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). *[14:2&3 CRLR 209–10]*

Although CHRB filed notice of an appeal, CHBPA attorney Robert Forgnone announced at CHRB's August 26 meeting that he and Deputy Attorney General Cathy Christian agreed to jointly file a stipulation with the appellate court postponing the commencement of the briefing schedule until after January 30; however, Forgnone also stated that he expects the appeal to be dropped after AB 991 (Tucker) (Chapter 62, Statutes of 1994) takes effect on January 1. Among other things, AB 991 allows for separate owner and trainer organizations to represent thoroughbred horsemen, provides that no funds deducted from purses may be used to make campaign contributions to candidates for public office or to support or oppose ballot measures, and provides that the organizations may not spend more than is "reasonably necessary" to represent themselves before the legislature and CHRB. *[14:2&3 CRLR 207–08]*

In January 1994, 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. *[14:2&3 CRLR 210]* At this writing, the matter is still pending in superior court.

RECENT MEETINGS

At its May 20 meeting, CHRB discussed its implementation of AB 991 (Tucker) (Chapter 62, Statutes of 1994), which allows for separate owner and trainer organizations to represent thoroughbred horsemen. *[14:2&3 CRLR 207–08]* The Board discussed the factors it should consider in approving the new owner and trainer organizations. CHRB Chair Ralph Scurfield stated that the Board would receive proposals from interested groups, and that each proposal should contain a list of the group's members and a way to validate that list; the proposal should also contain the group's mission statement and a sample of its bylaws.

Also at its May meeting, CHRB unanimously agreed to allow wagering in California on the National Best Seven, a fifty-cent bet in which a player tries to select the winners of seven specified races around the country; the weekly wager, which began in late May, is run by the Thoroughbred Racing Association.

At its July 28 meeting, the Board's California Horse Racing Industry Advisory Committee presented its final report on ways to improve attendance and the overall quality of horse racing in the state. The Committee presented seventeen specific recommendations, some aimed at CHRB and others for the industry in general, for stimulating interest in the sport; for example, the Committee recommended instituting full-card intrastate simulcasting (*see* LEGISLATION for a description of AB 1418); increasing out-of-state simulcasting; developing racing broadcasts for live television; creating a centralized marketing group; and instituting more wagering opportunities such as propositions and parlays. CHRB Chair Ralph Scurfield reported that the Committee will also be preparing a five-year action plan for the industry.

FUTURE MEETINGS

September 23 in San Mateo.
October 28 in Arcadia.
November 18 in Inglewood.
December 16 in Los Angeles.
January 27, 1995 in Arcadia (tentative).

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.

MAJOR PROJECTS

Protest/Petition Actions. *Frances Holmes and Marvin Holmes v. American Honda Motor Co., Inc.* (Petition No. P-260-93) involved a dispute under the Song-Beverly Consumer Warranty Act (Civil Code section 1790 *et seq.*) and other consumer protection laws. Petitioners alleged that they purchased a new motor vehicle from respondent, that the vehicle had a defective braking system, and that Honda had been unable to adequately repair the system after multiple attempts. The original claim sought recovery of the purchase price of $19,894.82 and other damages, as well as attorneys' fees and costs as provided by statute.

Immediately before the hearing commenced on January 24, the parties reached an agreement disposing of all issues except for the amount of attorneys' fees and costs to be paid by Honda to the petitioners; as part of the settlement, the parties agreed that Honda would pay the Holmes' attorneys' fees and costs as determined by the Board, within the range of $9,500 to $16,050.35. Petitioners' counsel requested a total of $15,580.35; following a February 10 hearing on this matter, the administrative law judge (ALJ) recommended an award of $13,270.60 based on findings that portions of the fees charged by petitioners' counsel were unreasonably high. On June 14, NMVB adopted the ALJ's recommendation, but also ordered that the respondent deliver to NMVB the check or draft made payable to petitioners, and that NMVB would hold the check or draft until petitioners tender to the Board the $200 filing fee required by section 553.40, Title 13 of the CCR.

Draco Trucks & Equipment, Inc. v. Isuzu Truck America, Inc. (Protest No. PR-1392-94) arose when Draco Trucks & Equipment, Inc., an Isuzu franchisee, alleged that Isuzu intended to permit the establishment of Dion International Trucks as an Isuzu extra-duty truck franchisee in Escondido; Dion also maintains a truck facility in San Diego which is within ten miles of Draco's business. Draco stated that the new facility would violate Vehicle Code section 3062 because Dion would be advertising or otherwise conducting Isuzu sales and service operations out of Dion's San Diego location; section 3062 requires that, except as otherwise provided, if a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership within a relevant market area where the same line-make is then represented, or seeks to relocate an existing

motor vehicle dealership, the franchisor shall, in writing, first notify NMVB and each franchisee in that line-make in the relevant market area of the franchisor's intention to establish an additional dealership or to relocate an existing dealership within or into that market area. Draco further alleged that this would constitute a modification of its own franchise agreement in that the proposed establishment is within Draco's geographical area, and that Isuzu failed to act in good faith in proposing the establishment since it failed to consult with Draco or give notice of the establishment until requested to do so by Draco.

Following a hearing, an ALJ found that Draco is outside the relevant market area of the proposed dealership, and that no factual basis exists to support a section 3062 claim. Also, the ALJ found that no evidence can be offered to support a finding that new Isuzu vehicles are being sold from Dion's San Diego location due to the fact that Dion has yet to be established as an Isuzu dealer; therefore, the ALJ held that the section 3062 claim raised by Draco is not ripe for determination.

The ALJ also noted that Isuzu granted Draco a nonexclusive right to sell Isuzu products, that the franchise between Isuzu and Draco grants Isuzu the absolute right to appoint other Isuzu dealers within or outside of the dealer's geographic area, and that the franchise is devoid of any provision requiring Isuzu to consult, confer, or in any manner give dealers notice of its decisions or intentions to establish new dealerships within or outside of a dealer's geographic area. Therefore, the ALJ also found that no evidence can be offered to support a finding that Draco's franchise agreement was modified by the establishment of the new dealership in light of the explicit language of the Isuzu franchise.

On June 14, NMVB adopted the ALJ's findings and proposed decision; however, NMVB also noted that its decision in no way affects Draco's rights and remedies under the Vehicle Code, including those afforded by section 3062, in the event that Dion does actually sell new Isuzu trucks from its San Diego facility.

University Ford, et al. v. Ford Motor Company (Protest No. PR-unassigned) and *Vince Dixon Ford, et al. v. Ford Motor Company* (Petition Nos. P-291-94 through P-297-94) arose out of Ford's action to modify the existing Ford Truck Sales and Service Agreement of Miramar Ford Truck Sales, Inc., to allow Miramar to sell Ford trucks of 8,500 pounds and up; protestants and petitioners (a total of eleven dealerships) claimed that Ford's conduct was a de facto establishment of a new dealer in the relevant market area competing directly with their sales of trucks of 8,500 pounds and up. Petitioners further claimed that Ford's actions constituted a breach of their Sales and Service Agreements and a breach of oral contracts between each of them and whereby Ford promised to restrict of Miramar Ford to sales of its truck Series 500 and greater.

After the petitions and protests were filed, Ford first filed a motion to dismiss, claiming that NMVB lacked jurisdiction. Later, Ford amended its motion to state that it has "deferred its conduct to some unforeseeable future time when production capacity and national demand warrant such action." Ford also promised that if it does decide to pursue the proposed action, it would provide appropriate advance notice to dealers in the affected markets. Accordingly, the ALJ recommended that NMVB dismiss the protests and petitions without prejudice to the refiling of the actions should Ford go ahead with its initial proposal. On August 25, NMVB adopted the ALJ's recommendations.

In *Gunderson-Ihle Chevrolet, Inc., v. Chevrolet Motor Division, General Motors Corporation* (Protest No. PR-1380-93), Gunderson-Ihle sought to prevent General Motors from relocating the Clippinger Chevrolet dealership into its market area. Among other things, Gunderson-Ihle claimed that its investments are permanent and would be adversely affected by the establishment of an additional dealership; 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; establishment of an additional dealership would not increase competition and would not be in the public interest; and Chevrolet made oral and/or written promises to induce 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 all parties, the ALJ concluded that Gunderson-Ihle established that its investments are permanent, but failed to establish that its investments would be adversely affected. The ALJ also found that Gunderson-Ihle failed to prove that the relocation would have an adverse effect on the retail motor vehicle business and consuming public in the relevant market area, that the relocation would be injurious to the public welfare, that there is adequate competition and convenient consumer care in the relevant market area, that the relocation would not increase competition, that Chevrolet made any promise of exclusivity to Gunderson-Ihle in the geographical area, or that Chevrolet made any representation upon which Gunderson-Ihle relied in deciding to relocate to its current site. Accordingly, the ALJ recommended that the Board overrule the protest, and that Chevrolet be permitted to relocate its Clippinger dealership to the proposed site; on August 25, NMVB adopted the ALJ's findings and recommendations.

NMVB Adopts Fee Increase. On May 31, NMVB held a public hearing on its proposed amendment to section 553, Title 13 of the CCR; specifically, the amendment would increase the fee charged to licensees subject to the jurisdiction of NMVB. *[14:2&3 CRLR 212]* According to NMVB, this increase is necessary to comply with Business and Professions Code section 3016, which requires that licensees be charged fees sufficient to fully fund NMVB's activities. Following the hearing, NMVB adopted the proposed change, and submitted the rulemaking file to the Office of Administrative Law (OAL); on July 1, OAL approved the amendment.

Other Board Rulemaking. At this writing, OAL is reviewing NMVB's proposed amendments to sections 585 and 598 and adoption of 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. *[14:2&3 CRLR 212; 14:1 CRLR 163]*

LEGISLATION

The following is a status update on bills reported in detail in CRLR Vol. 14, Nos. 2 & 3 (Spring/Summer 1994) at page 212:

AB 3539 (Aguiar). Existing law defines a buying and selling service, for the purposes of specified provisions of the Insurance Code relating 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 August 24, this bill requires 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 any compensation.

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 defines 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 effectuating the purchase of a motor vehicle, not owned by the dealer, for another or others. The bill defines the terms "autobroker" or "auto buying service" as a dealer who engages in the business of brokering.

Existing law specifies exemptions from the definition of the term "dealer" for purposes of provisions of the Vehicle Code. This bill adds to the exemptions a motor club, as defined, that does not arrange or negotiate specified purchase transactions but 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 prescribes the fee for the issuance of a license to dealers. This bill prescribes the fees for the registration of a dealer as an autobroker.

Existing law defines a "new vehicle" for purposes of the Vehicle Code as, among other things, a vehicle constructed entirely of new parts that has never been sold and exempts specified transactions involving dealer-to-dealer sales from the definition of the term "sold." This bill instead defines a new vehicle as, among other things, a vehicle constructed entirely of new parts that has never been the subject of a retail sale.

Existing law makes it a misdemeanor for a dealer to 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 deletes the exception specified above and, except as provided, authorizes 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 limits the content of the advertisements, requires a specified advertising statement, and specifies the type, size, and placement of that statement. The bill requires that a certain statement be included with certain smaller advertisements.

Existing law makes it a misdemeanor for a dealer to advertise for sale as new any new vehicle of a line-make for which the dealer does not hold a franchise. This bill also makes it a misdemeanor for a dealer to sell the specified vehicle.

Existing law makes it a misdemeanor for a dealer to do specified acts relating to the selling of motor vehicles. This bill makes it a misdemeanor for a dealer to do specified acts when brokering, as defined above. The bill also prescribes a specified form to be used by the dealer as a brokering agreement.

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 makes 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 upon the fact that an autobroker arranged or negotiated the sale. This bill also imposes specified duties pertaining to title registration, warranties, rebates, and incentives on a selling, franchised new car dealer involved in a brokered retail motor vehicle sale. This bill was signed by the Governor on September 30 (Chapter 1253, Statutes of 1994).

The following bills died in committee: **AB 3333 (Speier)**, which would have amended the Tanner Consumer Protection Act by repealing the third-party dispute resolution provisions, substantially revising related provisions, and establishing a comprehensive "lemon law arbitration program" in the Department of Consumer Affairs (DCA); and **SB 1081 (Calderon)**, which would have—among other things—established a seller's right of rescission based on the seller's inability to assign the contract, and required the right of rescission to be included in conditional sales contracts.

LITIGATION

In ***University Chrysler-Plymouth, Inc., v. Chrysler Corporation***, 28 Cal. App. 4th 386 (Aug. 19, 1994, as modified on Sept. 16, 1994), plaintiff University Chrysler-Plymouth (University) challenged Chrysler's opening of a competing Chrysler-Plymouth dealership in the Kearny Mesa area of San Diego; University also contended that Chrysler should have permitted it to act as a dealer for a line of cars built for Chrysler by the Italian manufacturer, Maserati. At trial, a jury agreed with University and awarded it $600,480 in damages caused by the opening of the Kearny Mesa dealership; the jury also awarded University $50,700 in damages caused by Chrysler's refusal to provide University with the Maserati line of cars.

On appeal, the Fourth District Court of Appeal reversed, stating that it found "no legal theory which supports the damage awards. Nothing in the Vehicle Code or the parties' dealership agreement impaired Chrysler's right to open the competing dealership. With respect to the Maserati line of cars, we find University failed to exhaust its available administrative remedies." The court explained that the regulation of a manufacturer's ability to establish new and competing dealerships is governed by the provisions of Business and Professions Code sections 3062 and 3063; in an earlier proceeding involving the same parties, the Fourth District had expressly found that plaintiff was not entitled to relief under sections 3062 and 3063. Further, the Fourth District found that University's dealership agreement did not provide it with any protection against the establishment of competing Chrysler dealerships, and that its dealership agreement with Chrysler expressly granted it only a nonexclusive right to purchase products from Chrysler.

Regarding University's contention that Chrysler should have provided it with the Maserati line of cars for sale, the Fourth District found that the matter is "clearly cognizable" by NMVB under Business and Professions Code section 3050, which gives the Board the power to consider "any matter concerning the activities or practices of any...manufacturer." The Fourth District noted that University never attempted to bring its Maserati claim before NMVB, and that its failure to exhaust an available administrative remedy barred any proceeding on the Maserati claim in superior court.

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;