

NEW MOTOR VEHICLE BOARD



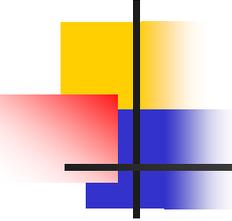
ATTORNEY/INDUSTRY
ROUNDTABLE
March 30, 2011

Topic 5:

Discussion Concerning the Trends in Case Management

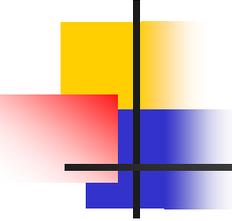
Robin Parker, Senior Staff Counsel, New Motor Vehicle Board

- Introduction and overview of the New Motor Vehicle Board.



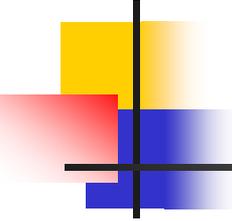
The Board could have Jurisdiction over dealers, manufacturers, or distributors of the following products:

- Motor vehicle
- On-road motorcycle and motor driven cycle
- Off-highway motorcycles subject to identification
- All-terrain vehicles
- Recreational Vehicles (excluding truck campers and park trailers)
- Low-speed vehicle
- Buses
- Ambulances, hearses, limousines
- Refuse trucks



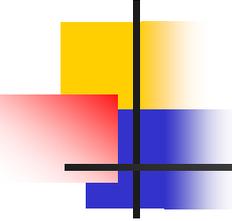
Types of Actions Filed before the Board

- Petitions
- Appeals
- Protests



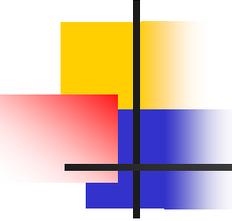
Trends in Case Management

- Discussion concerning trends in case management including:
 - Types and number of notices of termination being filed;
 - Types of protests being filed;
 - Number of cases going to a merits hearing; and
 - The number being resolved prior to hearing.



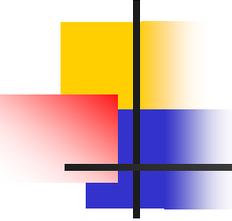
Notices of Termination

- A 15-day notice of termination can be issued if the specific grounds set forth include one or more of the following:
 - (1) transfer of any ownership or interest in the franchise without the consent of the franchisor;
 - (2) Misrepresentation by the franchisee in applying for the franchise;
 - (3) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law;
 - (4) Any unfair business practice after written warning thereof;
 - (5) Failure of the motor vehicle dealer to conduct its customary sales and service operations during its customary hours of business for seven consecutive business days, giving rise to a good faith belief on the part of the franchisor that the motor vehicle dealer is in fact going out of business, except for circumstances beyond the direct control of the motor vehicle dealer or by order of the DMV.



What are the types and number of notices of termination being filed?

Year	Product	15-day notices	60-day notices	Total
2007	Automobile, motorcycle, ATV, trailer, heavy duty truck	6	23	29
2007	Recreational vehicle	3	2	5
2008	Automobile, motorcycle, ATV, trailer, heavy duty truck	30	17	47
2008	Recreational vehicle	5	0	5
2009	Automobile, motorcycle, ATV, trailer, heavy duty truck	40	67	107
2009	Recreational vehicle	2	1	3
2010	Automobile, motorcycle, ATV, trailer, heavy duty truck	17	137	154
2010	Recreational vehicle	0	10	10

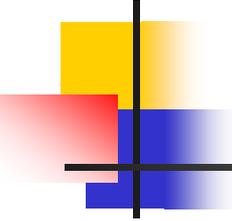


What are the types and number of notices of termination being filed?

PRODUCT	15-DAY NOTICE	60-DAY NOTICE
Cars	6	93
Heavy-Duty Trucks	0	5
Motorcycles, ATV, Scooters	10	39
Recreational Vehicles/Trailers	0	10
Trailers	1	0
TOTAL	17	147

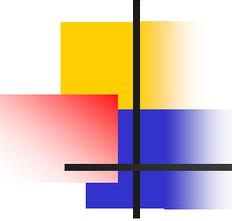
What are the types of protests being filed?

Year	3060 (T)	3060 (M)	3062 (E)	3062 (R)	3065	3065.1	3070 (T)	3070 (M)	3070 (E)	3075	3076
2006	14	1	25	5	3	0	0	0	0	1	0
Total 49											
2007	18	3	20	13	3	4	3	1	0	0	0
Total 65											
2008	21	1	9	9	0	1	1	0	0	0	0
Total 42											
2009	32	0	8	4	1	0	3	0	0	5	1
Total 54											



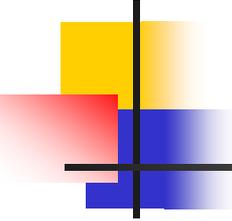
What are the types of protests being filed?

Year	3060 (T)	3060 (M)	3062 (E)	3062 (R)	3065	3065.1	3070 (T)	3070 (M)	3070 (E)	3075	3076
2010	26	3	31	3	1	1	5	4	1	5	5
Total 85											
2011 TYD	4	0	5	1	0	1	1	0	0	0	0
Total 12 Through March 25, 2011											



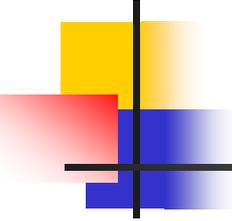
How many cases proceed to a merits hearing?

- The number of in-person merits hearing days per calendar year were as follows:
 - 2003 - 4 hearings for a total of 21 days
 - 2004 - 5 hearings for a total of 17 days
 - 2005 - 3 hearings for a total of 27 days
 - 2006 - 4 hearings for a total of 26 days
 - 2007 - 4 hearings for a total of 16 days
 - 2008 - 1 hearing for a total of 5 days
 - 2009 - 3 hearings for a total of 13 days
 - 2010 - 1 hearing for a total of 2 days
 - 2011 - 1 hearing for a total of 8 days



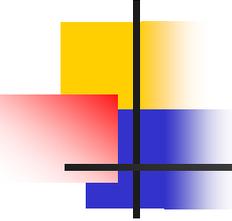
How many cases are resolved prior to a merits hearing?

- More than 90-95% of all protests filed are resolved prior to a merits hearing.
- The Board used to average 3-4 hearings per year but recently has only had 1 hearing a year.



Practicing Before the New Motor Vehicle Board

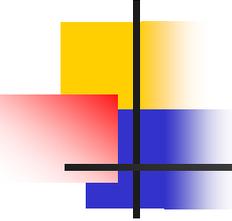
- What are the common mistakes encountered by the Board's legal staff with the pleadings submitted?
 - No proof of service;
 - "Notice to Dealer";
 - "Original" signatures versus copy;
 - The franchise is not part of the record or not referenced when drafting pleadings; and
 - Wrong Vehicle Code section referenced.



What are the common mistakes encountered by the Board's legal staff?

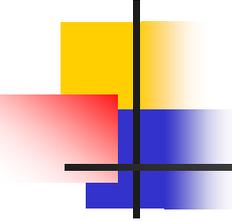
Manufacturers/Distributors issuing notices

- Statutory language does not comply – use the website or consult Board legal staff for procedural assistance.
- A 15-day notice of termination is issued when the statutory grounds for issuing a shorter notice do not apply.
- No contact information.
- Not enclosing copies of the notices to the dealer(s) with the cover letter to the Board.
- Notices that combine separate franchises.
 - A separate notice shall be issued to each franchisee.
 - A separate notice shall be issued for each line-make represented by a franchisee.
 - Notices shall not be combined to include more than one franchisee nor combined to include more than one line-make.
 - 13 CCR § 593.1 operative 3-17-11



What are the common mistakes encountered by the Board's legal staff?

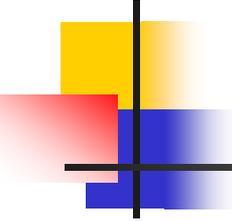
- Original signatures versus copy.
 - No longer required (13 CCR § 594 and 597; operative 3-18-11).
- The franchise is not part of the record or not referenced when drafting pleadings.
- Counsel mixes up the code sections for vehicles (3060 et seq.) and RVs (3070 et seq.).
 - There are differences, some are subtle but some are substantive.
- Counsel does not accurately reference the Board's regulations.
 - There are separate and different regulation provisions for appeals (Articles 3 and 4), petitions (Articles 2 and 4), and protests (Article 5).



What are the common mistakes encountered by the Board's legal staff?

■ Rulings on Objections

- Know the terminology used by a particular franchisor no matter whether you represent the protestant or respondent.
 - What are the geographic areas designated by the franchisor – PMA, AOR, AGSSA, and so on?
 - What is the next largest geographic area – metro, district, and so on?
 - What is the number of dealers in each geographic area?
- Understand the definition of relevant market area (“RMA”).
 - Not accurate to refer to “protesting dealer’s relevant market area”.
- Timeframe to be included within “existing circumstances” for evaluating good cause factors.

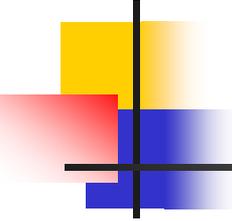


Topic 6:

Recently Promulgated Regulatory Provisions

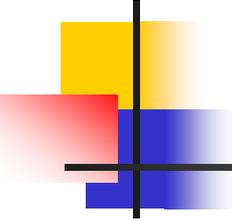
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- Overview of the recently promulgated regulatory amendments that provide clarity and consistency in addition to filling a number of case management gaps in the Board's procedures.
- Operative between March 17-26, 2011.



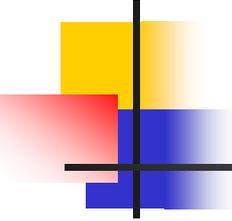
Recently Promulgated Regulatory Provisions

- Definitions (13 CCR § 550)
- Format of Pleadings (13 CCR §§ 594, 595, and 597)
 - No original signatures required.
 - Footer on the bottom of each page.
 - Dates of the hearing and future pre-hearing or settlement conference dates on the first page of each pleading.
 - In addition to a paper copy, the Board may require an electronic copy.
 - Pre-Hearing Conference Order
 - Briefing schedule (merits and motions)
 - Mandatory Settlement Conference Statements



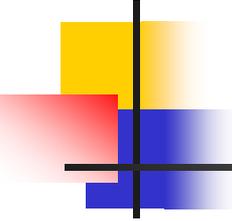
Recently Promulgated Regulatory Provisions

- Format of Pleadings (13 CCR §§ 594, 595, and 597)
 - Procedure for conformed copies.
 - Papers can be filed via facsimile or e-mail, unless required by order of the Board.
 - Papers delivered by the U.S. Postal Service or other means are deemed filed on the date actually received by the Board.
 - Papers hand-delivered and complete papers received by facsimile or e-mail during regular business hours will be filed on the date received.
 - Papers received after regular business hours are deemed filed on the next regular business day.
 - Protests sent by U.S. Postal Service certified or registered mail are deemed received by the Board on the date of certified or registered mailing and will be filed as of the date of the certified or registered mailing.
 - E-mail = file date.



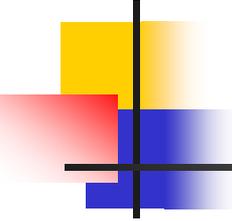
Recently Promulgated Regulatory Provisions

- Notices (13 CCR § 593.1)
 - All written notices pursuant to Vehicle Code section 3060, 3062, 3070, or 3072 shall be:
 - Separately issued to each franchisee; and
 - Separately issued for each line-make represented by a franchisee.
 - Notices shall not be combined to include more than one franchisee nor combined to include more than one line-make.



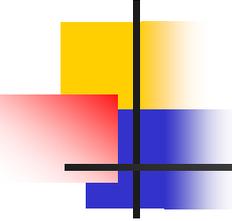
Recently Promulgated Regulatory Provisions

- Protests (13 CCR § 583)
 - If the franchisee is a natural person, not a corporation or other legal entity, the protest shall be signed by that person or by the franchisee's attorney or representative.
 - If the franchisee is a corporation or other legal entity, the protest shall be signed by an attorney representing the entity, or by an authorized representative of the entity.
 - Separate protests are required if there is more than one franchisee.



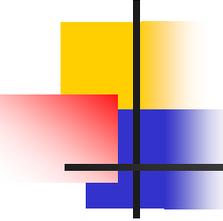
Recently Promulgated Regulatory Provisions

- Settlement Conference (13 CCR § 551.11)
 - Each party shall file a written settlement conference statement that must be received by the Board no later than five business days before the settlement conference.
 - The settlement conference statement shall contain a detailed statement of facts, a statement of issues, and a good faith settlement proposal.
 - Unless the parties agree orally or in writing that the statements shall be submitted only to the Board for use by the assigned settlement conference administrative law judge and designated "confidential", the settlement conference statement filed with the Board shall be accompanied by a proof of service showing service on all other parties.



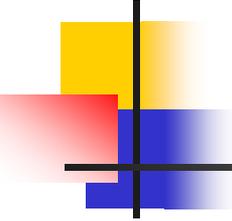
Recently Promulgated Regulatory Provisions

- Motion to Quash (13 CCR § 551.2)
 - A motion to quash pursuant to Government Code section 11450.30 shall be made in compliance with Article 1, section 551.19.
 - The motion shall be made within a reasonable time after receipt of the subpoena.
 - The person bringing the motion shall serve copies of the motion on all parties. Notice to all other persons entitled to such notice must also be given or received as may be required by law.



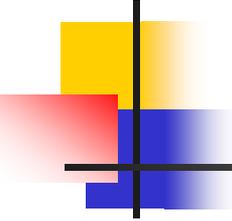
Recently Promulgated Regulatory Provisions

- Motions (13 CCR § 551.19)
 - All motions shall be in writing and filed with the Board with an attached proof of service on all parties (unless made during a hearing while on the record).
 - Motions and any response including an opposition to motion and a reply to the opposition shall conform to the requirements of Article 6.
 - The motion and any response shall state in plain language the relief sought and the facts, circumstances, and legal authority that support the motion or the response.
 - Briefing may be permitted by stipulation of the parties or by Board order.
 - Notwithstanding Government Code section 11440.30 of the Administrative Procedure Act, the ALJ may conduct the hearing by telephone, television, or other electronic means if each party in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits. In the event of live testimony, the hearing shall be conducted in person before an ALJ.



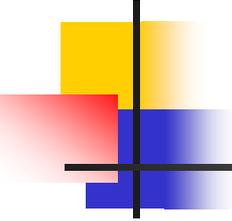
Recently Promulgated Regulatory Provisions

- **Conduct of Hearing - Protective Orders (13 CCR § 551.20)**
 - A motion seeking an order for closure or other protective order for all or part of a hearing, including a motion to seal designated portions of the record shall be made before the ALJ presiding at the hearing to which the order will apply.
 - The motion may be made by separate writing or it may be made orally on the record.
 - It may be made at the commencement of or during the course of the hearing but must be made as early as is practicable.
 - In any case, the provisions of Government Code section 11425.20 shall be applicable.
 - The motion shall clearly identify the relief sought and the facts, circumstances, legal authority, and shall include declarations or other evidence that support the motion.
 - An oral or written opposition to the motion may be permitted in the discretion of the ALJ.
 - The ALJ shall set forth on the record the facts, legal basis, and findings that support any protective order, order to seal parts of the record, or order to close all or part of the hearing to the public.



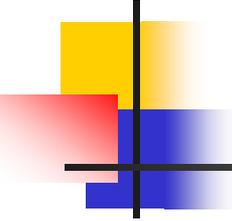
Recently Promulgated Regulatory Provisions

- Substitution or Withdrawal of Counsel (13 CCR § 551.25)
- The party to a protest, petition or appeal may substitute counsel of record at any time.
 - It shall be evidenced by a writing signed by the party and new counsel of record and filed with the Board.
 - The writing shall be served on all other parties named in the proceeding.
- Counsel of record for a party may not withdraw from a protest, petition, or appeal without permission from the Board.
 - To obtain permission, counsel must file and serve a written request to withdraw, stating with particularity the factor or factors as set forth in Rule 3-700 of the Rules of Professional Conduct and Code of Civil Procedure section 284, justifying the request.
 - Declarations of counsel may be filed under seal, but must be served on the party of the moving counsel, who then has an opportunity to be heard.
- Substitution or withdrawal of counsel does not alone constitute grounds for continuance of any previously scheduled dates in the proceeding.



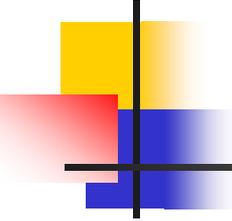
Recently Promulgated Regulatory Provisions

- Sanctions – Bad Faith Actions (13 CCR § 551.21)
- The ALJ may recommend ordering a party, a party's representative or both, to pay reasonable sanctions, including attorney's fees and costs, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.
 - "Actions or tactics" include, but are not limited to, the making or opposing of motions or the failure to comply with a lawful order or ruling of the Board.
 - "Frivolous" means:
 - Totally without merit; or
 - For the sole purpose of harassing an opposing party.
- The ALJ shall not recommend an award of sanctions without providing notice and an opportunity to be heard.



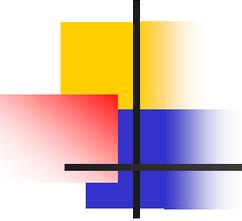
Recently Promulgated Regulatory Provisions

- Sanctions – Bad Faith Actions (13 CCR § 551.21)
- Whether there has been bad faith by a party shall be determined by the ALJ based upon testimony under oath or other evidence.
 - Any proposed order recommending sanctions by the ALJ shall be on the record, or in writing, setting forth the factual findings on which the sanctions are based, as well as setting forth the factual findings as to the reasonableness of the amount(s) to be paid.
- A proposed order recommending an award of sanctions shall be considered by the Board members at their next regularly scheduled meeting.
 - A determination not to award sanctions is not considered by the Board members and is final upon issuance by the ALJ.
- The Board members' consideration to affirm, reject or modify the ALJ's award of sanctions does not alone constitute grounds for continuance of any previously scheduled dates in the proceeding.

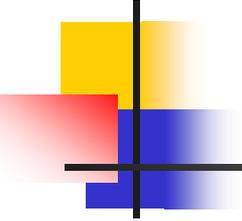


Recently Promulgated Regulatory Provisions

- Service; Proof of Service (13 CCR § 551.24)
- Proof of service of papers shall be made in accordance with Code of Civil Procedure section 1013a.
- Where service is by facsimile the proof of service shall state the method of service upon each party, the date and time sent, and the facsimile telephone number to which the document was sent.
- Where service is by electronic-mail the proof of service shall state the method of service upon each party, the date and time of electronic service, and the name and electronic notification address of the person served.



QUESTIONS AND ANSWERS



PLEASE
COMPLETE QUESTIONNAIRE