CCR, which provides for the issuance of temporary occupational licenses by CHRB and sets forth the conditions under which such licenses may become permanent; at this writing, the amendments are being reviewed by OAL. *[12:4 CRLR 221]*

LEGISLATION

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 introduced December 7, this bill would require that an amount equal to not less than 15% of the total purses paid be dedicated and set aside as purses for California-bred races, as described. *[S. GO]*

LITIGATION

In ***Cabazon Band of Mission Indians v. State of California***, No. CIV-S-90-1118-DFL, the Cabazon and Sycuan Bands of Mission Indians sought a determination from the U.S. District Court for the Eastern District of California that the state of California may not impose license fees on its on-reservation betting facilities for simulcast horse racing. The plaintiffs—collectively called "the Tribes" by the court—argued that the license fees are a direct tax on them that is barred by the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. section 2701 *et seq.*, and the doctrine of tribal sovereign immunity. Specifically, one provision of the IGRA provides that "[e]xcept for any assessments that may be agreed to [to permit the state to recover its costs of regulation], nothing in this section shall be interpreted as conferring upon a State...authority to impose any tax, fee, charge, or other assessment upon an Indian tribe...engag[ing] in a class III activity." Although the parties disagreed about whether California has jurisdiction to collect its license fee based on revenues generated at the Tribes' simulcast operations, the parties agreed that the fees are taxes, even though they are called license fees.

The court acknowledged that relevant portions of the IGRA "constitute a prohibition on direct taxation of revenues generated by tribes, other than that necessary to reimburse the state for the cost of its regulatory activities." However, the court noted that the IGRA "consistently speaks only to direct taxation," and that the issue presented is whether the license fees, which are levied on the racing associations and which affect the Tribes only indirectly, are an impermissible burden on the Tribes. The court found that a "primary purpose of IGRA was to create an arena in which Indian tribes could compete on an equal footing with non-Indian entities, 'to achieve a fair balancing of competitive economic interests.'" According to the court, California seeks to treat revenue generated by racing associations on Indian lands in precisely the same fashion as it treats revenue generated on non-Indian lands; the court held that such a tax furthers the twin goals of equality and uniformity in regulation. Based on IGRA's silence as to indirect taxation, and Congress' intent that Class III tribal gaming be treated equally to non-Indian gaming, the court concluded that IGRA does not preempt the tax at issue here.

In response to the Tribes' contention that the tax is invalid as an impermissible intrusion on the Tribes' sovereignty, the court considered—among other things—the economic and administrative burden on the tribe and the extent and cost of state regulation and state services provided. The court noted that if California cannot tax the revenues derived from betting at simulcast facilities located on the Tribes' lands, those revenues would be distributed 50% to the racing associations and 50% as purses to horsemen who participate in the races; because the Tribes do not have the responsibility of paying the taxes, and have no right to the revenues if the taxes were to go unpaid, the court found that the license fees do not impose an economic burden on the Tribes. Also, the court found that no additional administrative burden is placed on the Tribes by collection of the monies ultimately used by the racing associations to pay the license fees; under state law, the Tribes must turn over to the racing associations all monies received from wagering except for the percentage to which they are entitled as simulcast facility operators. The court also found that the presence of horse racing in California requires the state to support additional law enforcement and tax collection bureaucracies, as well as establish and operate the extensive administration that oversees the horse racing industry, and concluded that "[e]ven if the state revenues were disproportionately larger than state expenses, the lack of proportionality does not make the tax an impermissible burden on the tribes." Finally, the court noted that when the nature of an activity that a state seeks to tax is unrelated to traditional Indian activity and consists of taking advantage of an exemption not available to non-Indians, an indirect tax will be upheld, and acknowledged that "[g]aming is a major source of employment on Indian reservations," with tribes making large investments in building and maintaining gaming facilities. Accordingly, the court concluded that the license fees California collects from the horse racing associations which broadcast their races to on-reservation betting operations are neither preempted by IGRA nor a violation of the Tribes' sovereign immunity.

FUTURE MEETINGS

June 25 in Sacramento.
July 29 in Del Mar.
August 27 in Del Mar.
September 24 in San Mateo.

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 Considers Protest Regarding Franchise Termination. On November 5, NMVB and an administrative law judge (ALJ) heard a protest filed by Toyota of Visalia (TOV) against Toyota Motor Distributors, Inc. (Toyota) concerning Toyota's proposed termination of TOV's franchise. Toyota's request for termination of the franchise was based on its belief that TOV had deceived clients and Toyota, breached Toyota's dealer agreement, mistreated and abused employees, and committed over 150 counts of consumer fraud. Additionally, Toyota contended that its dealership

agreement with TOV states that Toyota may terminate the franchise if NMVB suspends TOV for seven days or longer; Toyota argued that because NMVB has suspended TOV for thirty days, Toyota is authorized under the agreement to terminate TOV's franchise.

TOV denied Toyota's claims and requested that NMVB reexamine the evidence before it allows Toyota to terminate the franchise. The Board and the ALJ took the evidence under consideration; at this writing, the Board is expected to announce its decision in early 1993.

LITIGATION

In ***Ray Fladeboe Lincoln-Mercury, Inc., v. New Motor Vehicle Board, Jaguar Cars, Inc., et al., Real Parties in Interest***, No. B060651 (Sept. 14, 1992), Fladeboe sought to overturn the decision of respondent NMVB which allowed real party in interest Jaguar Cars, Inc. (Jaguar) to terminate Fladeboe's Jaguar dealership, and rejected Fladeboe's petition seeking damages for Jaguar's assertedly wrongful conduct in the allocation of vehicles among its dealers. The Second District Court of Appeal concluded that the trial court properly denied Fladeboe's petition for writ of mandate, substantial evidence supports NMVB's findings, Fladeboe received a full and fair hearing before NMVB, and NMVB had jurisdiction to hear Fladeboe's petition claims.

Fladeboe contended that NMVB lacked jurisdiction under Vehicle Code section 3050(c)(2) to arbitrate the dispute between Fladeboe and Jaguar; that section states in part that the Board shall consider any matter concerning the activities or practices of any person applying for or holding a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative submitted by any person. After such consideration, NMVB may do any one or any combination of the following: direct the Department of Motor Vehicles (DMV) to conduct an investigation of matters that the Board deems reasonable, and make a written report on the results of the investigation to NMVB; undertake to mediate, arbitrate, or otherwise resolve any honest difference of opinion or viewpoint existing between any member of the public and any new motor vehicle dealer, manufacturer, manufacturer branch, distributor branch, or representative; or order DMV to exercise any and all authority or power that it may have with respect to the issuance, renewal, refusal to renew, suspension, or revocation of the license of any new motor vehicle dealer.

Fladeboe asserted that section 3050(c)(2) addresses only differences of opinion between any "member of the public and any new motor vehicle dealer, manufacturer, manufacturer branch, distributor branch, or representative." Fladeboe argued that the term "member of the public" refers to individuals served by the new motor vehicle industry, and claimed that the disputes described in section 3050(c)(2) do not include differences between new motor vehicle businesses. Fladeboe contended that the directive to "consider" matters under section 3050(c) is to be contrasted with language in subsections 3050(b) and (d) which directs the Board to "hear and consider" protests and appeals by franchisees and licensees.

The Second District noted that, although the Board possesses only such power as has been conferred upon it by statute, the cases of *Yamaha Motor Corp. v. Superior Court*, 185 Cal. App. 3d 1232 (1986) (*Yamaha I*), and *Yamaha Motor Corp. v. Superior Court*, 195 Cal. App. 3d 652 (1987) (*Yamaha II*), have held that section 3050(c) confers upon NMVB the authority to consider any matter concerning the activities or practices of any person holding a license as a new motor vehicle dealer, manufacturer, or representative submitted by any person.

However, Fladeboe argued that the more recent decision in *Ri-Joyce, Inc. v. New Motor Vehicle Board*, 2 Cal. App. 4th 445 (1992), undermines the holdings of *Yamaha I* and *Yamaha II*; the *Ri-Joyce* court commented that NMVB is a quasi-judicial administrative agency of limited jurisdiction, which does not have plenary authority to resolve any and all disputes which may arise between a franchisor and a franchisee. *[12:2&3 CRLR 255]* According to *Ri-Joyce*, NMVB's "jurisdiction under section 3060 encompasses disputes arising over the attempted termination, replacement or modification of a franchise agreement. Claims arising from disputes with other legal bases must be directed to a different forum."

In response to Fladeboe's argument, the Second District held that it disagrees with *Ri-Joyce* to the extent that it held that NMVB lacks authority over disputes involving the termination of franchises whenever a claim of impropriety is based upon estoppel or fraud. The court based its decision on the findings that *Ri-Joyce* failed to mention or consider *Yamaha I* and *Yamaha II*; segregation of claims otherwise proper for the Board's consideration, based upon the underlying basis of the claim, would allow franchisees to circumvent NMVB's jurisdiction through artful pleading; and the *Ri-Joyce* rule would require franchisees to pursue simultaneous actions before NMVB and in state court, wreak havoc with the exhaustion of remedies doctrine, and defeat the public policy which favors resolution of franchise disputes before the administrative agency.

On December 31, the California Supreme Court denied Fladeboe's petition for review.

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.

Two new members were recently appointed to OMBC by Governor Wilson. They are Michael A. Danforth, DO, an osteopathic physician from Fullerton, and Robert P. David, director of national accounts for the Sutter Corporation in San Diego. Board member Stanley L.K. Flemming recently resigned from OMBC, leaving the Board with one vacant DO position.

MAJOR PROJECTS

Continuing Medical Education. At its December 12 meeting in Irvine, OMBC discussed modifying its existing continuing medical education (CME) requirements. Under section 1635, Division 16, Title 16 of the CCR, OMBC currently