

CABA BRIEFS

CUBAN AMERICAN BAR ASSOCIATION

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By Elizabeth M. Hernandez

We are pleased to bring you the second issue of our 2003 Newsletter. CABA has accomplished many important objectives over the years. This year promises to be no different.

CABA has grown tremendously in size and influence in the community. With this growth comes new responsibilities and challenges as we strive to represent the interests of a diverse membership while effectuating the changes necessary to ensure that the Hispanic community is appropriately represented in positions of leadership in all branches of government.

CABA hopes to keep the membership informed about the organization's accomplishments and to communicate information about other matters of interest to lawyers, judges, legislators and professionals. This publication is made possible through the great generosity of distinguished members, law firms and institutions which include advertisements in our issues. We thank all our readers for their continued support and express our sincerest gratitude to the sponsors who make this publication possible.

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PRESIDENT'S MESSAGE

By : Victor M. Diaz, Jr.



HOW DO YOU HOLD A DICTATOR LEGALLY ACCOUNTABLE

The past few months have been challenging ones for all persons of conscience who care about the violation of human rights in Cuba. The recent crackdown of dissident civic leaders by the Castro dictatorship violates every norm of international law recognized by civilized nations. The response from several of the international organizations whose responsibility it is to monitor global human rights abuse has been disappointing. The outrage and swift condemnation that should accompany the blatant lawlessness engaged in by Fidel Castro have not been universal. In light of this lukewarm response from certain sectors of the established legal regime whose function it is to regulate international human rights violations, Cuban Americans, particularly those of us who are lawyers, cannot help but ask ourselves: how do you hold a dictator accountable to the rule of law?

For over 40 years, Fidel Castro systematically has repressed freedom of thought, freedom of expression, freedom of assembly and freedom of the press in Cuba. Castro has employed all of the punitive means available to a unilateral despot in order to achieve the repression of civic liberties in Cuba. People who disagree with the Castro dictatorship have been subjected to indefinite detainment without the presentation of criminal charges. Those who are eventually brought to trial often are tried before “kangaroo courts,” secret tribunals from which the international press and independent observers (including family members of the accused) are excluded. Those convicted are sentenced to long prison terms – or in the most egregious cases – summarily executed. During the most recent crackdown, Cuban citizens were **criminally** charged for the “offense” of organizing independent libraries, reading or circulating international publications, petitioning their government for reform and congregating to discuss political issues. Convicted of these so-called “crimes against the state,” seventy-five men and women have been imprisoned during the past three months for periods for up to forty years. Castro’s lawlessness is rendered all the more maddening by the silence of so many “first world” nations and their political and civic leaders in the face of such blatant despotism.

Without question, the actions of the Castro dictatorship violate numerous basic norms of international human rights law. So what can we as lawyers do to hold Castro accountable for his crimes against humanity and the Cuban people?

Some of the international organizations whose primary responsibility it is to monitor global human rights violations and provide a forum for addressing international human rights violations, such as the United Nations’ Human Rights Commission, have become captives of the very lawless states which they should be condemning. The shameless silence of the United Nations’ Human Rights Commission in the face of Castro’s brutal crackdown further erodes the little credibility this body has had on Cuba issues.

Fortunately, not all international human rights organizations have become captive to the solicitous diplomacy and political horse trading of the Castro regime. The human rights arms of the European Community and the Organization of American States have indicated a willingness to take up the issue of Castro's lawlessness. Prominent Cuban-American lawyer, Pedro Martinez-Fraga, has filed a complaint with the Inter-American Commission on Human Rights, an agency of the Organization of American States, charging the Castro regime with widespread violations of international human rights law. Pedro is to be commended for his quick and unilateral response to Castro's actions. Thanks to efforts of the CABA Board members, Jorge Mestre, Roland Sanchez-Medina, Tony Castro and others, the Cuban American Bar Association is filing our own complaint before the Inter-American Commission alleging a broader and more specific array of international law violations by the Cuban government. Although the ability of any international human rights organization to sanction or reverse the actions of the Castro dictatorship is limited, condemnation of Castro by the Inter American Commission will — in some measure — let the dissident movement in Cuba know that they have not been abandoned by the international community, nor by the Cuban exile community.

Domestically, CABA has worked and will continue to work with the ABA's Center for Human Rights to persuade the ABA to issue a "Rule of Law" letter directed to the Castro government noting the violations of international human rights, condemning the behavior and demanding the re-establishment of the rule of law in Cuba. Thank you to CABA Board member, Gene Hernandez and former board member, Adolfo Jimenez, for working with the ABA on this issue and to Marlene Morales and Roland Sanchez-Medina for their efforts to reach out to other groups as well. No one expects that the ABA's "Rule of Law" letter will reign in Castro's despotic dictatorship. However, it may help to influence or change the disturbing opinion held by some politicians and academics in this country that the brutal Castro regime is little more than some benign socialist experiment. The Cuban exile community knows better. We must use this most recent wave of despotic conduct by the Castro regime to educate international public opinion regarding the long history of systematic repression of basic civil liberties in Cuba. The recent executions of dissident leaders who were arrested, tried, sentenced and had their so called "appeals" denied in just 10 days needs to be understood as a continuation of a forty-three year history of repressive conduct by the Castro regime. This legacy of despotic behavior has, in just the past few years, included shooting down civilian aircraft flying over international waters and the intentional sinking of a tugboat full of refugee men, women and children.

To show solidarity with the Cuban dissident movement CABA also has decided — for the first time in our history — to begin providing financial support to dissident leaders within Cuba. CABA has created a humanitarian relief fund which will send the maximum permissible cash stipend to one or more specifically identified independent, dissident lawyers in Cuba. It is our hope that this fund can help these dissident lawyers continue their efforts to restore some semblance of an independent rule of law in Cuba. CABA members and others who support the work of these dissident lawyers are encouraged to contribute to our humanitarian relief fund. Little more in dollar terms than what we bill our clients for one hour of our legal services can sustain a dissident leader and his/her family in Cuba for many months.

CABA has many aspects to our mission. One of the most important is supporting the struggle to restore respect for basic civil liberties and universal human rights in Cuba. Meaningful progress on these two fronts probably will not come until Castro is dead. But while we wait for the death of a tyrant, we must do everything in our power to ensure that the international community's eyes remain open to the brutality of the Castro regime and seize every opportunity to hold Castro accountable before multi-national organizations for his systematic violations of international law. We may never be able to bring Castro to account personally before any earthly war crimes tribunal for the tens of thousands of political opponents he has murdered or imprisoned, but not to try is not an option.

Victor M. Diaz, Jr. Esq

“Keep Calm, Cool, and Collected”



By Corali Lopez-Castro¹

When Judge Goderich attended high school in Virginia, the school motto was, “Keep calm, cool, and collected.” It is a motto that has served him well during his twenty-five years on the bench. Few lawyers, if any, would disagree that Judge Goderich has the ideal temperament for a judge. He acknowledges that his temperament has been an asset to him

on the bench, and in addition, in his typically modest fashion, says that he has been at the right place at the right time throughout his career.

Although Judge Goderich had studied in Virginia, and had dreamed of attending Duke University, his return to the United States was more traumatic, as was the case for most people who were forced to leave Cuba. When he attended high school in Virginia, his mother’s goal was that he attend a school where there were no other Cubans so Judge Goderich would be forced to learn English. Little did his mother know that there were 23 Venezuelans attending the high school, and Judge Goderich was able to speak Spanish any time he wanted.

Ironically, though, it was the American Bar Association that helped him find employment upon his return to the U.S. The ABA arranged for Cuban lawyers to interview with some of the largest, best known U.S. companies, such as IBM and MetLife. His first job was with IBM in the stock transfer department along with two other jobs he had to maintain to support his family. He worked seven days a week. His goal, however, was to be admitted to law school in the United States, which he was, at the University of Miami. He graduated in 2-1/2 years, taking courses in the summer. Because he was not a U.S. citizen and so could not yet practice law, his first job was at the University of Miami School of Law library. Judge Goderich first worked as an assistant librarian and then became the Director.

In 1975, he was the first Cuban-American appointed by Governor Askew as a judge on the industrial claims bench. In 1978, Judge Goderich was appointed as a circuit court judge. Finally, in 1990, he was appointed to the Third District Court of Appeal by Governor Martinez. At the time of his last appointment, he said he felt ready for a change.

Judge Goderich was one of the founding members of the Cuban American Bar Association and its first president. He and the other members recognized the need for a voluntary bar association for Cuban lawyers as there were no Cuban judges, no Cuban law professors, and no educational facilities for Cubans. Judge Goderich and the other founders sought to empower the Cuban lawyers and were quickly able to “make friends and influence others.” He is proud of what CABA has become, and is amazed at how much it has changed.

As we all attended the Coconut Grove Playhouse’s presentation of the Spotlight Award to Judge Goderich on May 16th, we realized how much he has given to this community and to Hispanic lawyers. He is a man of intelligence and modesty. We are grateful to him.

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¹ The author is a partner in the firm of Kozyak, Tropin & Throckmorton and a member of the CABA Board of Directors.

HONORING JUDGE GODERICH

On May 16th, CABA, in conjunction with Gibraltar Bank, co-sponsored an evening honoring CABA founder and our first President, Judge Mario Goderich. The occasion was the presentation to Judge Goderich of the Coconut Grove Playhouse's First Annual Spotlight Award. Over 500 hundred judges, lawyers and community leaders joined with Judge Goderich's friends and family in honoring Jude Goderich for his many years of service to our community. The evening was highlighted by a performance of "Once Removed" by Cuban-American playwright Eduardo Machado and starring Lucy Arnaz.



HONORING JUDGE GODERICH



To recognize Judge Goderich's contribution to CABA and the legal profession, the Cuban American Bar Foundation announced the creation and full endowment of the Mario Goderich Merit Scholarship at Florida International University School of Law. CABA wishes to thank Gibraltar Bank, the Coconut Grove Playhouse, Ervin and Janice Gonzalez, our members and all the donors to the Mario Goderich Scholarship, for helping to make this wonderful tribute to Judge Goderich possible.



THE CABA BOARD RENEWS ITS COMMITMENT TO THE CABA PRO BONO PROJECT

By: Ena T. Diaz, Esq.²

To encourage other members of the organization as well as demonstrate the commitment this organization has made to providing pro bono services, the CABA Board voted a resolution that each member of the Board would at least take one case a year for the CABA Pro Bono Project. The Board asks CABA members to make the same commitment.

The possibility of having law students at Florida International University's School of Law serve as Project volunteers is currently being explored.

ABOUT THE PROJECT

CABA's Pro Bono Project was created in 1984 and continues to provide legal services to low-income immigrants in Miami-Dade County without regard for their immigration status. Project clients must be within 125% of the federal poverty level. The program is funded by the Florida Bar Foundation. The daily supervision of the Project is directed by the Florida Immigrant Advocacy Center, Inc. ("FIAC"), a non-profit organization founded in 1996 in response to federal funding restrictions on the availability of legal services for immigrants. FIAC has been CABA's partner in the Project since 1996.

Ursula Herrera, the Project Coordinator, handles the initial intake interviews and refers matters to Mr. Tom Zamorano, Esq., Managing Attorney for FIAC. Mr. Zamorano reviews on-going cases weekly and selects incoming cases for the Project to handle. If a case is selected, Ms. Herrera assigns the case to a CABA member, who has agreed to provide pro-bono legal services for the Project's clients. The CABA volunteer attorney to whom the case has been referred has an opportunity to meet with the client and decide whether or not to accept the case.

There are two fundamental divisions of the CABA Pro Bono Project. The first is the Pro Se Divorce Clinic and the second is a civil case assignment system. It is for the civil case assignment system, explained more fully below, that the Project is continually looking for volunteer attorneys.

THE PRO SE DIVORCE DIVISION

This program is designed to assist individuals who want to have their marriage dissolved. Ms. Herrera, the Project Coordinator, provides a monthly clinic at which she explains the dissolution process and ensures that the participants are filing the proper documentation with the Court. Notably, the pro se divorce clinic was granted a blanket waiver to a local court rule enacted in 1998 that required all pro se dissolution of marriage petitioners to participate in the Family Court Self Help Program. This saves pro se litigants the cost of the divorce packets sold by the Family Court Self Help Program.

² The author is a senior associate at the law firm of Akerman Senterfitt, specializing in the area of labor/employment law representing management, and is CABA Vice President and the coordinator of CABA's pro bono efforts in 2003.

THE CIVIL CASE ASSIGNMENT DIVISION

This division of the CABA Pro Bono Project handles matters including adoptions, bankruptcies, birth and marriage certificate amendments, contested dissolutions of marriage, consumer issues, guardianship, immigration, landlord-tenant disputes, and name changes. Ms. Herrera, the Project Coordinator, assigns a case to a CABA member that has volunteered to represent one of the Project's clients. The CABA volunteer attorney interviews the client referred by the Project to determine whether or not to accept the case. The attorney is not obligated to accept a referred case. Referred clients are responsible for costs related to the case, if any.

RECOGNITION RECEIVED BY THE CABA PRO BONO PROJECT

The Project was recognized as a Point of Light by former President George Bush due to the Project's commitment to providing legal assistance to low income immigrants regardless of their immigrant status. In 1999, the Project was selected among one of three finalists for the General Practice Solo & Small Firm Section Award.

HOW TO GET INVOLVED

If you would like to take a pro bono case for the Project, please contact Ena T. Diaz, Esq., CABA Vice President and Chair of the CABA Pro Bono Project at (305) 789-9246.



JOIN CABA FOR OUR ANNUAL MEMBER RETREAT/CLE IN KEY WEST OCTOBER 3-6

The Wyndham Casa Marina hotel will serve as our headquarter hotels and reduced room rates. Starting at \$179 per night have been arranged for the weekend.
The schedule of activities include:

Friday evening: Registration Wyndham Casa Marina Hotel.

Saturday morning: 10am-12pm CLE Session 1: Cuban Legal History.
Featured Speaker: Carlos Alberto Montaner.
Panelists: Jaime Suchlicki, Dr. Rogelio De La Torre and Rolando Amalor

Saturday afternoon: Snorkeling, Deep Sea Fishing, Lounging or Anything else your heart desires!!!!

Saturday evening: 6pm-8pm Reception at the historic and restored San Carlos Institute.

Sunday morning: 10am-12pm CLE Session 2: Cuba's Legal System: Today and Tomorrow
Panelists: Sergio Mendez, Esq. and Enrique Zamora, Esq. and others.

Sunday afternoon - Monday afternoon check out: CHILL AND ENJOY KEY WEST AND YOUR FELLOW CABA COLLEAGUES

**IF YOU ARE INTERESTED IN ATTENDING, SEND EMAIL TO mtmcrim@aol.com
A.S.A.P. TO RECEIVE FURTHER RETREAT INFO!!!**

CUBAN ASSET CONTROL REGULATIONS: BLOCKED PROPERTY

By: Sergio L. Mendez, Esq³

In 1963, pursuant to the Trading with the Enemy Act, ("TWEA") President John F. Kennedy imposed a trade embargo and ordered the blocking of assets of Cuba and Cuban nationals. Regulations implementing these sanctions are set forth at 31 CFR part 515. The Office of Foreign Assets Control of the Department of the Treasury is charged with administering and enforcing economic sanctions against targeted foreign countries, terrorists and terrorist organizations, and narcotic traffickers in furtherance of U.S. foreign policy and national security objectives. OFAC acts under general Presidential wartime and national emergency powers, as well as specific legislation, to prohibit transactions and freeze (or "block") assets subject to U.S. jurisdiction. Economic sanctions are designed to deprive the target of the use of its assets and deny the target access to the U.S. financial system and the benefits of trade, transactions, and services involving U.S. markets, businesses, and individuals.

The Cuban Assets Control Regulations, 15 CFR Part 515 (the "Regulations") were issued by the U.S. Government on July 8, 1963 under TWEA. The sanctions seek to deprive the Cuban government of U.S. dollars. Civil penalties range up to 10 years in prison, \$1,000,000.00 in corporate fines and \$250,000.00 in individual fines. Civil penalties up to \$55,000.00 per violation may be imposed. There is a total freeze on Cuban assets, both governmental and private, and on financial dealings with Cuba; all property of Cuba, of Cuban nationals, and of Specially Designated Nationals of Cuba in the possession or control of persons subject to U.S. jurisdiction is "blocked." Any property in which Cuba has an interest which comes into the United States or into the possession or control of persons subject to U.S. jurisdiction is automatically blocked by operation of law.

Banks receiving unlicensed wire transfer instructions in which there is a Cuban interest, or any instrument in which there is a Cuban interest, must freeze the funds on their own books or block the instrument, regardless of origin or designation. Blocking imposes a complete prohibition against transfers or transactions of any kind. No payments, transfers, withdrawals, or other dealings may take place with regard to blocked property unless authorized by the Treasury Department. The Cuban national may not disclaim, transfer or assign his interest. A power of attorney for these purposes is also void. The Cuban national may not directly or indirectly make any disposition concerning the U.S. asset.

An estate becomes "blocked" whenever a Cuban national is an heir or is the deceased. The benefits of a life insurance policy, annuity, or other survivorship type property benefit listing a Cuban national as a beneficiary are also "blocked". Any real property title interest passing to a Cuban national also becomes "blocked". The regulations permit the liquidation of these assets into cash as long as the net proceeds are deposited into a "Cuban Blocked Account" for the benefit of the Cuban national.

³ The author is a partner in the firm of Mendez & Mendez, a former CABA President and current member of the CABA Board of Directors.

The Regulations now permit as of March of this year that the sum of \$300.00 may be remitted directly to the Cuban national every 90 day period from the "Cuban blocked account" funds.

All persons in possession of blocked property are required to register with the Office of Foreign Assets Control. Persons subject to U.S. jurisdiction who engage in any commercial dealings that involve unauthorized trade with Cuba, either directly or indirectly, risk substantial monetary penalties and criminal prosecution.

The proper administration of estates in which a Cuban national is an heir require the appointment of a Guardian Ad Litem in order to protect the interests of the Cuban national while insuring that the Regulations are strictly complied with. Issues concerning language, communication, foreign policy, state security, current conditions in Cuba, and other difficult determinations affect the administration of estates involving a Cuban heir. In order to properly represent the Cuban national in the estate proceedings, travel to Cuba is frequently required. The Regulations require that persons subject to U.S. jurisdiction be licensed by the Treasury Department to travel to, from and within Cuba.



LUNCHEONS AND FUNCTIONS: *THE VARELA PROJECT* LUNCHEON

*O*n April 11th, before an audience of over 200 lawyers and community activists, CABA sponsored a lively debate regarding the merits and limitations of the Varela Project, a petition initiative to hold a public referendum seeking reform of the existing totalitarian Cuban government.

Panelists included Nicolas Colas, an original signer of the Varela Petition and former Cuban political prisoner; Joe Garcia, Executive Director of the Cuban American National Foundation; Carlos Saladrigas, member of the Cuba Study Group and attorney Nick Gutierrez. The debate was moderated by CABA Board member Ronald Sanchez-Medina. The Luncheon is part of CABA's ongoing efforts to highlight legal issues related to the re-establishment of democratic rule in Cuba.



Confessions of a freshman Lawmaker

By Representative: J. C. Planas



After winding down the final days of the State budget process, in what I had hoped would be the last (it's not) of a possible series of special legislative sessions, I can finally digest the journey taken over the past seven months. After almost two years as a candidate for office (a process which would best be defined as a struggle) my election and oath of office felt almost like a graduation ceremony celebrating the end of this electoral accomplishment. In reality, the pain and hard work of the election was more of a boot-camp preparing me for the sometimes more grueling road ahead. Just as a University Commencement ceremony symbolizes your entry into the proverbial "real world," as well as the end of your scholastic endeavor, my swearing in as a legislator signified not only the end of the campaign, but my entry into this testing, arduous, yet rewarding process we call legislation.

My first few weeks here were indeed a whirlwind. So many people came to me with so much unsolicited advice, I began to feel like a young Dustin Hoffman in the Movie "The Graduate" recreating that one scene where his father's friend approaches him and says "One Word,. . . PLASTICS." Of course, my scene was a lot less dramatic and the one word was "Med-Mal," but I did get that somewhat hollow feeling that Dustin Hoffman struggles with in the movie. I had done so much work to get here, yet I grappled with the fundamental questions I am sure plague most new lawmakers.

"Where do I fit in this process?"

"What do people expect of me?"

"What kind of bills should I sponsor?"

Luckily, the hectic pace at which the committee process started, avoided me getting involved in such self absorbing banter. With 60 days in which to do the peoples business, there was no time to wonder where I fit in. There was new terminology to learn and rules of procedure to study. What people expected of me, was hard work and intelligent responses to the problems facing Florida. The bills I would end up sponsoring came from my interests in the issues I was rapidly becoming involved with combined with the need in the community. It was this train of thought that led to my primary bill, re-establishing the DUI drug test after the Second DCA had ruled it in-admissible. My experience as a former prosecutor became invaluable. Eventually, my colleagues started keeping track of how many times, I would mention the fact that I was a former prosecutor compared to a Democratic member who constantly stated she had been a teacher. This became such a comical event, the public television show "Capital Update" started keeping track as well. By this point, I had learned most of the rules, how to work the system and was well on track to pass my bill.

As standard cliché's go, none is perhaps more recognized in this process than the familiar comparison of legislation to sausage making. While I have never visited a sausage making facility, nor do I personally know anyone employed in the field, I find it hard to believe that anyone at Oscar Meyer could withstand the same scrutiny as State Legislators do under 24 hour press coverage with cameras constantly scrutinizing their ingredient list. This, of course, is compiled with the ubiquitous presence of former sausage makers (ex-legislators) who have now been hired as consultants (lobbyists) whose only existence seems to be to constantly berate you with the reminder that they made much juicier sausage (fatter budget) than you do and were it not for their mandatory retirement program (term limits), they would still be making sausages while you would be at home angling for a seat in your county commission. If modern sausage making more resembled legislation, we would have much more nutritious sausages and less people would get food poisoning.

If there is one lesson I take from my experience, however, is how important yet at the same time insignificant we can be. Several years ago, while I was working as a prosecutor, I met a man named Lee Wiesenbourne. Lee was an older attorney who practiced criminal defense and was near retirement. The other prosecutors never gave him great plea offers and the defense attorneys never treated him as an equal. He always had a band aid on his face and his hands always had cuts. Upon my brief return to the State Attorneys office after my primary election, Lee came up to me to congratulate me on my election. I asked him, how he found out that I was running and if he followed politics.

"I actually served once," he said.

I was astonished. Here I had known this individual for several years, made fun of him and yet I never knew this about him. Several weeks later, during a stop in Tallahassee, I had opportunity to have lunch with Tom Gallagher, the State Chief Financial Officer. I asked him if he had served with Lee Weisenbourne. Gallagher appeared amused at the question. He took me to the first floor of the Capital where a plaque dedicated to Lee Weisenbourne hung. The plaque dedicated the Capitol building to Senator Lee Weisenbourne. "Had it not been for effort to move the Capitol to Orlando, this building would never have been built." Here was this great capitol building, one of only three modern capitol structures in the country, and it was largely due to the efforts of someone many people never heard of. This was the biggest lesson I had learned all year. Many years from now, no one will remember J.C. Planas. No one will remember Marco Rubio or Gaston Cantens. The things we do in government, however, have the power to last forever. As long as those of us who are leaders always remember that it is not about us, but about helping the state, that we must push the idea instead of the individual, then and only then, will we be able to accomplish great things.



CABA AWARDS SCHOLARSHIPS AT THREE LOCAL LAW SCHOOLS

By: Marlene Quintana Morales⁴

*F*or the first time in CABA's history, we have expanded our scholarship program and awarded scholarships to law students at the University of Miami, St. Thomas University, and Florida International University. Scholarships were awarded to students who distinguished themselves academically and/or in service oriented activities of importance to the Cuban-American community. Our sincere congratulations go out to all of the recipients.

Isabel Rodriguez-Ojea (Florida International University, B.A. 2001 *summa cum laude*) received the scholarship at the University of Miami. Ms. Rodriguez-Ojea is a second year Cuban-American law student and was recently elected to serve as President of UM's Hispanic Law Students Association for the 2003-2004 school year. Ms. Rodriguez-Ojea volunteers with the Florida Immigrant Advocacy Center's Children's Project, assisting children before the Immigration and Naturalization Service.

St. Thomas' recipient was Rocio Rams (Florida International University, B.S. 2001). Ms. Rams came to this country from Cuba at a very young age, and is currently beginning her second year of law school. While at FIU, Ms. Rams conducted research and fundraising for the Manny Mota Foundation, dedicated to serving underprivileged children.

Florida International University's first CABA scholarship went to Mauricio Rivero (Florida International University, B.A. with high honors 1991; Ph.D with high honors 2000). Mr. Rivero is in his first year of law school at FIU, while simultaneously working for the Internal Revenue Service as a tax compliance officer. Rivero, Cuban-American, also dedicates his time to the Volunteer Income Tax Assistance program, providing aid to low income and elderly individuals in the Little Havana area. Mr. Rivero serves as Vice-President of the FIU Student Bar Association and leader of its Community Service Committee.

Another first for CABA this year was the endowment of the Mario Goderich Merit Scholarship Fund at Florida International University College of Law. CABA announced the endowment at the Coconut Grove Playhouse on May 16, 2003, where Judge Goderich was also presented with the Playhouse's first annual Community Spotlight Award. Through generous donations from the following firms and individuals, CABA was able to honor one of its finest with a lasting tribute, as well as provide opportunity for advancement for law students for years to come.

LIST CONTRIBUTORS

CABA remains committed to providing opportunities and mentoring to law students in our community. CABA members will receive information in the fall regarding our renewed mentoring program, and are encouraged to participate in this very important aspect of our association. Members may also contribute to the Cuban American Bar Foundation's scholarship fund. Donations enable CABA to continue to recognize and assist local law students through scholarship awards.

⁴ The author is a partner at Muller, Mintz specializing in labor and employment law, a CABA Board member and the coordinator of CABA's scholarship and mentorship programs at 3 area law schools.



CABA

INVITES YOU TO JOIN US FOR THE FOLLOWING UPCOMING EVENTS:

September 30: Law School Mentor Reception

Place: Sheraton Biscayne Bay

Time: 6-8:30 pm

October 3-6: Annual Member Retreat / CLE

Place: Key West Florida

Headquarter Hotel: Wyndham Casa Marina

CLE: San Carlos Institute

October 9: Reception Honoring District Court Judge

Cecilia Altonaga and Magistrate Judge Patrick White

Place: Grove Isle Resort and Club

Time: 6:30-8:30 pm

October 23: Annual Judicial Reception

Place: Sheraton Biscayne Bay

Time: Noon to 7:00 pm

December 4th: Annual Elections

Place: Monty's Bayshore

Time: 6-9 pm

January 23rd: 2004 Installation Dinner

Place: Parrot Jungle Ballroom

Time: 7:30-midnight



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**We are pleased to announce our
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SWEEPING CHANGES TO THE FAIR LABOR STANDARDS ACT MAY CHANGE EXEMPT OR NON-EXEMPT STATUS FOR MANY EMPLOYERS

By: Marlene Quintana Morales

*O*n March 31, 2003, the Department of Labor ("DOL") issued proposed changes to regulations under the Fair Labor Standards Act ("FLSA")-- the first substantial update in over fifty years. The basic structure of the FLSA will not change. Employers still have to pay non-exempt employees the minimum wage of \$5.15 per hour, and overtime for hours worked over forty hours in one workweek. Instead, the changes focus on the regulations that interpret the FLSA's exemptions.

As a result, employees exempt or non-exempt status may need to be modified due to changes in the various duties tests applicable to the "white collar" exemption. The "white collar" exemptions apply to those employees who meet the definition of executive, administrative, professional (also known as the "EAP" exemptions), and outside sales employees. Below are some of the most notable changes proposed by the new regulations.

The proposed regulations would eliminate the current system that allows an employer to apply a long or a short test to determine if an employee meets the requirement for exempt status. DOL proposes to have one test (a "standard" test), to determine exempt status. Under the new standard test, an employee must be paid a minimum of \$425 per week (or \$22,100 per year), and meet the primary duty requirements of the applicable EAP exemption. This is an increase over the current long test minimum of \$155 per week. DOL also proposes a new salary level for what it calls "highly compensated employees," earning at least \$65,000 per year and performing office or non-manual work. Employees whose salaries reach this level would qualify as exempt if they have an identifiable executive, administrative, or professional function as described in the duties test.

With respect to executive employees, the proposed changes seem to narrow the pool of employees which will be eligible for the exemption. Current regulations only require that an exempt manager "customarily and regularly direct the work of two or more employees" and have the management of the enterprise as his or her primary duty. However, the proposed regulations streamline the duties test to apply the exemption only to those employees with the authority to hire or fire employees, or recommend hiring, firing, promotion, advancement, or other change of status. They also require that the recommendation of such employee be given particular weight.

Conversely, the administrative employees' exemption will likely be broadened by the proposed changes. The proposed regulation would replace the "discretion and independent judgment" test (which has been the subject of confusion and endless litigation), with a new test mandating only that administrative employees hold a "position of responsibility." The proposals define the term as one where the employee either performs work of substantial importance, or performs work that requires a high level of skill or training. The revised rules preserve the current requirement that the exempt administrative employee's primary duty be that of office or non-manual work directly related to the management or business operations of the employer. However, they eliminate the requirement that administrative employees spend less than twenty percent of his or her work time (or forty percent in retail establishments) performing duties not directly related to exempt work.

DOL has also recommended changing the duties test for professional employees to require that their primary duty consist of performing office or non-manual work requiring advanced knowledge customarily obtained by a prolonged course of specialized intellectual instruction. However, under the new regulations, that "advanced knowledge" can be obtained through alternative means. That is, an exempt learned professional can gain equivalent knowledge and skills through a combination of job experience, military training, attending a technical school, or attending community college. The new regulations also eliminate the requirement that exempt professional employees, as well as computer professionals, consistently exercise discretion and judgment.

The new regulations also alter the duties test for outside sales professionals. Under the current regulations, an outside salesperson may not spend more than twenty percent of his or her work time on non-exempt duties. Because DOL eliminated the long test with its twenty percent limitations for EAP's, the proposed changes also eliminate this requirement for outside salespeople, significantly expanding the use of this exemption.

DOL's proposed changes would also allow deductions from exempt employees' salaries for full-day absences occasioned by disciplinary issues. Currently, disciplinary suspensions for exempt employees cannot be less than one week. DOL has not, however, proposed any changes to the current prohibitions against salary deductions for partial-day absences.

DOL claims that the proposed regulations would give an estimated 1.3 million additional low-wage workers overtime protections, and strengthen overtime protections for an additional estimated 10.7 million workers. Given the prognosis, it is not too early for employers to consider how their compensation practices, personnel policies, and employee manuals should be changed if/when the proposed regulations become final. The comment period for the regulations expires on June 20, 2003. Although uncertain, it is expected that a final version of the FLSA regulations will



IF I STILL HAD A HAMMER... HOW STATE FARM HAS DIMINISHED THE POWER OF PUNITIVE DAMAGE AWARDS

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*S*as the the U.S. Supreme Court's decision in *State Farm Mutual Auto. Ins. Co. v. Campbell*, 123 S.Ct. 1513 (2003), removed the hammer of punitive damages from the plaintiff's toolbox? To what extent has the threat of irrational and, therefore, unpredictable punitive damage awards been pulled off the negotiation table? While the debate rages on, what seems certain is that the landscape of punitive damage awards has been inalterably redrawn.

One would think judging by the amount of press coverage *State Farm* has received that it contained a host of novel and revolutionary rulings regarding punitive damages. However, as most appellate practitioners recognize, the U.S. Supreme Court rarely acts in revolutionary terms, but rather in evolutionary ones. *State Farm* is the logical extension of a series of prior decisions by the Court that over the course of the past seventeen years have chipped away at the foundation of punitive damages awards. Of these predecessors, none is more significant than *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

In what has by now become a frequently recounted factual narrative (at least among lawyers), the plaintiff in *BMW* was a doctor who sued BMW because the automaker failed to disclose to him that the finish of his new car had been retouched because of minor damage caused in transit. The cost of the repair was approximately \$600. A jury awarded the doctor \$4,000 in compensatory damages and \$4 million in punitive damages, which the Alabama Supreme Court later reduced to \$2 million. BMW challenged the punitive damage award on the grounds that it violated the Due Process clause.

Perhaps the most significant aspects of *BMW* was the Court's approval of the Due Process challenge and its adoption of a three-part framework for analyzing whether a particular award is unconstitutional. Three factors are relevant to any court's consideration of the validity of an award: (1) the reprehensibility of the defendant's conduct; (2) the ratio between compensatory and punitive damages; and (3) the statutory fines (civil or criminal) imposed for comparable misconduct.

Applying this test, the Court concluded that BMW's conduct, while it might support tort liability or even a modest punitive damage award, was not sufficiently reprehensible to support the punitive damages imposed.

The Events Leading to State Farm

The plaintiffs in *State Farm* sued their insurer asserting a bad faith claim after *State Farm* refused to settle third party personal injury claims for the policy limits of \$50,000. Compounding the situation was the fact that the plaintiffs' liability in the underlying personal injury lawsuit was (in hindsight) almost a given, that *State Farm's* investigator had recommended settlement, and yet *State Farm* repeatedly insisted that no liability would be found. The jury in the personal injury action found liability and awarded approximately \$185,000.

At the conclusion of the trial of the bad faith claim, the jury found against *State Farm* and awarded the plaintiffs \$2.6 million in compensatory damages and \$145 million in punitive damages. In post-trial proceedings, the trial court reduced the compensatory damages to \$1 million dollars and the punitive damages to \$25 million. However, on appeal, the Utah Supreme Court reinstated the original punitive damage award citing to *State Farm*'s nationwide operations and the trial court's determination that *State Farm* "is an enormous company with massive wealth."

Reaffirming its three-part framework from *BMW*, the U.S. Supreme Court reversed the punitive damage award and made a series of rulings which continued the analytical trend begun in *BMW*. Specifically, the Court found:

- Grossly excessive punitive damages constitute an arbitrary deprivation of property. They are comparable to criminal penalties imposed without the safeguards of criminal procedures.
- Presentation of a defendant's net worth creates the potential that juries will be biased against large corporations. The wealth of a defendant cannot justify an otherwise unconstitutional award.
- A state does not have a legitimate interest in punishing unlawful acts outside its jurisdiction. An award of punitive damages cannot be based on extraterritorial conduct and the jury must be instructed accordingly.
- There is a presumption that a plaintiff has been made whole by an award of compensatory damages, particularly when pain and suffering are included in the award. Punitive damages should not be used to supplement a plaintiff's recovery.
- Due process does not permit courts, in calculating punitive damages, to adjudicate the merits of other parties' hypothetical claims under the guise of the reprehensibility analysis.
- While conduct of a recidivist may be more severely punished, the court must ensure that the conduct being examined replicates the prior transgressions.
- Few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process, particularly when compensatory damages are high, as was the case in *State Farm*. Greater ratios may be permitted where the conduct is particularly egregious, but the actual harm results in low economic damages.

Initially, when *State Farm* was released, the plaintiffs' bar immediately argued that its holdings were limited to economic loss cases that did not involve personal injury. However, even more recently, the U.S. Supreme Court granted certiorari and remanded two personal injury cases to the Kentucky Supreme Court and the California Fifth Appellate District Court for consideration of punitive damage awards under the *State Farm* paradigm. *Ford Motor Co. v. Romo*, ___ U.S. ___, 123 S.Ct. 2072 (Mem) (2003); *Ford Motor Co. v. Estate of Smith*, ___ U.S. ___, 123 S.Ct. 2072 (Mem) (2003).

The Effect of *State Farm* on Florida Law

State Farm and its predecessors have called into question a long line of Florida cases that have addressed the propriety of punitive damage awards. The Florida Supreme Court, on various occasions, has ruled that "punitive damages are...explicitly based on juror emotion...and are therefore based not on the plaintiff's actual damages but upon the wealth of the defendant...;" that it is "competent for the plaintiff to prove the wealth of the defendant to increase the damages...;" and that "punitive damages [need not] bear some reasonable relation to compensatory damages...." At first blush, these holdings are inconsistent with the letter and spirit of *State Farm*.

More recently, the Third District Court of Appeal in *Liggett Group, Inc. v. Engle*, ___ So.2d ___, 28 Fla. L. Weekly D1219 (Fla. 3d DCA 2003), cited *State Farm* and its predecessors to overturn a \$145 billion punitive damage award imposed in a class action lawsuit against numerous cigarette manufacturers. While the award was overturned on a number of different grounds – not the least of which was the unsuitability of the class action mechanism for the claims asserted and the fact that the award would bankrupt the defendants – the Third District cited to *BMW* and *State Farm* for the proposition that excessive punitive damage awards violate federal due process. It observed that even when such awards are not bankrupting, they "must be reasonable and proportionate to the harm suffered and cannot be justified solely upon the wealth of the defendants."

Even though the Third District did not discuss the single-digit ratio multiplier in *State Farm*, the court did focus on the limited role of net worth and financial assets for the purpose of *limiting* punitive damages, rather than increasing them. It also articulated that, in accordance with *State Farm*, it was necessary to engage in *de novo* review of punitive damage awards to ensure "the application of law, rather than a decisionmaker's caprice."

Whether and to what extent *State Farm* will newly focus the attention of Florida courts on the constitutional propriety of punitive damage awards remains to be seen. However, it is plainly apparent from the extensive literature already available that *State Farm*, at the very least, has made it onto the jurisprudential "radar" in ways that its predecessors apparently did not. On that basis alone, it will provide fodder for litigators (particularly defense attorneys) on an unprecedented scale.

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