poses. On February 16, Los Angeles County Superior Court Judge Robert O'Brien ruled that CHBPA's legislative advocacy efforts for the benefit of horsemen, generally or specifically, constitute services rendered to horsemen and fall within the purview of CHBPA's authority relating to the expenditure of its funds; further, the court found that CHRB may not limit or control CHBPA's allocation of such funds (*see* MAJOR PROJECTS).

In its decision, the court addressed two key issues raised by the parties. On CHBPA's first amendment claim. Judge O'Brien stated that "legalized horse racing is subject to all-encompassing government regulation; that such regulation is necessary to carry out the public policy of only allowing such gambling in a controlled, limited and monitored fashion...; that the section 19613 monies received by [CHBPA], which are derived from a portion of wagers placed on legalized horse races, are subject to statutes regulating horse racing; [and] that although [CHBPA] does have First Amendment rights, the regulation of its use of section 19613 monies to ensure that such monies are used for statutorily authorized purposes does not violate [CHBPA's] First Amendment rights." As to whether the section 19613 funds expended by CHBPA are "compulsory fees" as that term has been used in cases like *Keller v. State Bar of California* and *Abood v. Detroit Board of Education*, Judge O'Brien found that "the monies received by [CHBPA] pursuant to section 19613(b), a percentage of wagers made on legalized horse races, are not compulsory fees; that such monies are not voluntary contributions by [CHBPA's] members; that such monies are derived from a source that never belonged to any individual member of the CHBPA; that the expenditure of such monies does not directly affect any member's individual claims to the funds because if the funds are not expended, no member directly receives any monetary benefit; [and] that the benefits, claims and interests of CHBPA members to section 19613 funds, if any, are attenuated from any tangible and direct claim of members, including [the dissident CHBPA members]."

Accordingly, the court vacated that part of CHRB's November 18, 1993 order which prohibited CHBPA from expending funds for legislative advocacy, and that part of its modified February 3, 1994 order which prohibited CHBPA from spending more than 5% of its annual budget on legislative advocacy without CHRB approval. CHRB is currently appealing the court's ruling; however, the court's order is in effect pending the appeal.

In January, attorney Ron Zumbrun filed a suit in Sacramento County Superior Court against CHRB and members of the quarter horse industry; in ***Ronald and Ann Zumbrun v. CHRB, et al.***, No. 376925, plaintiffs allege that California racing law requires CHRB to assure equality between breeds, and that the named defendants failed to provide parity and equality for harness racing at Los Alamitos in 1993 and 1994.

RECENT MEETINGS

At its April 28 meeting, the Board presented former Commissioner Rosemary Ferraro with a resolution of commendation for her service as a CHRB member from 1986 to 1994.

FUTURE MEETINGS

May 20 in Cypress.
June 24 in Sacramento.
July 28 in La Jolla.
August 26 in Del Mar.

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.

In March, Governor Wilson announced his appointment of Alan Skobin to NMVB; Skobin, a Republic from Chatsworth, is employed by an automotive and real estate investment company. Also in March, the Governor announced the reappointment of Stephen Wittman to NMVB; Wittman, a Republican from Poway, is the senior managing partner in a law firm and has served on NMVB since 1992.

MAJOR PROJECTS

Protest/Petition Actions. Following the Sixth District Court of Appeal's December 1993 ruling that it did not properly consider and adopt the administrative law judge's (ALJ) proposed decision in the franchise termination dispute between Mitsubishi Motor Sales of America, Inc. (MMSA) and Automotive Management Group, which does business as Santa Cruz Mitsubishi (SCM) *[14:1 CRLR 163–64]*, NMVB reconsidered the proposed opinion on remand and adopted it on April 1.

This dispute arose due to a letter dated January 9, 1990, in which MMSA gave notice to SCM of its intention to terminate SCM's franchise; the sole ground listed for termination by MMSA was SCM's alleged failure to maintain the unrestricted availability of lines of credit as set forth in the Dealer Development Plan. This notice of termination was later rescinded by MMSA after SCM committed to reacquire an unrestricted line of credit.

In a letter dated October 18, 1990, MMSA again advised SCM of its intentions to terminate the franchise agreement, this time due to SCM's alleged failure to maintain a flooring line of credit. A copy of this notice was received by both SCM and NMVB on October 22, 1990; this letter specified that the termination date would be January 21, 1991.

In late September or early October of 1990, SCM began negotiations with North Bay Ford Lincoln-Mercury (North Bay) in an attempt to reach an agreement under which North Bay would purchase the assets of the Mitsubishi business from SCM; SCM advised MMSA about these ongoing negotiations. MMSA wrote a memorandum to SCM, dated January 17, 1991, in which it reiterated the fact that the franchise was scheduled for termination on January 21, 1991; however, MMSA further stated that it would be willing to consider the pending buy/sell agreement with North Bay, as long as MMSA received specified documentation by January 31, 1991. In a letter dated January 29, 1991, SCM advised MMSA that North Bay had backed out of the agreement to purchase the assets of SCM; this letter was not received by MMSA until February 5, 1991. By this time, MMSA had already disconnected SCM from its computerized dealer network.

On March 6, 1991, NMVB received a document which purported to be SCM's protest to the proposed termination of its franchise. On March 18, 1991, NMVB received MMSA's motion to dismiss. In this motion, MMSA asserted that NMVB does not have jurisdiction to consider

SCM protest because the protest was not received within the statutory time limits as set forth in Vehicle Code section 3060. On March 21, 1991, SCM filed its opposition to the motion to dismiss, in which SCM argued that MMSA should be estopped from asserting application of the time limitations contained in Vehicle Code section 3060 due to specified conduct on the part of representatives of MMSA. On August 19, 1991, after considering the records, pleadings, evidence, and oral arguments, an ALJ filed an order rejecting the protest for filing; pursuant to this order, the protest was not received by NMVB within the applicable statutory time period, and insufficient evidence was presented to establish that MMSA should be estopped from asserting the lack of a timely protest.

On September 19, 1991, SCM filed a petition for writ of administrative mandamus in Santa Cruz County Superior Court, challenging the ALJ's order rejecting the protest for filing; the court denied the petition for writ of mandamus on April 27, 1992. On appeal, the Sixth District Court of Appeal reversed the judgment of the superior court and remanded the matter to NMVB. In reaching its decision, the Sixth District concluded that the "ALJ's decision regarding the timeliness of the protest should have been submitted to the Board for review. Accordingly, the matter is remanded so that the Board may have an opportunity to consider this issue."

The sole issue presented to NMVB was whether the evidence supports a finding that MMSA made representations to SCM regarding the proposed termination such that SCM's reasonable reliance on MMSA's alleged representations caused SCM to delay in filing a protest to a point beyond the statutory period as set forth in Vehicle Code section 3060. According to the ALJ's proposed order, which was adopted by NMVB on April 1, Vehicle Code section 3060(b) requires that any protest to a notice of termination be filed with NMVB within thirty days of the franchisee's receipt of the notice. The document which purported to be SCM's protest was not received by NMVB until March 6, 1991. NMVB also found insufficient evidence to support the notion that MMSA made representations upon which SCM could have reasonably relied, causing SCM to fail to file a timely protest.

On February 3, in *Jim Lynch Cadillac v. Cadillac Motor Car Division, General Motors Corporation* (Petition No. P-236-92), NMVB adopted a modified version of a proposed ALJ ruling. Under its ruling, NMVB found that Jim Lynch Cadillac (Lynch) is collaterally estopped from relitigating its allegation that Cadillac Motor Car Division's (Cadillac) conduct was the ultimate cause of Lynch's franchise termination, because Lynch had an opportunity to litigate the matter in an earlier protest dealing with the original termination. *[14:1 CRLR 164]*

The original dispute arose after Lynch entered into a dealer sales agreement with Cadillac on December 17, 1986 and acquired the facilities of the former Buffington Motors, Inc. in Inglewood; the dealer agreement was subject to the provision that Lynch obtain a suitable site and relocate the dealership within one year. After five years of searching, Lynch was unable to find a relocation site acceptable to Cadillac. Without prior approval by Cadillac, Lynch then abandoned the facility and consolidated his Cadillac new car sales operation with another dealership in Inglewood. Seven months later, on October 7, 1991, Cadillac gave notice of its intent to terminate Lynch's dealership.

This led up to the original dispute between the two parties (Protest No. 1241-91), in which Lynch defended against the termination by offering to show evidence that its unauthorized relocation was the result of factors beyond its control, including the conduct and representations of Cadillac. In the original dispute, NMVB found that "Lynch was completely in charge of his own relocation efforts which were numerous. For the most part, Cadillac cooperated with Lynch in these efforts...." NMVB also found that Lynch was the one who unilaterally breached its dealer agreement by moving its new car dealership without obtaining Cadillac's approval. *[12:4 CRLR 223]*

In the present action, Lynch reasserts its argument that Cadillac failed to continue to support Lynch's relocation and alleges that Cadillac knew there were no suitable sites for relocation in the Inglewood area, and seeks $4 million in general damages for breach of contract and breach of the implied covenant of fair dealing. NMVB found that Lynch's breach of contract claims are clearly precluded by collateral estoppel, noting that the doctrine of collateral estoppel not only serves to bar relitigation of those issues which have been actually litigated, but also those that could have been put forth but were not. NMVB found that Lynch had the opportunity to litigate the breach of contract claims in the earlier action and thus is now barred from raising those issues now.

On April 1, in *Friendly Chevrolet v. General Motors Corporation, Chevrolet Motor Division* (Protest No. PR-unassigned), NMVB adopted an ALJ decision finding that Friendly's purported protest failed to comply with NMVB regulations set forth in sections 553.1, 584, 585, 594, 595, and 597, Title 13 of the CCR; because Friendly's submittal did not meet these requirements, NMVB did not have authority to accept the filing as a protest and now the statutory filing period has elapsed.

This dispute arose when Friendly received a notice on December 21, 1993 of General Motors' intent to relocate an existing American Chevrolet-Geo dealership in Modesto to a location within ten miles of Friendly's location. On January 3, 1994, NMVB received a letter from Friendly's counsel dated December 30, 1993, advising NMVB that it had received notice of General Motors' intent to relocate and that the letter was intended to serve as a formal protest. However, the letter did not conform to NMVB's form and content requirements as set forth in the CCR; the letter also did not contain the required filing fee as set forth in section 553.1. On or about January 26, Friendly's counsel telephoned NMVB to determine the status of the purported protest; NMVB staff responded that the December letter did not comply with the requirements of Title 13 and that no action had been taken.

On January 27, Friendly submitted a formal request that the NMVB Secretary accept the December 30 letter together with an amended protest by which Friendly intended to cure the defects in the letter; NMVB received these documents on January 28. General Motors filed a notice of motion to reject on February 7; Friendly filed its opposition papers on February 9. In its defense, Friendly stated that the purported protest of December 30 constituted a valid protest in substance, if not in form, and that General Motors will not be prejudiced if the purported protest is accepted. Friendly argued that while ignorance of the law is not an excuse, NMVB's staff did not advise it that its protest was not in proper form until its counsel telephoned the Board on January 26. General Motors argued that the December 30 purported protest did not meet NMVB's requirements and was not, therefore, a valid protest; since the Secretary was not asked to accept the purported protest until after the 20-day period for filing protests had expired on January 10, General Motors contended that the Board lacks jurisdiction to accept the protest.

The ALJ and NMVB found that under section 598 of Title 13, the Secretary may, for good cause shown, accept for filing any papers "that do not comply with these regulations...." However, this regulation does not authorize the Secretary to accept a protest after the statutory time for filing has elapsed. According to NMVB, a request for acceptance of a non-conforming

paper must be made, in the case of protests, before the statutory deadline is reached. Since the filing deadline past on January 10, and Friendly did not request the Secretary to accept the purported protest prior to that deadline, the Secretary is without discretionary authority to accept the purported protest.

Board Proposes Fee Increase. On April 15, NMVB published notice of its intent to amend section 553, Title 13 of the CCR, in order to comply with the requirements of Vehicle Code section 3016; specifically, this amendment proposes to increase the fee charged to licensees subject to the jurisdiction of NMVB. According to NMVB, this increase is necessary to comply with section 3016, which requires that licensees be charged fees sufficient to fully fund NMVB's activities. At this writing, NMVB is scheduled to hold a public hearing on this proposed amendment on May 31 in Sacramento.

Other Board Rulemaking. On December 15, NMVB published notice of its intent to amend sections 585 and 598 and adopt new section 593.1, Title 13 of the CCR, regarding the duties and procedures which the NMVB Executive Secretary must follow in accepting and filing protests. *[14:1 CRLR 163]* NMVB held a public hearing on this proposed rulemaking on February 14; in response to some of the comments, NMVB modified the rulemaking package and released the revised text for an additional 15-day public comment period. At its April 15 meeting, NMVB adopted the proposed changes, which await review and approval by the Office of Administrative Law.

LEGISLATION

AB 3539 (Speier). Existing law defines a buying and selling service, for the purposes of specified provisions of the Insurance Code related to motor clubs, as an arrangement by a motor club whereby the holder of a service contract with the club is aided in any way in the purchase or sale of an automobile. As amended May 16, this bill would require an advertisement to disclose specified information, if the advertisement is of a service offered by a motor club to refer members to a new motor vehicle dealer for the purchase of a new motor vehicle and if the dealer pays the motor club an advertising, promotional, or marketing fee.

Existing law defines the term "dealer" for purposes of the Vehicle Code as, among other things, a person who is engaged in the business of selling vehicles. This bill would define the term "brokering" for purposes of the Vehicle Code as an arrangement under which a dealer, for consideration, provides the service of arranging, negotiating, assisting, or effecting the purchase of a motor vehicle, not owned by the dealer, for another or others.

Existing law specifies exemptions from the definition of the term "broker" for purposes of the Vehicle Code. This bill would add to the exemptions a motor club, as defined, that refers members to a new motor vehicle dealer for the purchase of a new motor vehicle and does not receive a fee from the dealer contingent upon the sale of the vehicle.

Existing law makes it a misdemeanor for a dealer to, among other things, advertise or offer for sale or exchange any vehicle not actually for sale at the premises of the dealer or available to the dealer from the manufacturer or distributor of the vehicle at the time of the advertisement or offer. Existing law makes an exception to that provision by authorizing a dealer to advertise that it has the ability to purchase for resale vehicles available from franchised dealers, if the advertisement or offer states, among other things, that the dealer is not franchised to sell new vehicles, and that the vehicles must be purchased as used. This bill would delete the exception specified above and would instead authorize an autobroker to advertise its service of arranging or negotiating the purchase of a new motor vehicle from a franchised new motor vehicle dealer. The bill would limit the content of the advertisements, require a specified disclosure statement, and specify the type, size, and placement of that disclosure.

Existing law makes it a misdemeanor for a dealer to, among other things, advertise for sale as new any new vehicle of a line-make for which the dealer does not hold a franchise. This bill would, in addition, make it a misdemeanor for a dealer to sell the specified vehicle.

Existing law makes it a misdemeanor for any motor vehicle manufacturer, manufacturer branch, distributor, or distributor branch to do specified acts relating to motor vehicle dealers. This bill would make it a misdemeanor for any motor vehicle manufacturer, manufacturer branch, distributor, or distributor branch to dishonor a warranty, rebate, or other incentive offered to the public or a dealer in connection with the retail sale of a new motor vehicle, based solely on the fact that an autobroker arranged or negotiated the sale. *[A. W&M]*

AB 3333 (Speier). The Tanner Consumer Protection Act provides for a third-party dispute resolution process with respect to motor vehicle sales; existing law also requires each new motor vehicle manufacturer to establish or make available to buyers or lessees of new motor vehicles a qualified third-party dispute resolution process. As amended May 12, this bill would repeal the third-party dispute resolution provisions, substantially revise related provisions, and establish a comprehensive "lemon law arbitration program" in the Department of Consumer Affairs (DCA); the bill would require DCA to contract with one or more private entities to conduct arbitration proceedings in order to settle disputes between buyers and sellers. *[A. W&M]*

The following is a status update on bills reported in detail in CRLR Vol. 14, No. 1 (Winter 1994) at page 163:

SB 1081 (Calderon). Under existing law, every conditional sales contract, defined to include certain contracts for the sale or bailment of a motor vehicle, is required to contain certain disclosures, as specified. As amended May 26, 1993, this bill would establish a seller's right of rescission based on the seller's inability to assign the contract, and would require the right of rescission to be included in conditional sales contracts. The bill would specify the conditions under which the seller may rescind a contract, including requiring the seller to send a Notice of Cancellation to the buyer, as specified; however, the bill would specify circumstances in which, after rescission, the seller may repossess the vehicle without notice. The bill would provide that a seller is liable in a civil action to a buyer for any damages caused by an unauthorized rescission. The bill would prohibit conditional sales contracts from containing a seller's right of rescission based on inability to assign the contract, except as provided by the bill.

Existing law prohibits various activities in connection with the advertising or sale of motor vehicles by, among others, vehicle dealers licensed by the Department of Motor Vehicles. This bill would prohibit a licensed dealer from rescinding a contract for the sale of a vehicle and subsequently engaging in any unlawful, unfair, or deceptive act or practice, as specified, or stating an intent to rescind a contract pursuant to the right of rescission provided by the bill without having the ability to comply with the requirements of the bill.

The bill would state that the provisions regarding conditional sales contracts only apply to contracts entered into on or after January 1, 1994. *[A. Desk]*

The following bills died in committee: **AB 699 (Bowen)**, which would have changed the name of NMVB to the Franchise Dispute Resolution Board and enlarged the Board's scope of authority to include regulation of all franchisee-

franchisor relationships; **AB 802 (Sher)**, which would have prohibited a licensed vehicle dealer from advertising the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge without making clear and conspicuous disclosure of specified information; and **AB 1665 (Napolitano)**, which would have prohibited any manufacturer, manufacturer branch, distributor, or distributor branch licensed under the Vehicle Code from preventing a dealer from selling and servicing new motor vehicles of any line-make, or parts and products related to those vehicles, at the same established place of business approved for sale and service of new motor vehicles by any other manufacturer, manufacturer branch, distributor, or distributor branch, if the established place of business is sufficient to enable competitive selling and servicing of all new motor vehicles, parts, and other products sold and serviced at that established place of business.

RECENT MEETINGS

At its April 1 meeting, the Board elected Manning Post to serve as NMVB President and Lucille Mazeika to serve as Vice-President.

FUTURE MEETINGS

June 14 in Los Angeles.
July 15 in Los Angeles.

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 April 27, Governor Wilson appointed William J. Evans, DO, of Roseville to the Board. Dr. Evans is an anesthesiologist for the Permanente Medical Group. Even with Dr. Evans' appointment, the Board still has two vacancies—one public member position and one physician position.

MAJOR PROJECTS

Board Shuts Down Enforcement Program. As predicted last fall, OMBC shut down its enforcement program in January due to lack of funding. *[14:1 CRLR 164–65]* Thus, serious complaints against DOs are not being investigated, and the Board has slowed or suspended work on at least a dozen pending disciplinary cases.

The Board blames its budget woes on the legislature, which enacted budget language in 1991 which required the transfer of over $500,000 in DO licensing fees from the Board's reserve fund to the state general fund. OMBC also asserts that its budget has been cut in each of the past two years, and it has incurred deficits in both of those years but has no reserve funds to cover the deficit. This year, the Board projects another deficit of at least $100,000.

At this writing, an urgency fee increase bill is pending in the legislature (*see* LEGISLATION).

Rulemaking Update. OMBC's proposed amendments to sections 1600, 1602, 1668, 1620, 1621, 1656, 1690, and Article 18, Title 16 of the CCR, were approved by the Office of Administrative Law (OAL) on September 22, 1993; to date, OAL has not published notice of that approval in its *California Regulatory Notice Register*, although the changes have been incorporated into the CCR. These changes, which were adopted by OMBC at its May 1993 meeting, change references to the Board of Osteopathic Examiners to the Osteopathic Medical Board of California, in accordance with the Board's recent name change; delete a reference to a 75% pass rate for the Board's written examination; provide that a petition for reinstatement shall not be heard by the Board unless the time elapsed from the effective date of the original disciplinary decision or from the date of the denial meets the requirements of Business and Professions Code section 2307; and increase the Board's examination fee from $125 to $350, its duplicate certificate fee from $10 to $25, its annual tax and registration fee from $175 to $200, and its delinquent annual tax and registration fee from $87.50 to $100. *[14:1 CRLR 165; 13:4 CRLR 202]*

On March 23, OAL approved OMBC's amendments to sections 1635 and 1641, Title 16 of the CCR, which were adopted by the Board at its October 1993 meeting. Among other things, the changes authorize American Osteopathic Association (AOA) Category 1-B continuing medical education (CME) hours, and delete the annual CME requirement of twenty hours, leaving in place the requirement for 150 hours of CME in a three-year period with 60 hours being AOA CME and 90 hours being either AOA or American Medical Association CME hours. *[13:2&3 CRLR 209]*

LEGISLATION

AB 3732 (Alby). Existing law requires OMBC to require each licensed osteopathic physician to demonstrate satisfaction of its CME requirements as a condition for renewal of a license. As amended April 14, this bill would provide that commencing January 1, 1995, OMBC instead require each licensed osteopathic physician to complete a minimum of 150 AOA Category 1-A CME hours, as defined, during each three-year cycle as a condition for renewal of a license.

Existing law establishes fees for examinations, taxes, and registration as licensed osteopathic physicians and requires these fees to be deposited in the Osteopathic Medical Board of California Contingent Fund, a continuously appropriated fund. Under existing law, the annual tax and registration fee to be set by OMBC may not exceed $200, and the fee for failure to timely pay the annual tax and registration fee is 50% of the renewal fee but not more than $100. This bill would increase the maximum amount for the tax and registration fee to $300, and would change the penalty fee to provide that it may not exceed $150. To prevent further expropriations of its licensing fees by the legislature (*see* MAJOR PROJECTS), this bill would also provide that any and all fees received by OMBC shall be for the sole purpose of the operation of the Board. This bill also provides that effective July 1, 1999, the fee increases in this bill would be repealed, and would reestablish the fee requirements under existing law. *[A. W&M]*

AB 3125 (Aguiar), as amended April 19, would recognize the need to emphasize the practice of primary care medicine and establish a pilot project at the College of Osteopathic Medicine of the Pacific (COMP) that would combine medical school education and residency training in