



jured by the policyholder). In this case, Montrose allegedly disposed of hazardous waste before the period of Admiral's insurance coverage began. The Supreme Court held that standard CGL coverage includes bodily injury and property damage that occurs during the policy period—even if initially caused by preceding events. In the case of successive policies (sometimes by different insurers), a deteriorating type of injury and property damage is covered by "all policies in effect during those periods."

The *Montrose* case involved the production of DDT from 1947 until 1972; after the pesticide's domestic ban, Montrose continued production until 1982 for export. Seven different carriers covered Montrose from 1960 to 1986, with Admiral involved only during the 1982-1986 period. Admiral argued that it had no duty to defend and no coverage obligation since there was no dumping during the policy period and no "occurrence" under the policy triggered its coverage; rather, the problem was an uninsurable "loss in progress" at the time it wrote its first policy in 1982. The court agreed that such a limitation may be appropriate in the first-party context where one is insuring against liability from an act or event, but that coverage for injuries to third parties by the insured is based on injury, not event. The impact of this decision may be momentous in terms of the insurability of any enterprise with a latent liability for a preexisting hazard.

In *Quintano v. Mercury Casualty Company*, 11 Cal. 4th 1049 (Dec. 6, 1995), the California Supreme Court ruled that the statute of limitations governing uninsured motorist claims does not apply to claims based on underinsurance coverage, if the claim against the underinsured motorist is settled. The court reasoned that the basic differences in the settlement process for uninsured motorist coverage and underinsured motorist coverage make it clear that the legislature did not intend the statute of limitations for the former to apply also to the latter. Chief Justice Malcolm Lucas held that in an uninsured motorist situation, the insured is not required to pursue legal action against the uninsured motorist before making a claim under the policy, whereas under Insurance Code section 11580.2, underinsured coverage is only available after the insured has obtained payment in the amount of the tortfeasor's policy limits.

Manufacturers Life Insurance Company v. Superior Court (Weil Insurance Agency, Inc., Real Party in Interest), 10 Cal. 4th 257 (June 1, 1995), involves the important interplay between state antitrust statutes (Business and Professions Code

section 16700 *et seq.*), the Unfair Competition Act (Business and Professions Code section 17200 *et seq.*), and the unfair business practice provisions of the Insurance Code itself (Insurance Code section 790 *et seq.*). [15:1 CRLR 116-17; 14:4 CRLR 131; 14:2&3 CRLR 139] Manufacturers Life contended that antitrust law does not apply to insurance, and that the exclusive remedy for unfair business practices vests with the Insurance Commissioner under section 790 *et seq.* of the Insurance Code. Affirming the First District Court of Appeal's decision, the court held that life insurance has not been granted a general exemption from antitrust law coverage, and that state antitrust law and the Unfair Competition Act generally provide remedies which are coextensive and cumulative to those available to the Commissioner under the Insurance Code (*e.g.*, license revocation). However, the court held that where a violation is alleged of the Insurance Code provisions alone, it is not for that reason an "unfair or unlawful" act in competition giving rise to the additional remedies of the Unfair Competition Act. This limitation is not likely to be a problem for plaintiffs, given the possibility of alleging unfair or unlawful acts separate and apart from the Insurance Code's unfair practice provisions.

NEW MOTOR VEHICLE BOARD

Executive Secretary:
Sam W. Jennings
(916) 445-1888

Pursuant to Vehicle Code section 3000 *et seq.*, the New Motor Vehicle Board (NMVB) licenses new motor vehicle dealerships and regulates dealership relocations and manufacturer terminations of franchises. It reviews disciplinary action taken against dealers by the Department of Motor Vehicles (DMV). Most licensees deal in cars or motorcycles.

NMVB is authorized to adopt regulations to implement its enabling legislation; the Board's regulations are codified in Chapter 2, Division 1, Title 13 of the California Code of Regulations (CCR). The Board also handles disputes arising out of warranty reimbursement schedules. After servicing or replacing parts in a car under warranty, a dealer is reimbursed by the manufacturer. The manufacturer sets reimbursement rates which a dealer occasionally challenges as unreasonable. Infrequently, the manufacturer's failure to compensate the dealer for tests performed on vehicles is questioned.

On August 10, Governor Pete Wilson announced the reappointment of Marie Brooks and Michel Padilla to the Board. Brooks is the president and founder of Ellis Brooks Chevrolet-Pontiac-Nissan-Geo in San Francisco; she has served on NMVB since 1992. Padilla is the president of Gateway Chevrolet in Anaheim; he has served on NMVB since 1992.

MAJOR PROJECTS

Protest/Petition Actions. The matter of *Gunderson-Ihle Chevrolet, Inc., v. Chevrolet Motor Division, General Motors Corporation* (Protest No. PR-1380-93) was first brought before NMVB in June 1994. Gunderson-Ihle and three other Chevrolet dealers (whose protests were later withdrawn) instituted this action to preclude Chevrolet from carrying out its intention to relocate Clippinger Chevrolet from its location in Covina to a West Covina site off the Interstate 10 Freeway in Gunderson-Ihle's market area. Gunderson-Ihle claimed that the relocation would adversely affect its permanent investments; there would be an adverse effect on the retail motor vehicle business and the consuming public in the relevant market area; the establishment of an additional franchise would be injurious to the public welfare; the existing Chevrolet dealers in the relevant market area are providing adequate competition and convenient consumer care for Chevrolet motor vehicles including adequate motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel; and the establishment of an additional dealership would not increase competition and would not be in the public interest. Finally, Gunderson-Ihle claimed that Chevrolet made oral and/or written promises to Gunderson-Ihle, as part of Chevrolet's "Project 2000," that it would have an exclusive freeway dealership location on the I-10 freeway from Ontario to the Pacific Ocean, inducing Gunderson-Ihle to relocate to its current location, a move it would not have made had it known Chevrolet would ultimately attempt to relocate Clippinger to the proposed site.

After reviewing the evidence submitted by the parties, the administrative law judge (ALJ) decided that Gunderson-Ihle failed to show good cause for not allowing the relocation of Clippinger; this proposed decision was adopted by NMVB on August 25, 1994. [14:4 CRLR 194] Having exhausted its remedy with NMVB, Gunderson-Ihle asserted its claim within Los Angeles County Superior Court, which eventually ordered discovery of any and all documents pertaining to Chevrolet's "Project 2000" and remanded the matter to NMVB.



Having decided against Gunderson-Ihle on the merits of its other claims, the sole issue presented at the August 1995 hearing was whether the previously undisclosed documents of Chevrolet's "Project 2000" supported the claim that Chevrolet had promised Gunderson-Ihle an exclusive market area on the I-10 freeway from Ontario to the Pacific Ocean.

After reviewing the documents, the ALJ found that "Project 2000," as it pertains to this matter, is a plan developed by Chevrolet to locate its dealers in strategic marketing areas in order to position Chevrolet and its dealers for vehicle sales and customer service into the next century. Chevrolet account managers discussed particular dealer plans with each dealer; it was at such a meeting that Gunderson-Ihle contends that it was assured that no other dealers would be located in the marketing area at issue. However, the ALJ considered it significant that the account managers were instructed by Chevrolet to maintain the confidentiality of each individual dealer plan and were instructed not to discuss any dealer's plans with any other dealer except the affected dealers themselves. The ALJ also found that Gunderson-Ihle was never shown any documents pertaining to "Project 2000" and therefore could not have relied upon them. Accordingly, the ALJ found that the previously undisclosed documents contradicted Gunderson-Ihle's contentions and supported Chevrolet's intent to permit Clippinger to relocate, and thus recommended that the Board overrule the protest; on September 12, NMVB adopted the ALJ's findings and recommendations.

The matter of *Person Oldsmobile v. Oldsmobile Motor Division, General Motors Corporation* (Petition No. P-208-90) was brought before the Board by Person Oldsmobile after Person received notice from Oldsmobile in March 1990 that it intended to establish Oldsmobile representation on a dual basis with a then-existing Chevrolet dealer in Person's marketing area. Person immediately filed a protest with the Board, disputing the ability of Oldsmobile to carry out its intention (Protest No. PR-1158-90). Pursuant to the recommendations of the ALJ, the Board overruled the protest in September 1990; Oldsmobile was thus permitted to establish the proposed dealership.

In addition to the protest, Person filed the instant petition against Oldsmobile, alleging fraud in the inducement to enter into the franchise that existed between Person and Oldsmobile. On April 19, 1995, the Board issued an order splitting the issues of liability and damages raised by the petition; the hearing on the liability portion was held before an ALJ in May.

Person contended that at the time it signed its dealer sales and service agreement with Oldsmobile, Oldsmobile had plans to establish an opening for a new Oldsmobile dealership within the market area Person believed it was acquiring, and that Oldsmobile concealed or otherwise failed to disclose this information. Person further contended that this failure to disclose amounted to fraud because a franchisor has a duty to disclose such facts that would materially affect the desirability of the franchise. Person asserted that NMVB should require disclosure of any final, formal recommendation by a factory zone to its national dealer planning manager for the establishment of an open point, as such information would substantially impact the desirability of a franchise to an applicant.

The main issue presented at the hearing was whether there is any fiduciary or special relationship between a prospective new motor vehicle dealer franchisee and the prospective franchisor which would require disclosure of all facts known to the franchisor which could reasonably affect the prospective franchisee's decision to execute the sales and service agreement. Citing state and federal law, the ALJ explained that there is no fiduciary relationship between an automobile manufacturer and its dealers, and that the franchise relationship amounts to nothing more than an ordinary commercial transaction. Determining that no fiduciary or special relationship exists between a prospective new motor vehicle franchisee and franchisor, the ALJ concluded that there is no duty to disclose all facts known by the franchisor which would reasonably affect the prospective dealer's decision to execute the sales and service agreement. Accordingly, the ALJ recommended to the Board that the petition be overruled; on September 12, NMVB adopted the findings of the ALJ.

Mark K. Edward, Michael L. Edward and William R. Winterhalder v. Mazda Motor of America, Inc. (Petition No. P-290-94) involved individuals acting collectively as prospective buyers to purchase Santa Cruz Motors. In February 1992, petitioners and Santa Cruz Motors entered into a written agreement whereby Santa Cruz Motors agreed to sell all interest in the dealership to petitioners. The franchise agreement between Santa Cruz Motors and Mazda required the consent of Mazda to the assignment of the Mazda franchise agreement to third parties, such consent not to be unreasonably withheld.

By a letter dated May 22, 1992, Mazda agreed to the assignment of the franchise to the petitioners, conditioned upon the commitment that the petitioners would ei-

ther by construction of a new site or renovation of the existing site bring the facilities into compliance with Mazda's minimum guidelines concerning, among other things, square footage for the new car showroom, the parts building, the new and used car display, and storage. In the instant petition, petitioners asserted that this condition amounted to an unreasonable withholding of consent.

In recommending that the petition be overruled, the ALJ found it significant that the existing facilities fell far below the minimum standards set out by Mazda. The ALJ also found that although no action was taken to comply with the standards except for a failed attempt at development of a new auto mall, alternatives did exist that would have satisfied the standards. Accordingly, the ALJ found that Mazda did not unreasonably withhold consent to the assignment via its condition. On September 12, NMVB adopted the ALJ's findings and recommendation and overruled the petition.

Appeals. On October 18, in *Forty-Niner Sierra Resources, dba Forty-Niner Subaru/Suzu v. State of California, Department of Motor Vehicles* (Appeal No. A-131-95), NMVB upheld DMV's decision revoking Forty-Niner's dealer's license for selling vehicles with mileage exceeding 7,500 miles while representing the vehicles as new. The revocation was stayed with the following conditions: the dealer's license was suspended for thirty consecutive days; Forty-Niner must reimburse DMV for \$75,000 in costs sustained in the action; and Forty-Niner's dealer's license was placed on probation for four years.

The matter of *World Nissan, Inc. v. State of California, Department of Motor Vehicles* (Appeal No. A-132-95) arises from an accusation filed by DMV in September 1993 asserting that World Nissan engaged in acts of moral turpitude, including false advertising and advertising a specific vehicle for sale without a vehicle identification number or license number (for which it was criminally convicted following a plea of *nolo contendere*), illegal use of dealer plates; failure to sell a vehicle at the advertised price; submission of dishonored checks to DMV; failure to pay the administrative service fee in a timely manner; and failure to register vehicles in a timely manner.

In September 1994, an ALJ recommended that the findings justified a revocation of World Nissan's dealer's license. The recommendation further proposed that World Nissan could reactivate its license subject to several conditions and a three-year probation period; however,



DMV did not adopt the ALJ's proposed decision in its entirety. In March 1995, the DMV Director issued his decision ordering the dealer's license revoked without the possibility of reactivation and issuance of a probationary license; DMV's decision relied upon the ALJ's finding that the advertising violations constituted moral turpitude.

World Nissan filed the instant appeal with NMVB in April 1995; after hearing all arguments and considering the evidence, NMVB held that a violation of the Automobile Franchise Act (Vehicle Code section 3000 *et seq.*) is not *per se* moral turpitude, and that if moral turpitude exists in a given case, it must be based on the particular circumstances surrounding the conviction(s) and whether the conviction(s) demonstrates unfitness to practice as a licensed new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative. Board members reasoned that state courts have been reluctant to hold that any but the most abhorrent crimes constitute moral turpitude *per se* in cases where an individual's vested right to pursue a particular profession or vocation is at stake.

Accordingly, the Board ordered that World Nissan's dealer's license be suspended for thirty days, and stayed the order until World Nissan applies for issuance of a new occupational license as a new motor vehicle dealer. In addition, NMVB ordered that any subsequent occupational license as a new motor vehicle dealer issued to World Nissan will be probationary for a period of three years from the issuance of the license, and any license issued to World Nissan during the three-year probationary period will be issued only as a probationary license.

■ LEGISLATION

AB 28 (Gallegos). Existing law makes it unlawful for the holder of any dealer's license to fail to disclose in writing to the buyer of a new motor vehicle that the vehicle, as equipped, may not be operated on a highway signed for the requirement of tire chains if the owner's manual or other material provided by the manufacturer states that the vehicle, as equipped, may not be operated with tire chains. As amended July 18, this bill requires vehicle manufacturers to provide franchised dealers with a list of the affected vehicles, and requires the dealer to provide a specified disclosure statement to the buyer or lessee of a new motor vehicle, in not less than fourteen-point boldface type on a single piece of paper. The bill requires the dealer to furnish the buyer or lessee with a copy of the disclosure, signed by the buyer or

lessee, prior to the sale or lease of the vehicle. This bill was signed by the Governor on September 2 (Chapter 452, Statutes of 1995).

AB 770 (Aguilar). Existing law prohibits the holder of any motor vehicle dealer's license from advertising for sale or selling any new vehicle of a line-make for which the dealer does not hold a franchise; a violation of that provision is a misdemeanor. Existing law makes several exceptions to that general prohibition, including transactions involving a commercial vehicle. As amended May 11, this bill limits the exception for transactions involving a commercial vehicle to commercial vehicles with a gross vehicle weight rating of more than 10,000 pounds. The bill adds to the list of exceptions specified above a transaction involving a manufactured home, a vehicle purchased for export and exported outside the territorial limits of the United States without being registered with DMV, or a new vehicle that will be substantially altered or modified by a converter, which the bill defines, prior to resale.

Existing law requires DMV to furnish an autobroker's registration certificate to a dealer who registers with DMV as an autobroker. This bill instead requires DMV to furnish the dealer with an autobroker's endorsement to the dealer's license. This bill was signed by the Governor on July 30 (Chapter 211, Statutes of 1995).

AB 1381 (Speier). The Automotive Consumer Notification Act requires the seller of a vehicle to include a specified "lemon law" disclosure if that vehicle has been returned, or should have been returned, to the dealer or manufacturer for failure to conform to warranties. As amended August 21, this bill revises and recast the Automotive Consumer Notification Act to, among other things, require the manufacturer to retitle specified defective vehicles in its name, request DMV to inscribe the ownership certificate with a "lemon buy-back" notation, affix a "lemon buy-back" decal to the left doorframe of the vehicle, deliver a specified notice to the transferee of the vehicle, and obtain the transferee's acknowledgment. The bill provides that it shall apply only to vehicles reacquired by a manufacturer on or after January 1, 1996. This bill was signed by the Governor on October 3 (Chapter 503, Statutes of 1995).

AB 1383 (Speier), as amended July 28, would make existing law which authorizes the Department of Consumer Affairs (DCA) to certify third-party dispute resolution processes for "lemon law" disputes inoperative for a four-year period, during which time alternative provisions added

by the bill would be operative. Among other things, the bill would require DCA to impose an additional fee of up to \$2 on the sale of all new motor vehicles to be used solely for the purposes of the bill subject to appropriation by the legislature.

Existing law specifies the remedies for breach of a consumer warranty, including the remedies for breach of an express warranty. This bill would eliminate the above provisions which specify the damages available for breach of an express consumer warranty, and replace them with provisions applicable solely to motor vehicle manufacturers who refuse to participate in or comply with a decision rendered pursuant to state-certified new car arbitration proceedings under the bill. [*S. Jud*]

AB 1218 (Escutia), as amended July 29, is no longer applicable to NMVB.

SB 1085 (Wright), as amended April 5, is a spot bill making minor changes in the law requiring DCA to certify qualified third-party dispute resolution processes to resolve "lemon law" disputes. [*S. Rls*]

■ FUTURE MEETINGS

To be announced.

OSTEOPATHIC MEDICAL BOARD OF CALIFORNIA

Executive Director:
Linda Bergmann
(916) 322-4306

In 1922, California voters approved a constitutional initiative which created the Board of Osteopathic Examiners; 1991 legislation changed the Board's name to the Osteopathic Medical Board of California (OMBC). Today, pursuant to Business and Professions Code section 3600 *et seq.*, OMBC regulates entry into the osteopathic profession, examines and approves schools and colleges of osteopathic medicine, and enforces professional standards. The Board is empowered to adopt regulations to implement its enabling legislation; OMBC's regulations are codified in Division 16, Title 16 of the California Code of Regulations (CCR). The 1922 initiative, which provided for a five-member Board consisting of practicing doctors of osteopathy (DOs), was amended in 1982 to include two public members. The Board now consists of seven members, appointed by the Governor, serving staggered three-year terms.

On June 27, Governor Wilson appointed attorney Navid Sharafatian to a