

# CABA BRIEFS

The Magazine of the Cuban American Bar Association

WINTER 2010



*Feature Article*

## **HEALTHCARE REFORM**

**in 2011**

Art in the Tropics

Past Presidents' Dinner

**Elections**

Mentor Reception



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# [CABA BRIEFS WINTER 2010]

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# [PRESIDENT'S MESSAGE]

As my term as the 36th President of the Cuban American Bar Association comes to an end, I am pleased to report that we have accomplished all of the goals and objectives we set forth last January.

A year ago, we agreed that CABA would continue to be at the forefront of all battles and set forth three fundamental objectives for the year. CABA would (1) strive to ensure a diverse, qualified and funded judicial system and would strive to educate the public on electing qualified and diverse candidates to the judiciary and legislature of the State of Florida; (2) continue to make a difference in the lives of others through our scholarships, our Mentor/Mentee Program, our Pro Bono Project and our support of other local organizations; and (3) continue to support and promote human rights and freedom in Cuba. With the help of your 2010 Board, we were able fulfill each of our commitments and many more.

First, CABA worked with each of the Bar Associations in Broward County to ensure that qualified minority judges would retain

their seats. CABA this year hosted both a legislative and judicial luncheon. At these luncheons, our members were able to listen to the goal and objectives of each of the candidates. CABA later published its judicial poll. CABA also held a voter registration drive

at its Pro Bono Office. Members of your Board of Directors traveled to Tallahassee to lobby for funding of our Judicial System and CABA's Pro Bono Project.

Second, CABA continued to expand its Mentor/Mentee program. In addition to the scholarships that CABA has already endowed in every law school in the State of Florida, this year we set aside an additional \$50,000. Of this amount, \$25,000 is being endowed

as a separate CABA "At Large" Scholarship and the remaining \$25,000 was given to five law students throughout the state in five \$5,000 CABA "At Large" Scholarships. We are happy to report that this year, CABA gave out 15 separate scholarships. Additionally, we supported various local organizations, including the American Red Cross, YWCA Court Care, Centro Mater and the Ronald McDonald House.



**By Manuel A. Garcia-Linares**

CABA's Pro Bono Project continues to grow. With the funds we have received from the State of Florida, The Florida Bar and through our Pro Bono Party, we were able to hire a second attorney to exclusively handle foreclosure matters. CABA's Pro Bono Project assists hundreds of needy families in our community each year.

Third, the CABA on Cuba Committee continued to work with lawyers in the United States, Spain and Cuba on refining a proposed transitional law and celebrated "El Dia Del Abogado" with a presentation from Rene Gomez Manzano who heads "La Corriente Agramontista". Finally, in these economic times we must continue to assist our members with



opportunities to network and obtain new potential business opportunities. In that regard, we had several networking events for our members with various organizations and a dedicated Corporate Counsel Seminar in November, where our members were able to learn and socialize with distinguished local and national corporate counsel.

Our success this year was the product and hard work of many, but especially of the 2010 Board of Directors. We owe them a debt of gratitude for the countless hours they dedicated to our organization. I also want to thank Diana Powell for her tireless efforts as CABA's Executive Director.

I want to thank my Firm and all of my partners for allowing me the time necessary to lead CABA this past year and especially to my wife Elena and my daughters Patricia, Victoria and Gabriella, for their love and support in all of my endeavors.

I am proud to have served as your 36th President and look forward to continuing to be a part of CABA in the years to come. I wish your incoming President, Victoria Mendez great success and I am sure that CABA will continue to flourish under her leadership. Thank you.

*Manuel A. Garcia-Linares*

*Please visit [www.cabaonline.com](http://www.cabaonline.com) for ways to participate in CABA events and serve on CABA Committees.*

# [PRESIDENT ELECT'S MESSAGE]

It is with great pleasure that I write to you today as your 37th President of the Cuban American Bar Association. As we begin this new year with much promise and hope, I look forward to leading CABA in reaching the goals we have set out to accomplish. I want to take this time to share some of these goals with you and to invite you to join me and the 2011 Board of Directors in working towards them.

One of our primary objectives is to increase diversity in the legal profession, both on the bench and in our law firms. We plan to do this by relentlessly advocating for a judiciary that is reflective of our community and by focusing on diversity and sensitivity training for our judges and managing partners within firms.

This year CABA also intends on becoming a more prominent player in the transition to a free and democratic Cuba. CABA will continue to denounce the ongoing human rights violations on the island and raise public awareness about these abuses, in the hopes of curtailing the violence.

In these tough economic times, CABA is also mindful of those less fortunate in our local community and will continue to provide free legal services through our Pro Bono Project and our Community Outreach programs.

I am excited to announce that CABA has also added a few more committees this year, including a Business Development Committee and a Cultural,

Arts, and Athletics Committee. Our Young Lawyers Committee will be also very active this year. We will be offering leadership workshops and fun networking events in order to mentor our young attorneys. Our Mentoring and Scholarship Committee will also be an exciting one. CABA will

continue fundraising efforts to award scholarships for our law students across the state of Florida and by mentoring them through our Mentor/Mentee program. Please check out the rest of our committees on our new and improved website, [www.cabaonline.com](http://www.cabaonline.com), for more information on how to join them.

CABA also hopes to enhance our CLE programming by offering a few webinars this year. We also want to expand our CLE library and continue to host informative seminars for our members. The first seminar

we have planned is the JNC Seminar scheduled for March 2, 2011, co-sponsored by DCBA, FAWL, GSCBWLA, HLA, WDFJBA. Please check our website for details.

I am thrilled to begin this journey with you as CABA President, and hope the journey is as exciting and rewarding for you as well. Wishing you and your family a healthy and Happy New Year. I look forward to seeing you at our events and working with you to achieve our goals.



**Victoria Mendez**

Warmest Regards,  
*Victoria Méndez*



**Angel Castillo, Jr., Partner**  
J.D. 1978, University of Florida  
LL.M. 1980, Yale Law School

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# [CABA ELECTIONS]

Regions Bank Tower, Coral Gables December 7, 2010





## Election '11

### CUBAN AMERICAN BAR ASSOCIATION

#### 2011 Annual Elections Personal Statements

#### Nominees for President-Elect



**Vivian de las Cuevas-Diaz**  
Through my leadership roles in CABA, as a committee lead, as Treasurer in 2007, 2008 & 2009 and currently as Vice President and as the founder of the Art in Progress Committee, my commitment to CABA is consistent and proven. I have and will support the election of CABA's next President-Elect. I am proud to be part of the next great generation. Let's work together to make CABA the best and most professional, diverse and dynamic bar association. Thank you for considering me as CABA's next President-Elect.



**Sandra M. Ferrera**  
I have been an active Board Member for the past eight years and have served as Vice President since 2008. For the past three years, I have served as CABA's Past Board President. My legal services have been provided to hundreds of newly practicing attorneys. My goals include promoting diversity in our profession beyond Miami, Florida; increasing business opportunities through our members; utilizing our connections about membership qualifications; and creating a successful CABA leadership for the next year and beyond. I am confident that I will continue to serve the CABA, effectively.

#### Nominees for Board of Directors



**Nelson C. Bellido**  
I have been a member of the Cuban American Bar Association since 2007. I have served on the Executive Committee, the Board of Directors, and the Board of Trustees. I am currently serving as the Vice President of the Board of Directors. I am proud to be part of the next great generation. Let's work together to make CABA the best and most professional, diverse and dynamic bar association. Thank you for considering me as CABA's next President-Elect.



**Manuel L. Cropp, Jr.**  
I am proud to be part of the next great generation. Let's work together to make CABA the best and most professional, diverse and dynamic bar association. Thank you for considering me as CABA's next President-Elect.

#### Nominees for Board of Directors



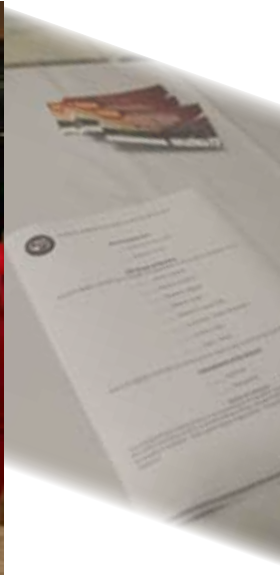
**Stephen K. Garcia-Vidal**  
I have been a member of the Cuban American Bar Association since 2007. I have served on the Executive Committee, the Board of Directors, and the Board of Trustees. I am currently serving as the Vice President of the Board of Directors. I am proud to be part of the next great generation. Let's work together to make CABA the best and most professional, diverse and dynamic bar association. Thank you for considering me as CABA's next President-Elect.



**Anna Maria "Annie" Hernandez**  
I have been a member of the Cuban American Bar Association since 2007. I have served on the Executive Committee, the Board of Directors, and the Board of Trustees. I am currently serving as the Vice President of the Board of Directors. I am proud to be part of the next great generation. Let's work together to make CABA the best and most professional, diverse and dynamic bar association. Thank you for considering me as CABA's next President-Elect.



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# [CABA CACPA HOLIDAY RECEPTION]

Total Bank, Miami, November 30, 2010



# [CABA CACPA HOLIDAY RECEPTION]



# [CORPORATE COUNSEL EVENT]

Epic Hotel, Miami, November 10, 2010





# [CORPORATE COUNSEL EVENT]



# [CORPORATE COUNSEL EVENT]



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# Health Care Reform in 2011: *Year One of the New Normal*

While the passage of health care reform legislation in early 2010 brought with it a firestorm of debate, much of the controversy has centered on new requirements that are several years away from affecting employee health plans. For example, the “Pay or Play” mandate that forms the heart of health care reform does not become effective until 2014, while the so-called “Cadillac Tax” becomes effective in 2018.

The heightened attention on these distant events may give the false impression that employers have a free pass for the short-term. However, as any client that sponsors an employee health plan knows, this could not be further from the truth. In addition to the marquee reforms that dominate the headlines, the new health care reform legislation also includes a raft of varied and far-reaching benefit reforms that become effective for plan years beginning after September 23, 2010. For plans that operate on the calendar year, this means that 2011 will be the first phase of implementation.

As this article goes to press in early 2011, employers are scrambling to get their plans ready to comply with these new benefit requirements. Even though the law was passed in early 2010, guidance has been trickling in throughout the year, leaving employers with just a few months to get up to speed on the new 2011 requirements. Many changes require extensive plan review and discussions with third-party administrators and vendors, not to mention careful financial planning to absorb the costs of expanding health care benefits for their employees.

Over the next few months, the practical effects of health care reform will unfold as plans begin to operate under the first wave of health care reform requirements. What follows below is a list of five developments to watch for as health care reform takes its first steps during 2011.

## 1) **Grandfathered Plans Revisited**

When the health care reform bill was passed in early 2010, employers were introduced to the newest



*by D. Finn Pressly*

celebrity in the employee benefits world: grandfathered plans. As the length of this section of the article illustrates, grandfathered status is a complex issue that casts a long shadow.

The notion of a grandfathered plan has its roots in the early campaign promises of the health care reform movement. Employers were assured that their existing coverage would be protected from health care reform. In August of 2009, President Obama himself said, “If you like your health care plan, you can keep your health care plan.” As employers soon learned, this didn’t exactly turn out to be the case.

The general idea of grandfathered coverage has been implemented as follows: coverage that existed on March 23, 2010 is automatically grandfathered, and therefore exempt from some of the new health care reform requirements. Grandfathered status is not

permanent, however. As discussed below, coverage can lose its grandfathered status if the plan sponsor enacts certain prohibited changes. The stakes are high because once a coverage option loses grandfathered status, it can never be regained. Unfortunately for employers, there is no such thing as a born-again grandfathered plan.

One of the biggest questions facing employers during 2010 was whether or not their coverage will maintain grandfathered status. This analysis often boiled down to a simple cost-benefit analysis: do the perks of grandfathered status outweigh the potential cost and effort of staying grandfathered.

First, we look at the perks. The biggest argument in favor of keeping grandfathered status is that the coverage is deemed exempt from some health care reform obligations. One common misconception about grandfathered plans is that they are wholly exempt from health care reform. In fact, many reforms apply to all group health plans – regardless of whether or not they are grandfathered. For example, the new requirement to extend dependent coverage for children up to age 26 applies to all plans – not just those plans that lose grandfathered status. Similarly, grandfathered plans are not exempt from the new restrictions on imposing lifetime and annual dollar limits on essential health benefits.

That being said, there are some unmistakable perks associated with grandfathered status, such as an exception for the rules that group health plans must provide 100% coverage for preventive health care services with no employee cost-sharing. These services include a wide variety of services, including vaccines, counseling opportunities, mammograms, folic acid supplements for pregnant women, STD screenings, alcoholism counseling, and certain vision screenings for children. (A full list of covered preventive services is available online at [www.healthcare.gov](http://www.healthcare.gov)). While this opens an array of new services at no cost for participants, covering preventive services could certainly increase annual benefit costs for employers. Grandfathered plans are also exempt from other reforms, including expanded external review procedures for claims appeals (discussed below), new reporting duties to the Department of Health and Human Services, expanded access to out-of-network emergency services, and new rights with respect to selection of a primary care provider.

Keeping grandfathered status is not an easy task, however. To do so, employers must give up certain rights

with respect to the coverage that was offered on March 23, 2010. Employers cannot eliminate all (or substantially all) benefits to diagnose or treat a particular condition. Additionally, employers cannot increase participant cost-sharing (such as coinsurance), nor can they adjust fixed-amount cost-sharing (such as copays) or their own employer contribution rate beyond a certain threshold.

The chart below provides a rough summary of the pros and cons associated with grandfathered status. In fact, some employers ran the numbers and realized that it made better financial sense to voluntarily drop grandfathered status than to make the sacrifices necessary to maintain grandfathered status. During 2011, expect to see this analysis repeat itself. Employers that were able to maintain grandfathered status for 2011 will have to revisit this analysis and decide whether they can – or want to – keep grandfathered status for 2012.

Not surprisingly, with each passing year, employers will likely find it increasingly difficult to keep their contribution schedules essentially frozen as of the March 23, 2010 cut-off date. For that reason, 2011 will provide an invaluable opportunity for employers to study the real costs and practical effects associated with providing the additional services required for non-grandfathered coverage (particularly with regards to the new external appeals processes, which are discussed in greater detail below).

For those plans that do retain grandfathered status, 2011 will also see increased participant communication regarding a plan’s grandfathered status. If certain benefit coverage retains grandfathered status, the employer is required to publish a notice to its employees alerting them of this fact and giving them the opportunity to request more information about the plan’s grandfathered status. This means that employers should be prepared to have the communication materials and supporting documents necessary to adequately respond to patient requests for information about grandfathered status.

<b>Grandfathered Plan Considerations</b>	
<b>GF Status Perks</b>	<b>Drawbacks of Maintaining GF Status</b>
Grandfathered plans do not have to provide first-dollar coverage for preventive care services.	Limits on adjusting certain financial elements of the plan, such as copays, employer contributions, employee cost-sharing.
Grandfathered plans are exempt from the new, expanded claims appeal procedures.	Plans cannot eliminate benefits to treat or diagnose a particular disease or condition.
Grandfathered plans will not have to file new annual reports with the Department of Health and Human Services.	Additional employee communication requirements, and related recordkeeping.

Employers may also want to consider additional communications to address one of the more subtle effects of health care reform – an issue that South Floridians recognize as the “mi primo” issue. During 2011, employees of different companies will begin to take advantage of the new benefits offered through health care reform and begin comparing notes with each other about their coverage. For example, those employees who participate in a non-grandfathered plan will enjoy 100% coverage for preventive services. As friends and relatives talk about their health plans, employees in grandfathered plans may ask pointed questions about why mi primo’s plan provides free preventive services, while their own grandfathered coverage does not.

## **2) Watching the New Appeals Processes in Motion**

As mentioned above, plans that are not grandfathered in 2011 must comply with new requirements governing appeals of benefit determinations under their plans. Generally speaking, health care reform adds a new level of independent external review on top of existing claims procedures, which will be a big change for self-insured plans. The new external appeals process will require an unprecedented level of cooperation between plans, claims administrators, and a new class of external reviewers called Independent Review Organizations, or “IROs.”

Employers that sponsor non-grandfathered plans are, in essence, the guinea pigs testing a new system of external review. Never before have self-insured plans been required to contract with IROs to comply with claims procedures rules. 2011 will be an extended case study to see how plans, administrators, and IROs work together to develop the systems and processes necessary to comply with health care reform’s new procedural requirement. This new rule provides added incentive for employers to retain grandfathered status for 2011 – even if just for one year. By the time 2012 comes around, the external appeals processes will have had a full year to get settled. This means that plans that retain grandfathered status for 2011 but lose it in 2012 will not be jumping into a brand new system. The idea is that 2011’s guinea pigs will have helped work out the kinks in the system so that plans complying with the new rules for the first time in 2012 will not be jumping into uncharted waters.

## **3) Preparing for W-2 Reporting**

Health care reform also imposes a new W-2 reporting requirement on all plans, regardless of their grandfathered status. The new rules require employers

to report the aggregate cost of employer-provided health care coverage on an employee’s Form W-2. This new rule was intended to be put into effect for 2011, but many employers expressed concern that they would not be able to adequately adjust their payroll systems in time for 2011. Part of this hesitation may have stemmed from the fact that the Internal Revenue Code grants employees the (rarely-exercised) right to request a W-2 at any time following the termination of their employment, which would mean that employers would need to be ready to produce a compliant Form W-2 as early as January 2011. To further compound the confusion, employers lack definitive guidance on how to calculate the aggregate cost of coverage. For example, as of press time of this article, questions remain about how to value the cost of health-care coverage provided through on-site medical clinics. Perhaps in response to pushback from plan sponsors, the Internal Revenue Service announced that it would not enforce this new rule for the 2011 Form W-2. This gives employers an additional year to get their payroll systems ready to comply with the new rule. Additionally, the new W-2 reporting requirement will also require employee communications to explain what the new figures on their W-2s represent. Many employees will assume that they are being taxed on the value of their health care, so employers should anticipate responding questions about why these numbers are appearing on the Form W-2. Thankfully, the enforcement delay until 2012 gives employers much-needed breathing room, which will allow them to spend 2011 getting ready to comply with this new rule.

## **4) The ERRP Gets Into Motion**

Health care reform did more than impose new rules on plans; it also introduced a unique new program designed to help defray the cost of providing medical benefits to early retirees. The Early Retiree Reinsurance Program provides employers access to a \$5 billion fund that can be used to reimburse employer plans for 80% of the health costs between \$15,000 and \$90,000 incurred by early retirees and their covered spouses and dependents. The program defines early retirees as former employees that are above the age of 55 but yet eligible for Medicare. The ERRP will continue to reimburse claims until it exhausts its \$5 billion fund.

When guidance on the ERRP was released in 2010, employers were quickly reminded that the ERRP’s \$5 billion buffet is no exception the old rule that there’s no such thing as a free lunch. First and foremost, participation in the ERRP is by application only. The Program limits how employers can use the reimbursement funds, and imposes

additional recordkeeping duties. For many employers, the cost of completing the application and complying with the Program rules were outweighed by the lure of the potential reimbursement bonanza offered through the ERRP.

The Program began accepting applications during the summer of 2010, and recently issued guidance on how to submit claims for reimbursement. Because the ERRP has a finite pool of money from which to reimburse claims, employers have been keen to make sure their paperwork is submitted on time so that they can begin submitting claims as quickly as possible. With the preliminary application work completed, the real ERRP action will begin 2011 as the reimbursement machinations get underway. As noted above, employers must abide by strict Program guidelines, particularly with regards to how they use the money received as reimbursements. Employers were required to certify that they would use ERRP reimbursements for certain limited plan purposes: to reduce out-of-pocket costs for plan participants, reduce the employer's premium costs, or a combination thereof. Additionally, the ERRP places an affirmative duty on employers to maintain records related to ERRP reimbursements and produce them to the Secretary of Health and Human services upon request.

As ERRP money begins to be paid out in 2011, employers should be careful to document their use of the reimbursements and track where their reimbursement money goes so that they can properly respond to a federal audit. One solution may be to create new subaccounts so the employers can track how their ERRP money is spent. Program rules also require approved employers to issue a notice to all plan participants – not just early retirees – explaining that the employer has elected to participate in the ERRP and may receive reimbursements that may be used to lower plan costs. Like all ERRP requirements, employers must comply with this rule even if the plan never files a single claim for reimbursement.

## **5) Amendment for FSAs**

Health care reform also imposes significant limits on how employees can use pre-tax dollars set aside in a flexible spending account (FSA). (This is another example of a new reform that applies to all plans, not just those that lose grandfathered status). Effective for purchases beginning on January 1, 2011, FSAs cannot be used to purchase over-the-counter medications (except for insulin), unless the employee produces a doctor's

prescription for the medication. So, for example, if the employee wants to seek reimbursement from an FSA for his purchase of an over-the-counter aspirin, he cannot seek reimbursement for the purchase from his FSA unless he also submits a doctor's prescription for the aspirin.

Participants also face restrictions on purchasing over-the-counter medications with their FSA debit cards, which were a quick and easy way for participants to access money from their accounts. In most cases, participants must now file a formal claim for reimbursement from their FSA, or comply with complex guidelines for substantiating prescriptions for over-the-counter medications prior to purchase. Employers communicated this change to participants during open enrollment in 2010, but there is still work left to be done in 2011: namely, amending the cafeteria plan to reflect this new change. Recently-issued from the IRS offers transitional relief that gives plan sponsors until June 30, 2011 to retroactively amend the plan documents to incorporate these new FSA rules. This means that employers who are preoccupied with other health care reform issues during the final months of 2010 can wait until 2011 to address this particular cafeteria plan amendment.

## **On the Horizon**

While this list is by no means comprehensive, the five topics discussed above give some hint as to the breadth of health care reforms being put into effect in 2011. In addition to the "known" reforms facing employers, new regulations and guidance are constantly being issued that create new duties or change existing rules – turning health care compliance into an increasingly complex game of Whack-a-Mole. For example, up until recently, employers operated under the assumption (as spelled out in prior guidance) that their insured coverage would lose grandfathered status if they entered into a new policy or contract after March 23, 2010. However, new guidance was issued in November of 2010 that prospectively reversed this rule, which illustrates how quickly rules can be adjusted. For many employers, these quick changes in rules can have far-reaching business and employee relations effects.

On top of the 2011 reforms, more requirements are waiting the wings. For example, health care reform calls for the automatic enrollment of participants into certain health care plans. As of the press date of this article, guidance on this new requirement has not been issued, so employers still have no idea when the new rule will become effective.

Additionally, employers will receive guidance in the next year or so about the new benefit summary requirement, which is commonly referred to as the mini-summary plan description (or “mini-SPDs”). These short plan descriptions are not intended to replace summary plan descriptions, but instead represent one more documentation requirement that employers must keep track of in the future.

The sheer volume of new health care requirements that must be set into motion in 2011 makes the major reforms of 2014 seem comparatively distant. The requirements being put into place for 2011 are merely a prelude to the fundamental and systemic overhaul of the health care system anticipated as part of the government requirement to carry health insurance. Given that employers have little to no guidance on what to expect for 2014, the best advice for clients is remain vigilant and flexible to respond to the changing benefit scene set into motion by health care reform.

*D. Finn Pressly is an employee benefits attorney in the Chicago office of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., a labor and employment firm with more than 500 attorneys in 40 offices nationwide, including Miami, Tampa, and St. Thomas, USVI. He received his undergraduate degree (cum laude) and law degree from the University of Notre Dame. He is also a graduate of the University of Florida's LL.M. degree program in taxation. Mr. Pressly is a native of Palm Beach County, and he is licensed to practice in Illinois and Florida.*



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# The Role of Enterprise Risk Management & Tort Liability

As companies target the bottom line of their accounting statements to augment profits, there has been a pronounced shift toward anticipating and hedging against potential litigation. Corporations often cause injury to parties who do not participate in the enterprise as owners, employees, or customers, thus giving rise to “enterprise liability.” Mark Geistfeld, *Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?*, 45 UCLAL. REV. 611, 612 (1998). (“[U]nless the business was negligent, it is ordinarily not liable for the injuries of someone with whom it did not have a contractual relationship.”). Risk management is of particular interest to members of the Cuban-American Bar Association (“CABA”) as the state and federal courts in Miami-Dade County resolve the plurality of personal injury litigation involving the 18,000,000 passengers who set sail each year.



By Jordan Dresnick

A popular vehicle to meet this goal has come in the guise of risk management, which is still a young and evolving discipline. Proper risk management involves determining which of a corporation’s activities creates a potential for loss or exposure to liability and then calculating the expected loss. Although the liability waiver emerged decades ago as an attempt to shield corporate coffers against the piercing arrows of plaintiffs’ counsel, the jurisprudence in the area has been suffocated with significant clout.

“Risk management is the practice of assessing and identifying the [myriad] risks facing a person, an institution, or society because of its activities and

environment, determining the likelihood of losses and other consequences from those risks, and taking appropriate actions,” which include monitoring the risks and reducing the potential damage and related consequences. James Fanto, *Anticipating the Unthinkable: The Adequacy of Risk Management in Finance and Environmental Studies*, 44 WAKE FOREST L. REV. 731, 731 (2009). Although risk management is most frequently applied to investments, recent legal scholarship and federal legislation have highlighted the role of risk in corporate governance. Enterprise risk management is the procedure by which a corporation’s officers and directors define the firm’s strategies and objectives so as to arrive at an optimal balance between growth, return, and risk management. Risk can take several forms for companies, including accounting fraud, labor relations, securities fraud, lack of internal controls, and weak corporate governance. However, one of the most significant risks faced by a company is the potential for tort liability bet-the-company litigation.

Some CABA members have already witnessed the ripple effect in personal injury litigation stemming from the Florida Supreme Court’s opinion in *Kirton v. Fields*, 997 So. 2d 349 (Fla. 2008). In *Kirton*, Bobby Jones took his son to a sports motor park to drive an all-terrain vehicle (“ATV”). To gain entry into the park and ride the ATV, Jones signed several documents of legal import, including a release, a waiver of liability, assumption of risk, and an indemnity agreement. While operating the ATV, the minor lost control on a particular jump and was ejected, hitting the ground, whereupon the vehicle landed on top of him, taking the minor’s life.

The minor's personal representative brought a wrongful death claim against the owners, operators, and manager of the park. The trial court granted the defendants' motion for summary judgment, noting the lack of genuine issue of material fact because Jones had "willfully and with full understanding" executed the pre-injury release on behalf of his son and later filed an affidavit stating that it was his intention to waive the right to sue for the death of his child and that the release served to forever discharge the defendants of any and all loss or damage and any claim or demands due to the injury of the minor or his property. The Fourth District affirmed that the material facts were not in dispute but reversed the lower court's enforcement of the release, thus enabling the plaintiff to litigate the wrongful death claim.

The case eventually reached the Florida Supreme Court, which answered the question of "whether a parent may bind a minor's estate by the pre-injury execution of a release" in the negative. The court considered the public policy concerns and the potential chilling effect on the willingness of individuals to volunteer amidst a potential minefield of personal liability, in the absence of waivers. From the outset of the opinion's second footnote, the court expressly stated that its decision in *Kirton v. Fields* should not be read as limited solely to pre-injury releases signed in the context of for-profit commercial activities.

Since the recent shift in Florida law, effectively nullifying pre-injury waivers executed by parents on behalf of their children, businesses across the state have become weary of exposure to tort liability. Even businesses whose customer base is comprised mostly of adults, have wheezed at the potential legal implications affecting their patrons. These companies also cater to the children in accompanying their parents. Central Florida theme parks, activity providers, the Florida Restaurant and Lodging Association—including SeaWorld, Disney World, and Gatorland—have joined the bandwagon to urge state lawmakers to overturn *Kirton v. Fields* and are supporting two bills currently before the Florida legislature that would allow natural guardians or parents to waive and release, in advance, any claim or cause of action that would accrue to minor children to the same extent as any adult. These bills would effectively

overturn *Kirton*. The state's trial lawyers argue that the measure is overbroad and could lead to protecting truly negligent recreational businesses that threaten the safety of children across the State of Florida.

If left unaltered by the Florida legislature during the current session, *Kirton* will have several long-lasting impacts on the manner in which corporations, both in and out of the state, anticipate risks that were previously immunized by exculpatory agreements. First, corporate risk management offices must undertake a careful analysis of the consequences exposed by the invalidation of parental waivers. Second, corporations will likely need to carry additional insurance to cover lawsuits by minors, which are now unleashed by the blanket voidance of certain pre-injury waivers. This in turn will lead to the eventual rise in prices charged to customers, as businesses receive the bills from the insurance contracts. In the end, the consumer will face a higher cost to engage in certain activities as a result of the delicate balancing between the state's role as *parens patriae* and the parent's right to assess the perils awaiting her child. Based on the very nature of the American tort system, a parent's absolute waiver of a potential suit against a commercial entity, or any party for that matter, greatly diminishes the potential risk to the enterprise.

The future is still uncertain as parties join the intense battle to change *Kirton*. In 1533, Martin Luther warned of the import of good corporate citizenship: "Everyone should conduct his trade, craft and business in such a way that he overcharges no one, cheats no one with false wares, is satisfied with a fair profit, and gives people something worthwhile for their penny." Nearly 500 years later, the penny paid for another's trade will likely go toward insurance against future litigation.

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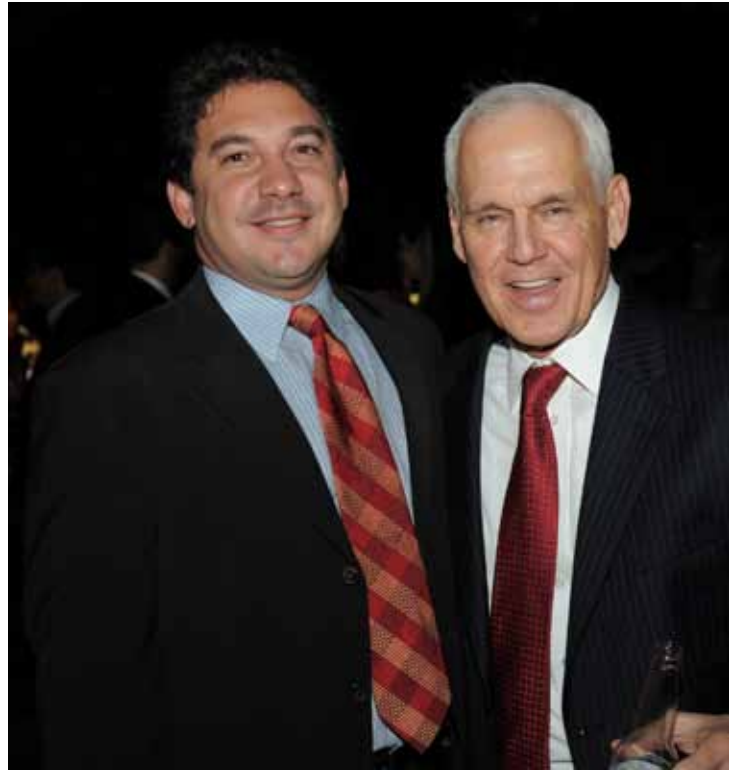
**Jordan A. Dresnick** is a member of Columbia Law School, where his research focuses on securities and financial regulation. Mr. Dresnick is an elected Director of the Dade County Bar Association. Before returning to academia, he maintained a commercial litigation and antitrust practice at two national law firms. He may be reached at [jordan.dresnick@law.columbia.edu](mailto:jordan.dresnick@law.columbia.edu)

# [CABA PAST PRESIDENTS' DINNER]

Miami, October 28, 2010



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# Interview with Candidate for City of Coral Gables Commission, Frank C. Quesada

This April, the City of Coral Gables will hold its mayoral and commission elections. One of the various candidates for the City Commission is Frank C. Quesada. Mr. Quesada has been a member of CABA since he was in law school and currently works at Fowler Rodriguez Valdes-Fauli. Mr. Quesada received his undergraduate degree from Villanova University in 2002 and his J.D. at St. Thomas School of Law in 2006. I had the opportunity to interview Mr. Quesada, and thank him for his time.

*- Maria D. Garcia*



*Frank C. Quesada, Candidate for Coral Gables City Commission*

## **How has CABA helped you in your new role as a candidate for the Commission of the City of Coral Gables?**

*Since first joining CABA as a student member some years ago, I have made many friends that have helped me grow as an individual and as a candidate. Many of CABA's members and directors have been instrumental to my candidacy by helping me reach out to residents and by acting as a sounding board in my crafting of potential policies for the City of Coral Gables.*

## **What major life experiences do you think equip you to be a Commissioner for the City of Coral Gables?**

*There are a number of events in my life that have shaped me as a candidate and afforded me the experience necessary to be an effective Commissioner for the City of Coral Gables. However, my experiences as a practicing attorney and in volunteering for numerous civic organizations, ranging from La Liga Contra El Cancer to the Coral Gables Community Foundation, have helped me gain a well rounded understanding of our community and given me the tools to successfully lead Coral Gables in the future.*

*I have broad experience resolving significant corporate disputes for companies such as Royal Caribbean Cruise Lines and Carnival Cruise Lines. Most recently, I was privileged to be a member of the trial team that successfully advocated on behalf of Carnival Cruise Lines against Rolls Royce in a major fraud and misrepresentation action.*

*As a volunteer and board member of La Liga Contra El Cancer I have had the privilege of working with this amazing organization. I am involved with La Liga because I want to ensure that our generation keeps this organization relevant and at the forefront of helping those with Cancer throughout our lifetime and beyond. As one of the few Cuban organizations that have survived exile from Cuba, La Liga is not only an organization that helps those in need, but also symbolizes Cuban-American values and our culture of giving and charity. Throughout my tenure with La Liga, I have primarily been involved in fundraising and help to drive direct significant financial contributions to La Liga through a yearly party called "Arroz Con Mango".*

*As a board member of the Coral Gables Community Foundation, I have been able to assist during the implementation of new initiatives within the City of Coral Gables. Through this Foundation, I took part in the development of Coral Gables @ Home. This program is directed towards those seniors in our community who may no longer be able to perform some of the tasks that many of us take for granted. In a short period of time, the program has provided assistance to over 100 seniors within the city.*

## **If elected, which issues will you first confront as Commissioner? Which do you think will be especially relevant to the Hispanic community in South Florida?**

*The most pressing issues affecting our community are the troubling local and national economies. We are at a period in time where our local and national leaders need to be proactive in addressing departments and programs that are placing an excessive burden on our governments. Because of this, my central focus will be to cut excess spending, focus on the current employee pension program to make the program fair and reasonable for both the city and its employees. Further, I will advocate on behalf of initiatives such as tax breaks for both our residents and local businesses. It has been proven time and again that when our businesses are healthy our communities prosper.*

## **Who has been the most influential person in your political career?**

*My grandfather, Carlos Perez-Heydrich, has been a major influence in my interest in public service. Like many of us, my parents and grandparents sacrificed so much for us to be here. My grandfather left a thriving law practice in Cuba before being forced out by the Castro regime. Although he was forced to leave everything behind and start from scratch, he was able to raise a family, learn a new language, attend school, start a successful new career and continue to give back to his community at every opportunity. His ability to balance his life and continue to do so much for his community, no matter the obstacles, is something that I aspire to everyday.*



## What do you think is the future of politics in South Florida and more broadly nationally for the next generation of Cuban-Americans?

*The future is promising for the next generation of Cuban-Americans. Recently, there have been a number of extremely well qualified Cuban-Americans elected to office, such as City of Miami Commissioner Francis Suarez, State Senator Anitere Flores, State Representative Carlos Trujillo, State Representative Jose Diaz and State Representative Eric Fresen, to name a few. However, I think our generation's political leaders will be judged on how well we deal with the current economic situation both locally in South Florida as well as nationally. This is why it is important for all municipalities to focus on limiting their spending, examining their pension systems and examining every line item to cut unnecessary costs so that savings can be passed on to constituents. Municipalities should do everything in their power to reduce the burden on taxpayers, rather than create additional obstacles.*

*As society and the political system in Cuba continue to evolve, what do you anticipate will happen on the island in the next to five years? Do you think our state and local governments will have a role in the coming years?*

*I strongly feel that we are nearing the end of the Castro Regime. With the combined efforts of the Cuban-American community we can make this a reality. Our generation, whether involved in the public or private sectors, will have a significant role in reclaiming our parents' Cuba. We are fortunate to be alive at a time where Cuban-Americans can play a key role in ensuring a democratic transition.*

## What message would you like to send to the members of CABA?

*As a Coral Gables City Commissioner I will work tirelessly to preserve the character of the Coral Gables community that we know and love by continuing to move our city forward. I will focus on preserving our community and will remain proactive as I aim to improve our quality of life.*

*If you are currently a candidate for public office and would like to inquire into CABA Briefs, please contact Maria D. Garcia, Media Editor, at [mgarcia@houckanderson.com](mailto:mgarcia@houckanderson.com).*

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Northern Trust, Miami, October 20, 2010



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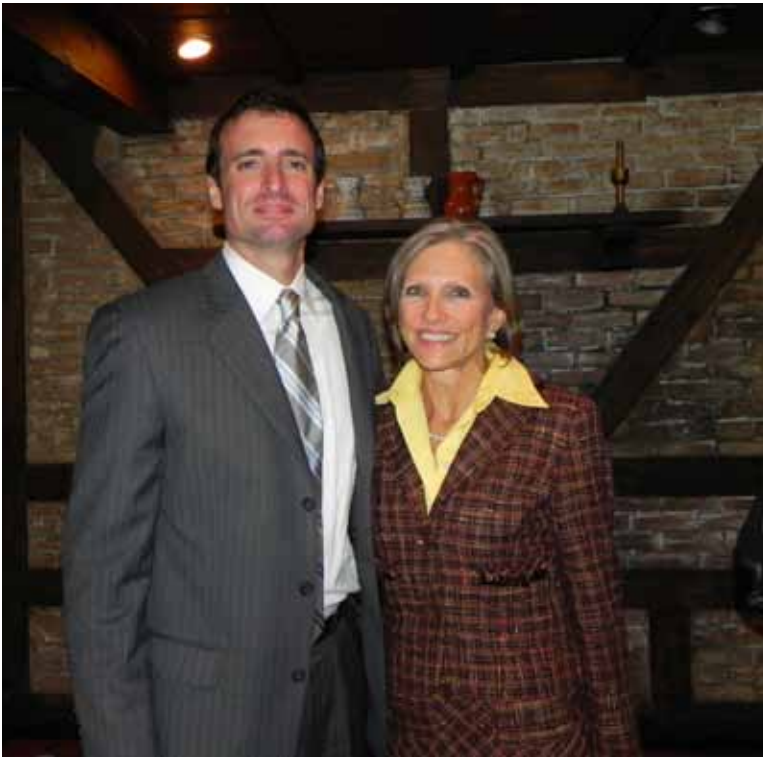


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Northern Trust, Miami, October 20, 2010



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Fairchild Tropical Botanic Garden, Coral Gables, September 11, 2010





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# [CABA YOUNG LAWYERS SUMMER SOCIAL]

Baru Urbano, Miami, August 11, 2010



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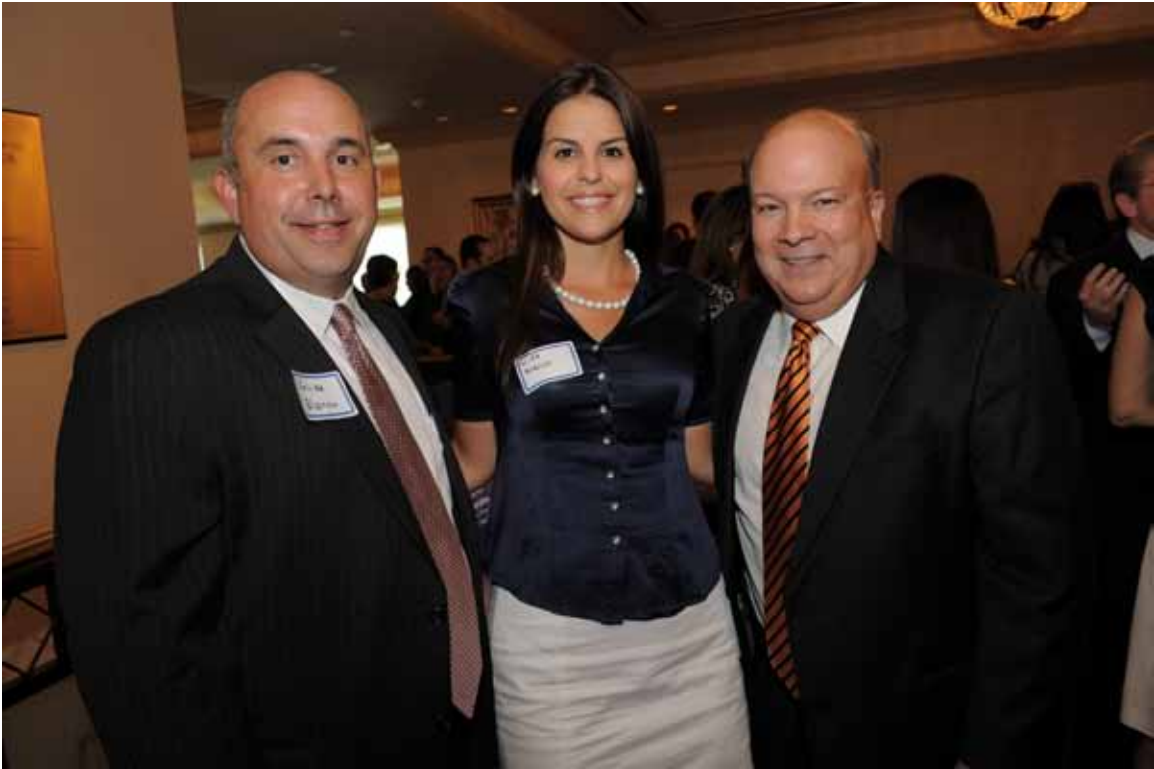
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*for*

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