workers' compensation insurance. *[S. Inactive File]*

SB 29 (Maddy). Existing law provides for the distribution to the horsemen as purses of a portion of the total amount wagered on horse races. As amended July 14, this bill would require that an amount equal to 10% of the total advertised purse be distributed as a bonus payment for California-bred thoroughbred horses, as described.

Existing law requires every licensee conducting a horse racing meeting, each racing day, to provide for the running of at least one race limited to California-bred horses, to be known as the "California-Bred Race." This bill would repeal that provision. *[A. GO]*

SB 847 (Presley). Existing law provides that an association licensed to conduct a racing meeting in the southern zone may operate a satellite wagering facility at a location approved by CHRB if the location is eligible to be used as a satellite wagering facility during any of specified periods. As amended April 27, this bill would expressly authorize an association licensed to conduct a racing meeting in Riverside County to operate a satellite wagering facility at a location approved by the Board under those conditions. *[A. GO]*

SB 549 (Hughes). The Gaming Registration Act regulates the operation of gaming clubs, and prohibits any person from owning or operating a gaming club without first obtaining a valid registration from the Attorney General. "Person" includes an officer or director, as specified. As amended April 12, this bill would provide, notwithstanding any other provision of law, that a racing association licensed by CHRB, as specified, which has a class of securities registered under the Securities Exchange Act of 1934, may operate a gaming club if the officers, directors, and beneficial owners of more than 10% of the shares of stock of the racing association are registered with the Attorney General and no person owning 5% or more of the shares of stock of the racing association is determined by the Attorney General to be unfit to own an interest in a gaming club. This bill would provide for reimbursement of the Attorney General for the actual costs of investigating and processing applications for registration, and would prohibit the denial of an applicant's registration by reason of its, or any affiliate's, ownership or operation of a business that conducts parimutuel wagering in accordance with the laws of the state in which that wagering is conducted. *[A. GO]*

SCA 29 (Maddy). Existing provisions of the California Constitution permit certain kinds of gaming in this state, including wagering on the results of horse racing, bingo for charitable purposes, and the operation of a state lottery. Existing provisions of the California Constitution require the Legislature to prohibit casinos of the type currently operating in Nevada and New Jersey. As amended July 1, this measure would create the California Gaming Control Commission, and would authorize the Commission to regulate legal gaming in this state, subject to legislative control. The measure would also create a Division of Gaming Control within the Office of the Attorney General, and permit the legislature to impose licensing fees on all types of gaming regulated by the Commission to support the activities of the Commission and the Division. The measure would provide for the regulation of bingo by the Commission, and provide that the proceeds of those games shall be used exclusively to further the charitable, religious, or educational purposes of a nonprofit organization or institution that is exempt from state taxation.

Existing statutory law establishes the California State Lottery Commission and requires it to administer the California State Lottery Act of 1984. Under existing statutory law, CHRB regulates horse racing and wagering thereon. This measure would permit the legislature to provide for the regulation of parimutuel wagering on horse racing and the state Lottery by the Gaming Control Commission.

This measure would exclude from the meaning of the term "gaming" merchant promotional contests and drawings conducted incidentally to bona fide business operations under specified conditions, and certain types of machines that award additional play. The measure would prohibit the state Lottery from using any slot machine whether mechanical, electromechanical, or electronic.

The measure would require the legislature to provide for the recording and reporting of financial transactions by commercial gaming establishments. The measure would also define the term "casino" for the purpose of the prohibition against casinos. *[S. GO]*

AB 1418 (Tucker). Existing law requires the execution of an agreement between, among others, the racing association conducting the meeting and the satellite wagering facility as a prerequisite to the transmission of the audiovisual signal of the live racing and the conduct of wagering at the satellite wagering facility. As amended September 8, this bill would permit the agreement to contain a provision requiring the payment of a proximity fee to a racing association or fair as a condition of receiving the audiovisual signal of the live meeting under the circumstances specified in the bill. *[A. Conference Committee]*

AB 1764 (Tucker). Under existing law, CHRB may authorize an association that conducts a racing meeting in this state to accept wagers on the results of out-of-state feature races and out-of-state harness or quarter horse feature races or stake races or other designated races under prescribed conditions. As introduced March 4, this bill would define "out-of-state" for purposes of these provisions to mean anywhere outside this state within or outside the United States. *[A. Inactive File]*

RECENT MEETINGS

At its May 28 meeting, CHRB adopted and presented a resolution honoring the late Robert Strub, former Board Chair and Chief Executive Officer at Santa Anita Park, for his outstanding contributions to the horse racing industry and community. Cliff Goodrich of the Los Angeles Turf Club accepted the resolution on behalf of the Strub family.

At its August 27 meeting, CHRB approved a policy requiring, as a condition of licensure, that all applicants for new licenses and initial renewals, except for owners, attend a substance abuse seminar that includes the viewing of a substance abuse videotape. The Board agreed that section 1485, Title 4 of the CCR, which authorizes it to place conditions on any license issued by the Board, gives it the authority to take such action.

FUTURE MEETINGS

January 28 in Monrovia.
February 25 in Arcadia.
March 25 in Emeryville.
April 28 in Los Angeles.
May 20 in Cypress.

NEW MOTOR VEHICLE BOARD

Executive Officer:
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.

The Board consists of four dealer members and five public members. The Board's staff consists of an executive secretary, three legal assistants and two secretaries.

MAJOR PROJECTS

Board Decides Dispute Over Ferrari Testarosa. On July 9, NMVB adopted the proposed decision of Administrative Law Judge (ALJ) Douglas Drake in a contract dispute between Black on Black Imports and R.B.B., Inc., dba Ferrari of Los Gatos. The controversy began when Black on Black contacted Ferrari of Los Gatos, just before September 9, 1989, about purchasing a 1990 Ferrari Testarosa. Representatives of Black on Black and Ferrari of Los Gatos negotiated a sales contract for $300,000, with a $50,000 down payment paid on the spot by Black on Black; the remaining $250,000 was due upon receipt of the Ferrari, which the contract stipulated for delivery in February or March of 1990. On February 28, 1990, a Black on Black representative wrote a letter purporting to cancel the contract, stating that Ferrari of Los Gatos failed to provide either a vehicle identification number (VIN) or a confirmation number for the specific Ferrari ordered; however, the contract did not require Ferrari of Los Gatos to provide either a VIN or confirmation number to Black on Black.

When Ferrari of Los Gatos received the Ferrari it had ordered for Black on Black, it wrote a letter to Black on Black demanding performance of the contract by April 25, 1990; because Black on Black failed to perform at that time or any other time, Ferrari of Los Gatos sold the Ferrari to another dealer for $225,000. According to NMVB, Ferrari of Los Gatos could have sold this Ferrari for $265,000 had it sold the car retail rather than wholesale.

On June 20, 1990, Black on Black filed Petition No. P-247-82 with NMVB, asking for the return of the $50,000 down payment from Ferrari of Los Gatos; on October 28, 1990, Ferrari of Los Gatos filed Petition No. P-247-92 with NMVB, asking for $75,000, the difference between the $300,000 contract price and the $225,000 for which it actually sold the car.

The ALJ's decision, which was adopted by NMVB, found that Black on Black breached the contract to purchase the car in that (1) the February 28, 1990 letter constituted an anticipatory breach of contract; and (2) Black on Black refused to perform the contract by taking delivery and paying for the Ferrari. However, the ALJ also found that Ferrari of Los Gatos breached its duty to mitigate its damages in that (1) it had a duty to mitigate its damages by selling the Ferrari designated to Black on Black for the highest price obtainable; and (2) it failed to market the car for the highest price obtainable.

The ALJ concluded that Ferrari of Los Gatos suffered damages in the amount of $35,000, the difference between the contract price of $300,000 and the amount for which it could have sold the car, or $265,000. However, the ALJ also found that Ferrari of Los Gatos was unjustly enriched by its retention of the difference between Black on Black's down payment of $50,000 and the $35,000 in damages it suffered; accordingly, Ferrari of Los Gatos was ordered to return to Black on Black the sum of $15,000, plus interest at 10% per annum from April 26, 1990, to date of payment.

NMVB Reduces Annual Fees. On July 22, NMVB filed an emergency action with the Office of Administrative Law (OAL) which amended section 553, Title 13 of the CCR, to reduce the amount of fees paid by new motor vehicle dealers or dealer branch applicants and licensees. On July 23, NMVB published notice of its intent to permanently adopt the amendment to section 553, which reduces the fees for every applicant for a license as a new motor vehicle dealer or dealer branch, and every applicant for renewal of a license as a new motor vehicle dealer or dealer branch, from $300 to $100. The changes also reduce NMVB's annual fee from $0.45 to $0.15 per new vehicle distributed by the manufacturer or distributor.

On August 6, NMVB held a public hearing on the proposed action; following the hearing, the Board adopted the changes, which were approved by OAL on September 14.

LEGISLATION

SB 486 (Rosenthal). Existing law provides various remedies for the breach of consumer warranties. As amended August 23, this bill imposes specified notice requirements on motor vehicle manufacturers and new motor vehicle dealers with respect to motor vehicle warranty adjustment programs, and authorizes a consumer to file a claim for reimbursement for expenses incurred prior to knowledge of an adjustment program. This bill was signed by the Governor on October 3 (Chapter 814, Statutes of 1993).

AB 1821 (Costa). Existing law authorizes NMVB to, among other things, adopt rules and regulations relating to persons holding licenses as new motor vehicle dealers, manufacturers, and distributors. Existing law exempts from those provisions transactions involving off-highway motor vehicles subject to identification, including all-terrain vehicles. As amended August 25, this bill extends NMVB's authority to include transactions involving all-terrain vehicles. This bill was signed by the Governor on September 29 (Chapter 594, Statutes of 1993).

AB 1032 (Aguiar). Existing law requires every vehicle franchisor to properly fulfill every warranty agreement made by it and adequately and fairly compensate each of its franchisees for labor and parts used to fulfill that warranty when the franchisee has fulfilled warranty obligations of repair and servicing, and to file a copy of its warranty reimbursement schedule or formula with NMVB. Existing law prescribes procedures to be followed by franchisors, franchisees, and the Board regarding claims for warranty reimbursement. As amended June 22, this bill requires that any claim not specifically disapproved in writing within 30 days from receipt by the franchisor is deemed approved on the 30th day. The bill authorizes franchisors to conduct audits of franchisee warranty records on a reasonable basis, and requires that franchisee claims not be disapproved except for good cause, as specified. The bill also prescribes procedures to be followed by franchisors and franchisees regarding franchisee claims for payment under the terms of a franchisor incentive program. This bill was signed by the Governor on September 26 (Chapter 528, Statutes of 1993).

AB 431 (Moore). Existing law requires specified disclosures to be contained in conditional sales contracts, which are defined to include certain contracts for the sale or bailment of a motor vehicle. Under existing law, a willful violation of these provisions is a misdemeanor. As amended August 26, this bill requires every conditional sales contract to contain a notice in bold type warning the prospective buyer that California law does not provide a "cooling off" or other cancellation period for vehicle sales, as specified.

The Vehicle Leasing Act requires every lease contract, as defined, to contain specified notices. This bill requires these lease contracts to contain a notice warning the prospective lessee that California law does not provide for a "cooling off" or

other cancellation period for vehicle leases, as specified.

Existing law, with certain exceptions, requires every motor vehicle dealer licensed by the Department of Motor Vehicles to conspicuously display his/her license at his/her place of business, and also requires every such dealer who displays or offers one or more used vehicles for sale at retail to post a notice in a conspicuous place regarding the prospective purchaser's right to have the vehicle inspected at his/her own expense. This bill requires every such dealer to conspicuously display a notice in each sales office and sales cubicle of the place of business where sale or lease transactions are discussed with prospective purchasers or lessees and where sale and lease contracts are regularly executed, as specified, warning that California law does not provide for a "cooling off" or other cancellation period for vehicle lease or purchase contracts. This bill was signed by the Governor on October 10 (Chapter 1092, Statutes of 1993).

AB 699 (Bowen), as amended June 10, would change the name of NMVB to the Franchise Dispute Resolution Board; revise references to NMVB in other provisions of existing law; and enlarge the Board's scope of authority to include regulation of all franchisee-franchisor relationships and authorize the charging of certain fees, as specified. *[A. W&M]*

AB 802 (Sher), as amended March 30, would prohibit 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. The bill would require advertisements to made in a prescribed manner. *[A. Trans]*

AB 1665 (Napolitano), as introduced March 4, would prohibit 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. *[A. Trans]*

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, 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]*

LITIGATION

In ***Mathew Zaheri Corp. et al., v. Mitsubishi Motor Sales***, No. A056105 (July 22, 1993), the First District Court of Appeal upheld the lower court's dismissal of plaintiffs' complaint, holding that plaintiffs failed to exhaust their administrative remedies before NMVB.

Mathew Zaheri Corporation, doing business as Hayward Mitsubishi, was an authorized franchise of Mitsubishi Motor Sales. Beginning on or about July 1, 1988, Hayward Mitsubishi performed warranty service and repair of automobiles pursuant to a written agreement with Mitsubishi. In July 1990, Mitsubishi conducted an audit of Hayward's warranty repair service claims and found some improprieties; Mitsubishi charged back over $137,000 of the previously paid warranty claims and then disseminated statements indicating that it was "pulling the franchise" because of evidence of warranty fraud.

Based on Mitsubishi's allegations, plaintiffs' complaint set forth six causes of action—two in tort and four in contract; each of the causes of action was based on statements made by Mitsubishi. The defendant demurred to each cause of action on the basis that plaintiffs had not exhausted their administrative remedies. Defendant asserted that the claims were based on plaintiffs' dissatisfaction due to defendant's chargeback of warranty claims; as such, the matter is within NMVB's jurisdiction. The trial court agreed and sustained the defendant's demurrer.

After filing a timely notice of appeal, plaintiffs filed a dealer petition and dealer protest with NMVB, claiming violations under Vehicle Code sections 3050 and 3065; plaintiffs' petition set forth the factual allegations underlying their superior court cause of action for slander and requested the Board to issue an order compelling defendant to cease and desist making defamatory statements. The First District Court of Appeal noted that, as a preliminary matter, defendant asserted that the appeal must be dismissed because plaintiffs invoked NMVB's jurisdiction after filing their appeal; the court rejected this contention, holding that "[t]here is no question this court has jurisdiction to hear the appeal by virtue of Code of Civil Procedure section 904.1. Although the Board may have had concurrent jurisdiction with the superior court to initially determine the question of jurisdiction, it lacks jurisdiction to review the propriety of the superior court determination. Unlike precedential jurisdiction, appellate courts have exclusive subject matter jurisdiction to review superior court judgments....[S]ubject matter jurisdiction may not be waived."

Turning to the basis for the appeal, the court noted that plaintiffs were contending that the defendant's demurrer should have been overruled because the Board lacks jurisdiction over plaintiffs' claims. The court explained that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act; even if the administrative remedy cannot resolve all issues or provide the type of relief the plaintiff desires, the exhaustion doctrine is still favored since it facilitates the development of a complete record, includes administrative expertise, and promotes judicial efficiency. However, the court noted that where the legislature has not granted an administrative agency a "pervasive and self-contained system of administrative procedure" and the agency possesses no greater expertise to consider the controversy than a judicial forum, exhaustion of the administrative remedy is not required.

Under California caselaw, whether the exhaustion doctrine is to be applied in a particular instance has been determined by a qualitative analysis on a case-by-case basis, with concentration on whether a paramount need for agency expertise outweighs other factors. The First District noted that, in the instant action, "the genesis of the dispute between the parties concerns warranty service charges," and Vehicle Code section 3050(c) grants the Board authority to consider any matter concerning the activities or practices of persons holding licenses as a new motor vehicle dealer and/or manufacturer; further, section 3065 specifically governs warranty reimbursement practices. Thus, the court concluded that an administrative hearing by NMVB would facilitate a complete record, include the Board's expertise, and promote judicial efficiency. The court added that "[i]f the Board resolves those factual prerequisites within its area of expertise in plaintiffs' favor, but is unable to afford full common law relief, plaintiffs have exhausted their administrative remedy and may proceed to file a tort claim in court. If, on the other hand, the Board finds against plaintiffs, the Board's decision must be overturned by a grant of a writ of mandate prior to plaintiffs filing a tort action." Accordingly, the First District affirmed the trial court's holding.

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.

MAJOR PROJECTS

Rulemaking Update. On May 8, OMBC adopted proposed amendments to sections 1600, 1602, 1668, 1620, 1621, 1656, 1690, and Article 18, Title 16 of the CCR. Among other things, the proposal would make the following changes:

–change references to the Board of Osteopathic Examiners to the Osteopathic Medical Board of California, in accordance with the Board's recent name change mandated by various sections of the Business and Professions Code;

–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.

At this writing, the rulemaking file on this regulatory action is pending review at the Office of Administrative Law.

LEGISLATION

AB 1987 (Horcher). Existing law authorizes OMBC to utilize an examination prepared by the Federation of State Medical Boards until December 31, 1993, for granting certificates of licensure based on reciprocity. As amended May 13, this bill deletes the December 31, 1993 limitation. This bill also prohibits individuals who possess DO certificates from holding themselves out to be "board certified" unless that certification has been granted by the appropriate certifying board, as authorized by the American Osteopathic Association or the American Board of Medical Specialties, or is the result of certain approved postgraduate training. Finally, this bill revises certain terminology relating to osteopathic medicine. This bill was signed by the Governor on July 26 (Chapter 226, Statutes of 1993).

AB 2046 (Margolin). Existing law prohibits osteopaths from charging, billing, or otherwise soliciting payment from any patient, client, or customer, for any clinical laboratory service if the service was not actually rendered by that person or under his/her direct supervision, unless the patient, client, or customer is apprised at the first, and any subsequent, solicitation for payment of the name, address, and charges of the clinical laboratory performing the service. As amended August 26, this bill requires, commencing July 1, 1994, a clinical laboratory to provide, upon request, to each of its referring providers, as defined, a schedule of fees for prescribed services. The bill also requires, commencing July 1, 1994, a clinical laboratory that provides a list of laboratory services to a referring provider or to a potential referring provider to include a schedule of fees for the laboratory services listed. This bill was signed by the Governor on September 28 (Chapter 593, Statutes of 1993).

AB 179 (Snyder). Existing law provides that it is unlawful for an osteopath to charge, bill, or otherwise solicit payment from any patient, client, or customer, for any clinical laboratory test or service if the test or service was not actually rendered by that person or under his/her direct supervision, unless the patient, client, or customer is apprised at the first, or any subsequent, solicitation for payment of the name, address, and charges of the clinical laboratory performing the service. As amended June 18, this bill deletes the requirement that the patient, client, or customer be apprised for any subsequent solicitation for payment of the name, address, and charges. The bill prohibit this provision from applying to a clinical laboratory of a health facility, as defined, or a health facility when billing for a clinical laboratory of the facility, or to any person licensed for one of those practices, if the standardized billing form used by the facility or person requires a summary entry for all clinical laboratory charges.

Existing law provides that it is unlawful for an osteopath to charge additional charges for any clinical laboratory service that is not actually rendered by the licensee to the patient and itemized in the charge. Existing law prohibits that provision from being construed to prohibit any itemized charge for any service actually rendered to the patient by the licensee. This bill also provides that the prohibition against additional charges is not to be construed to prohibit any summary charge for services actually rendered to a patient by a health facility, or by a person licensed for one of those practices if the standardized billing form used by the facility or person requires a summary entry for all clinical laboratory charges. This bill was signed by the Governor on August 25 (Chapter 304, Statutes of 1993).

AB 336 (Snyder). Existing law prohibits defined providers of health care