered.

He stated, “Considerations may include

1. representations by the broker about its expertise;
2. representations by the broker about the breadth of the coverage obtained;
3. the length and depth of the relationship;
4. the extent of the broker's involvement in the client's decision-making about its insurance needs;
5. information volunteered by the broker about the client's insurance needs; and
6. payment of additional compensation for advisory services.”

As a result, it is now much more likely that when a policyholder’s attorney brings an E&O suit against your agency because of an uncovered claim, that suit is going to allege that you had a special relationship with your client. It will go on to state that you breached your duty by failing to advise them properly about their insurance needs, and it will provide examples of how your relationship with the client met the criteria laid out in this case. Vincent Leonard, formerly Allstate’s Litigation Coordinator in Florida and now the Litigation Coordinator for the plaintiff firm of Searcy, Denney, Scarola, Barnhart & Shipley in West Palm Beach commented, “With this case, the services delivered by Florida insurance agents will be scrutinized under a fine microscope. When consumers believe that they relied on their agent to get them the right coverage and then coverage is denied, they will surely be looking to their agent.”

With that in mind, what steps can your agency take to protect itself? Here are some thoughts:

**Eliminate Over-Inflated Promises.** Don’t promise what you cannot deliver to *all* of your clients. Your website and other agency materials may make statements like, “We offer an outstanding level of personal service, attention, and expertise to our clients. Our qualified agents will make sure you know what insurance you need, how much insurance you need, and the different options you have to choose from.”

In practice, very few agencies can provide that level of service to all of their clients all of the time. But if a client says they learned about you from your website or relied on those statements in your proposal, a jury may hold you responsible to live up to your promises—even if the client is small and unprofitable.



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**Identify Your Special Relationships.** In practice, most agencies give their best service to two types of clients, the very large and the very demanding. Now prudent agencies are on notice that they should add a third group—those a jury is likely to say have a “special relationship.”

Who are those clients? Of course no one can tell for sure what a jury will decide, but you can probably determine which ones are the most likely by scoring them yourselves based on the criteria laid out in the Tiara vs. Marsh case. Have your producers and CSRs go through their client lists and ask these questions:

1. Do we claim to be experts in this client’s type of risk?
2. How long have they been our clients?
3. Do we write all of their insurance?
4. Have we offered advice or have they asked for advice on coverage and limits?
5. Have they taken our advice in the past?
6. Do we charge an extra fee for our advice?
7. Are we involved in their decision-making?
8. Do we have other connections with them—play golf with the owner every week, etc.?

Rate your clients on each of these questions and give them a score. Keep in mind that there are no general exemptions for personal lines and small commercial accounts. The same standards will usually apply to all of your clients. There may be other factors that have to be considered in a particular case, but know that a jury would probably find that you have a higher duty to those with a higher score.

**Identify, Offer, and Document.** From my involvement with agent E&O cases, I can tell you that if a special relationship is established, the next step will usually be to shine a spotlight on what your agency did and didn’t do to advise your client.

- **Identify.** You will want to be able to show that you sought to identify your client’s exposures. Did you send out an annual exposure questionnaire or meet with them regularly to review their exposures? Every step you took to identify your client’s risks will weigh in your favor.
- **Offer.** Be consistent in offering your clients the higher limits and broader coverages they will want at claim time. The best E&O loss control that exists is to sell your clients the protection they need.

Covered clients don’t (usually) sue their agents. Don’t be worn down by their refusals and cynicism. Maintain your passion for what you do. Make the offer. And if your agency sells life and health as well as P&C, be sure to propose those coverages too. The more consistently you offer coverage the better both of you will be protected. Policyholder attorney Chip Merlin, president of the Merlin Law Group, commented, “Agents in a competitive environment are often in the position of being undercut by those that offer less coverage to gain price advantage. Giving into these economic realities without fully advising of coverages available is a dangerous game for somebody who is claiming to be a ‘trusted advisor’ of insurance.”

- **Document.** If your client does not buy the coverage and you don’t document the offer and refusal, you are likely to be caught in a “he said/she said” before a jury. One policyholder attorney told me, “I will take he said/she said cases all day long. I figure I have at least a 50/50 shot.”

**Know What You are Talking About.** The quickest way to establish a special relationship with a client is to give them inaccurate advice. Tell them the coverage isn’t available when it is, or tell them the policy covers them when it doesn’t. You have given them advice, and they have relied on it to their harm. They will probably still be covered for that claim, under your E&O policy. Resist the temptation to tell them what they want to hear. Read the policies you sell, and don’t be afraid to say, “I don’t know. I will have to get back to you on that.”

**Serve or Separate.** You may go through your book of business and see that there are many small, marginally profitable clients that probably are also “special relationship” clients. You may not see how you can afford to provide them with the level of service a jury is going to expect of you. At that point, you clearly have a choice to make.

- You can continue to carry them on the books as you have, knowing that you have an increased E&O exposure.
- You can find a way to provide the service that will be expected.
- You can help them find a new agency home.





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That is a difficult decision to make with many business, ethical, and personal implications. But from an E&O standpoint, it is best to either provide your clients with the service a jury will expect or help them to find a new agency home.

No matter who ultimately prevails in the *Tiara vs. Marsh* case, Judge Hurley's recent ruling has changed the game for E&O claims against Florida agents. I recommend that you try to identify which clients a jury is most likely to say had a "special relationship" with your agency. Then make a special effort to provide the level of service that a jury will expect of you, or assist those clients in finding a new agency home. Also, eliminate over-inflated promises from your marketing materials, and be sure that the advice you give to your clients is accurate.

I often get calls from both agent and policyholder attorneys telling me about an uncovered loss and asking my opinion about a case against the agent. If you follow this advice, you will help me be able to say, "It looks to me like the agent has a strong case here. They did everything right, and they can prove it."

*Clear Advantage Risk Management, based in Delray Beach, provides fee-based insurance and risk management consulting services and support in insurance litigation.*

## Florida Gold Coast CPCU Chapter Scholarship

Established in 2003 by the Florida Gold Coast Chapter of CPCU, it is available to FSU students enrolled in its Department of Risk Management, Insurance, Real Estate, and Business Law.

One scholarship is awarded in the amount of \$1,000. The selection is made in the spring, and the award is made in the following fall semester.

Preference is given to students from the South Florida area. Other criteria are: Junior (not senior) RMI Major at time of application, minimum of 3.0 GPA, primary interest in Property-Casualty insurance.

RMI faculty makes recommendations to the Florida Gold Coast CPCU Chapter.

## Florida Gold Coast Chapter Meeting December 09, 2014 Recap

We had a great luncheon. Elections for 2015 took place. The same officers were reelected.

Additionally, we got to hear from some of our newest CPCU designees (Michelle Smith and Kevin Ott) and their experiences at the Conferment ceremony and Annual Meeting in Anaheim.

We also have a picture to share of the toys that we collected at this meeting to share with underprivileged children. A big thank you to David Arch, for always coordinating the toy drive for us. Also congratulations to David Arch on his new bundles of joy!





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## **Call for News/Articles**

If you have written any news or articles that would be of interest to our general chapter membership, please contact Shani Oulton, CPCU Vice President-Communications Officer at [shani\\_oultou@ncci.com](mailto:shani_oultou@ncci.com) or (561) 893-3168.

We also welcome postings for any professional positions you may have open within your company. Just let us know and we'll get the word out.

Also, please visit our chapter website at <https://floridagoldcoast.cpcusociety.org/>. We are also on Linked In now. Please request to be added to the Gold Coast Chapter CPCU page.

## **Chapter Contacts Officers 2013-2014**

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