



*New Motor Vehicle Board*

# *In-Site*

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## **2007 ATTORNEY ROUNDTABLE**

The Board hosted an Attorney Roundtable on Friday, September 28, 2007, in the auditorium of the Ziggurat building in West Sacramento. The purpose of the event was to provide an in-depth discussion of the Board's case management policies and procedures, and to obtain feedback on how the Board might improve its operation. A PowerPoint presentation was provided which gave a step-by-step outline of each of the topics. Senior Staff Counsel, Robin Parker and Staff Counsel, Polly Riggenbach spoke on topics #1-5, with General Counsel, Howard Weinberg discussing topic #6.

Topic #1 discussed the "nuts and bolts" of practicing before the Board, raising such issues as statutorily required notices, the path of a Protest from filing to the dismissal or Board action, and common mistakes encountered by the Board's legal staff.

Topic #2 covered the role of the Mandatory Settlement Conference (MSC) in the resolution of a protest. The attending attorneys were asked for comments and suggestions on the Mandatory Settlement Conference process. The attorneys provided valuable feedback on the process and informed the staff that both attorneys and their clients felt that the Board's Settlement Conference should be mandatory in every case, rather than allowing participation to be voluntary.

The majority of the attorneys also felt that the MSC Statements would be more effective in two parts: having one part of the statement exchanged among the parties with a copy to the settlement judge, and another part which the parties would submit in confidence only to the settlement judge. The Board's staff is currently reviewing these suggestions.

Robin Parker also discussed the role of Proposed Stipulated Decisions and Orders and what documents are subject to disclosure. She gave the attorneys information on how to properly protect confidential settlement

information in the Proposed Stipulated Decision and Order, when needed.

Topic #3 was an open forum discussion on proposed changes to case management operations, as well as theoretical discussions relating to the size of the relevant market area in comparison to other jurisdictions. Board staff asked for feedback from the attorneys on proposed amendments and additions to the Board's regulations. The attorneys offered a great deal of support for a regulation eliminating the requirement of an original signature for filing a pleading with the Board. Board staff requested follow-up comments on the proposed regulations from the attorneys after they have had the opportunity to fully review them following the Roundtable.

Topic #4 discussed the Board's petition jurisdiction in light of the decision in *Mazda Motor of America, Inc. v. California New Motor Vehicle Board; David J. Phillips Buick-Pontiac, Inc., Real Party in Interest* (2003) 110 Cal.App.4<sup>th</sup> 1451, which greatly limited the petitions that could be heard by the Board.

Topic #5 addressed the trends in case management, discussing the large number of open cases that the Board has consistently been handling over the past couple of years. Statistics were also given to the attendees regarding the number of cases going to merits hearings and the average number of days each hearing is running. This year the Board has had in excess of 50 open Protest at any given time. Over the last five years, the Board has heard an average of four merit hearings per year. The total average number of days for the merit hearings, in the same period, was six. The Board's staff and judges have made efforts to reduce the number of days of hearing, in turn reducing the costs to the parties. This year, to date, the Board has heard four Protests, each lasting only four days.

Lastly, topic #6, discussed the recent U.S. Supreme Court opinion in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, (2007) 127 S. CT. 2705, 168 L. Ed. 2d 623. The Leegin case reversed 96 years of precedent and held that a manufacturer's setting of a minimum retail price (taking

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the "S" out of MSRP – Manufacturer's suggested retail price) was no longer per se illegal under the Sherman Antitrust Act. Rather, such pricing by a manufacturer would now be scrutinized on a case-by-case basis to see if there were pro-competitive consequences justifying such retail pricing. Hypothetical consequences of the decision on the new motor vehicle industry were discussed.

## SEPTEMBER 7, 2007 GENERAL MEETING HIGHLIGHTS

The Board held its September 7, 2007, General Meeting in San Francisco. Haig Papaian, Public Board Member was presented with a resolution for his contributions to the New Motor Vehicle Board, the motor vehicle industry and the people of the State of California from 2002 through 2006. Mr. Papaian was reappointed to the Board in 2007.

The Public Members considered ALJ Prod's Proposed Decision in *Forty-Niner Sierra Resources, Inc., dba Forty-Niner Suburu v. Subaru of America*, Protest No. PR-1972-05. A Vehicle Code section 3060 termination protest was filed in September 2005, by Richard E. Wilmshurst, Protestant In Pro Per.

After considering the briefs and oral arguments, the Public Members unanimously remanded the ALJ's Proposed

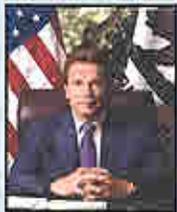
Decision to re-open the record and file Protestant's Post-Hearing Brief and attached exhibits, dated July 27, 2007. ALJ Prod was directed to consider the brief and make any appropriate changes to the Proposed Decision. The matter will be brought before the Board again at the November 15, 2007, General Meeting.

The Public Members considered ALJ Skrocki's Proposed Order granting Respondent's motion to dismiss as to the claims of the Silicon Valley Suzuki Advertising Association in *Bob Lewis Volkswagen dba Bob Lewis Suzuki v. American Suzuki Motor Corp.*, Protest No. PR-2042-07. The Protest was filed in February 2007 under Vehicle Code section 3065.1, alleging that Suzuki failed to pay claims under a franchisor incentive program. After consideration by the Public Members, the motion to adopt the ALJ's Proposed Order carried unanimously. The Protest will proceed before the Board with Bob Lewis Suzuki as the sole Protestant.

Maurice Sanchez, Esq., Baker & Hostetler LLP, counsel for the RVIA, and Michael P. Norton, Esq., Assistant General Counsel, National RV Holdings, Inc., were present at the meeting to request that the Board reconsider its policy concerning Dealer Board Member participation in Article 5 recreational vehicle protests.

Skip Daum, Executive Director, California Recreation Vehicle Dealers Association (CalRVDA) was also present and requested additional time to respond to the

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RVIA's request. CalRVDA represented that it would file a response with the Board by the end of October. This matter was postponed to allow RVIA, CalRVDA and any other interested parties to make a presentation to the Board on the issue.

A number of staff reports were given at the meeting on a variety of topics. The staff reported on the Board's continuing compliance with the 1996 Performance Audit, the development and use of the Board's website, and the Board's budget. Discussion was held regarding the determination that funds collected by the Board are properly classified as fees which are determined to be fair and reasonable. The Board also discussed who was marketing "Smart Fortwo" vehicles in the United States.

Staff reported that Richard Lopez resigned as a Board ALJ and was taken off the merits hearings and mandatory settlement conference assignment logs. In addition, the Board considered a proposed revision to the assignment log for the Mandatory Settlement Conferences. The Board adopted a policy wherein ALJs Marilyn Wong and Polly Riggerbach will conduct all Mandatory Settlement Conferences for a period of six-months, to allow the Board time to hire and train additional judges. This will preserve the availability of the other current Board ALJs, which will allow them to preside over the upcoming Merit Hearings.

## RVIA LAWYER'S COMMITTEE MEETING

On Thursday, October 4, 2007, Executive Director William Brennan, legal staff, and Administrative Law Judge Jerry Prod, were invited to attend the Recreational Vehicle Industry Association's (RVIA) Lawyer's Committee Meeting in Napa, California. Given that RVs have only been under the Board's jurisdiction since 2004, attendance at the meeting gave staff an excellent opportunity to learn the procedures and practices of the RV industry, particularly the differences between the RV business model and those of other new motor vehicles under the Board's jurisdiction. The

meeting also presented Board staff with the opportunity to meet and exchange contact information with both in-house and outside counsel representing RV manufacturers.

Among the topics presented at the meeting was Practice Before the New Motor Vehicle Board presented by outside RV manufacturer counsel Maurice Sanchez and Kevin Colton of Baker & Hostetler, LLP. Board staff was available to answer questions and discuss the finer points of Board practice in relation to RVs. Other topics included a discussion contrasting the RV industry with the automotive industry and the filing of statutorily required warranty schedules and formulas, and delivery and preparation obligations and schedule of compensation.

## MEDIATION SPOTLIGHT

On June 6, 2007, the New Motor Vehicle Board's Mediation Services Program received a request for mediation from a Northern California consumer who was requesting that a dealership buyback his 2000 Dodge Durango. According to the information provided by the consumer, he had purchased the Dodge Durango with the understanding that his 2005 Lancer would be paid off and used as a trade in on the Dodge. He was told by the dealership, after his purchase of the Dodge, that they could not pay off the Lancer because he owed too much on it. The consumer found himself in the position of making two vehicle payments, which he was unable to do. His case was assigned to Mediation Services Representative Jackie Grassinger.

On June 6, 2007 and again, on July 12, 2007, Mrs. Grassinger sent letters of inquiry, together with the consumer's complaint, to the dealership asking for their comments and proposed solution to the consumer's problem. The dealership was willing to repurchase the Dodge but was not willing to rebate the fees. Ms. Grassinger explained to the dealership that they can receive a refund on the license fee through the Department of Motor Vehicles. She further explained that the dealership can receive a refund for the taxes through the Board of Equalization.

On September 18, 2007, Ms. Grassinger received a telephone call from the dealership stating they will fill out the forms for the refund on the tax and license and will then pay off the loan to buy the vehicle.

On October 12, 2007, Ms. Grassinger called the consumer for an update and was informed that the dealership had paid off the loan. The consumer thanked Ms. Grassinger for her exceptional assistance in resolving the matter.

### UPCOMING BOARD MEETINGS

**General Meeting**  
**November 15, 2007**  
**Special Meeting**  
**December 13, 2007**