Department of the Secretary of State

Maine Motor Vehicle Franchise Board

Matthew Dunlap
Secretary of State

Darling's, Plaintiff

v.

Ford, Defendant

M.M.V.F.B. No.03-01

DECISION

Darling's filed a Complaint with this Board dated February 24, 2005. Ford Answered and filed several motions. By Order of May 20, 2005, the undersigned Chairman ruled that Ford's Motion to Withdraw was Granted. By Order of June 16, 2005, the undersigned Granted Ford's Motion to Dismiss Count II, Granted the Motion in part as to Count I, stayed the remainder of that Count and Denied it as to Counts III and VI. Ford's Motion for More Definite Statement of Counts IV and V was deferred. Those Orders are adopted as if fully set forth here. The Complaint was bifurcated for hearing and arguments. Count III was dismissed at a Conference held before the first hearing. Count VI was heard on June 28, 2005. The parties submitted closing arguments one month later. Most of Counts IV and V were Dismissed on September 14, 2005, and the Board heard the claims remaining under those Counts on September 19, 2005. The parties submitted closing arguments one month later. Ford objected to this Board deliberating in executive session; the undersigned denied that motion. The matter is now closed and ready for Decision.

The Board will first address its Dismissal of most of Counts IV and V; it will then address Ford's argument that Maine's Freedom of Access Law Title 1, Chap. 13. (hereinafter FOAA) required the Board to deliberate in public. Based upon the testimony, exhibits and arguments, Count VI of Darlings complaint is dismissed; the claims heard under Counts IV and V are granted.

Order on Counts IV and V.

The Board Granted Ford's Motion for Partial Summary Judgment on much of Counts IV and V by Interim Order of September 14, corrected September 16, 2005. Those Orders are adopted as if fully set forth herein. The legal basis for this Board's Interim Order is as follows. The eight claims which arose before Darling's March 2002, Complaint to the Secretary of State are barred by the doctrine of res judicata; Darling's could have presented those claims then. *Camps Newfound/Owatonna Corp. v. Town of Harrison*, 1998 ME 20, ¶ 11, 705 A.2d 1109, 1113. The parties to that proceeding did not agree, nor did the Hearing Examiner rule, that they could be brought later.

The seven claims settled and dismissed by the Small Claims Court are barred because Darling's has collected on the underlying disapproved claims and therefore lacks standing under sec. 1176. The judgment of the Small Claims Court establishes that Darling's has collected the disapproved amount on the claim underlying 2002-242376-01, and therefore has no standing. Lack of standing under Tit.10 § 1176, also bars these claims which Ford paid: 2002-041502-1; 2002-103002-1, 110502-1 and 111302-1; .2002-082902-1, 090602-1, and 091302-2; 2002-112002-1; 2002-100802-2, 101002-1, 101402-1 and 102102-1; 2002-257191, 251436, 256314, and 244850.

Since 1979, § 1176[1] has provided relief to dealers for unpaid warranty work, however small the amount which the manufacturer disallowed. The Statement of Fact to L.D. 1610, which became the second paragraph of § 1176, explained that the bill provided that dealers could "...recover for parts and labor and costs and fees since the disapproved warranty claim would often be less than $100." The intent of the words is clear; that intent is explicitly stated in the Statement of Fact. Section 1176 provides relief for unpaid warranty claims. From 1975, to 1997, § 1173 provided dealers with an action for damages when a manufacturer violated the Franchise Law. But in contrast to § 1176, costs and fees were not available to dealers under § 1173, until 1997.

[1]Title 10 §1176. Warranty In any claim that is disapproved by the manufacturer and the dealer brings legal action to collect the disapproved claim and is successful in the action, the court shall award the dealer the cost of the action together with reasonable attorney fees. Reasonable attorney fees shall be determined by the value of the time reasonably expended by the attorney and not by the amount of the recovery on behalf of the dealer.

In 1997, the Legislature required manufacturers to be licensed [2] and broadened § 1173 to facilitate complaints by dealers. The new language stated that an action would lie when a dealer "...suffers financial loss of money or property, real or personal, or who has been otherwise adversely affected...," by a franchisor's unfair or deceptive act or violation of the Franchise Law. Of even greater practical effect was the provision of costs and attorney's fees to a dealer who prevailed, "...regardless of the amount in controversy...." [3] Thus, a dealer could go to court to recover damages under § 1173, or file with the Secretary of State to enforce the law under § 1171-B; § 1173 provided for costs and fees under both sections.

Once Ford paid these disputed warranty claims under § 1176, Darling's lacked standing to seek further relief under that section of the act.

Open Deliberations

Ford's interpretation of the FOAA ignores the Legislature's reason for passing that law; it confounds the practical application of that Act; which enables this Board to function as the Legislature intended; it reads Tit. 1 § 405 so narrowly that Executive Sessions would not protect the integrity of deliberations or the attorney-client privilege; it treats subsection (2) of Tit. 1 § 405 as surplusage; it ignores the FOAA's definition of public proceedings, and it would lead to an absurd result.[4] Based upon the FOAA and the Franchise Board Law, and case law from Maine and elsewhere, the Legislature intended for the Board to meet, discuss rules, hear cases and take official actions in public; it did not intend to *require* the Board to send statewide notice, and allow the public and the parties to attend, record and even broadcast its deliberations.

---

[2] This provision went into effect in 1999.

[3] From 1975, § 1173 provided that any dealer, "... who has been damaged by reason of a violation of a provision of this chapter, may bring an action ... to recover any damages arising there from...."

[4] see *Bangor v. Penobscot County*, 2005 ME 35,¶9, 868 A 2d 177,180 (2005), for the rule against treating any part of a statute as surplusage, *Opinion of the Justices*, 311 A .2d 103, (Me. 1973), for avoiding inconsistencies between statutes, and *Fraser v. Barton*, 628 A. 2d 146, 148 (Me. 1993) and *Nasrallah v. Missouri State Board of Chiropractic Examiners, Court of Appeals of Missouri, Western District*, WD 51663, 1996 Mo. App. LEXIS 1944, for avoiding absurd results.

The Legislature found and declared "...that public proceedings exist to aid in the conduct of the people's business." [5] It opened proceedings to the public and required liberal construction of the Act to "promote its underlying purposes and policies." That is, to improve the workings of government[6] In September, 2003, the legislature created the Maine Motor Vehicle Franchise Board as a forum "...with specific expertise in the motor vehicle industry..." to hear the "...complex and time-consuming litigation [formerly] before the courts of the State and in hearings before the Secretary of State."(Board Order, 6/16/2005, at 1-2) The Legislature gave the Motor Vehicle Franchise Board primary jurisdiction to enforce Maine's Franchise Law. [7] It hears private actions for damages and penalties based upon particular alleged violations of the statute. Its role and its deliberations differ from those of the licensing and environmental boards, regulation and control boards, rate regulatory boards and policy making boards explicitly governed by the FOAA and Maine's Administrative Procedures Act. [8]

---

[5] Tit.1. § 401. "The Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that their actions be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly....This subchapter shall be liberally construed and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent."

[6] Thus it provided for executive sessions, in order to "'establish an equilibrium between the public's desire for access and the governmental agency's need to act in private, short of reaching 'a collective decision, commitment or promise.'" *City of Prescott v. Town of Chino Valley*, 803 P.2d 891, 894 (Ariz. 1990). Other state courts have refused to elevate the intent of such laws over their stated purposes. In *Gosnell et al., vs. Kelly Hogan et al.*, 179 Ill. App. 3d 161, 171; 534 N.E.2d 434, 441-42, (1989), the court refused to apply the rule of liberal construction "blindly and technically," every time a board's actions did "not fall squarely within the language of the exceptions provided." It ruled that when public proceedings would hinder the conduct of the people's business, then the overriding purpose of the act would prevail and allow closed deliberations. And see *Angerman v. Medical Board of Ohio,* 70 Ohio App. 3d 346, 591 N.E. 2d 3(1990).

[7] Tit. 10 Ch. 204. The Franchise Board conducts hearings, administers oaths, compels the attendance of witnesses and the exchange of evidence, appoints persons to attend the depositions of out of state witnesses, issues and enforces interim orders, issues written decisions, awards damages, and costs and assesses civil penalties for statutory violations which are also Class E crimes. Its decisions are based upon the facts of each case and are binding only on the parties to the complaint. It acts in a quasi-judicial capacity because it affects a constitutionally protected interest, and when it adjudicates the rights of a party before it. *Pelkey v. City of Presque Isle,* 577 A.2d 341, 343, (Me.1990; *Lyons v. Board of Directors of SAD 43,* 503 A.2d 233, 236, (Me.1986).

[8] The Franchise Board issues no ordinances, resolutions, regulations, contracts or appointments as described in 1 §§ 405(2) and 409(2); it makes no decisions on applications, licenses, certificates or permits under § 407(1); nor does it consider the contracts of public officials, employees or appointees under § 407(2) It does not promulgate performance standards, nor issue advisory rulings. The Franchise Board has no regulatory authority, it does not administer a statute pursuant to any policy, thus, it is not a party to appeals of its decisions. see *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271, (1941) and *F.T.C. v. National Lead Co.*, 352 U.S. 419, 77 S. Ct. 502, 1 L. Ed. 2d 438, (1957), for discussions of

Ford ignores both the practical operation of the FOAA which the Legislature intended and the consequences which would flow from its construction of that Act. *Clark v. State Employees Appeals Board,* 363 A. 2d 735 738, (Me 1976). Ford would have the Franchise Board not only meet and hear cases in public, it would require the Board to discuss and evaluate the evidence, find the facts, apply the law and impose Civil Penalties of up to $10,000, at deliberations which required advance notice statewide and which anyone could attend and record or even broadcast.[9] Such proceedings would eviscerate the Board as envisioned by the Legislature. As one Court said:

> Such a construction of the ... act is not an appealing one. It would effectively prevent the frank exchange of views in private among members of quasi-judicial agencies in reaching a decision. - thus putting them on an entirely different footing from appellate courts and juries - to say nothing of federal administrative agencies – where experience has shown that the free flow of discussion unimpeded by the presence or reactions of the parties to the controversy has encouraged fair and just results *Jordan v. District of Columbia,* 362 A. 2d 114, 117-18; 1976 D.C. App. LEXIS 344

The public would be poorly served as past or present Maine dealers and employees of manufacturers and other citizens became reluctant to serve on a Board which required them to

---

expert administrative agencies with broad remedial powers to achieve the policy of the laws they administer. In contrast to such Boards, the Franchise Board makes rules only to govern its own internal adjudication procedures. Its own rules, rather than Maine's Administrative Procedures Act, govern intervention by non parties and govern its adjudicatory proceedings in general.

In short, the Franchise Board does not regulate any public benefit or administer any law in the public interest. Pierce, *Administrative Law Treatise,* Fourth Edition, §§ 9.2 and 9.3 sets out the due process standard when adjudicative facts are at issue; and see *Gorham v. Town of Cape Elizabeth,* 625 A.2d 898, (Me. 1993), and *Mutton Hill Estates, Inc. vs. Town of Oakland,* 468 A.2d 989, (Me. 1983). *Maine et al v. M.L.R.B. and M.S.E.A.,* 413 A.2d 510, 512-13, (Me. 1980) Indeed, the Legislature buttressed the quasi-judicial nature of Board adjudications when it provided for a jury trial on the facts on appeal, but required the appellant to rebut the Board's findings of fact by clear and convincing evidence. Tit. 10 §1189-B (2).

[9] "Except as otherwise provided by statute or by section 405, all public proceedings shall be open to the public..." §403; "...all persons shall be entitled to attend public proceedings and to make written, taped or filmed records of the proceedings, or to live broadcast..." them § 404; "Public notice shall be given for all public proceedings reasonably calculated to notify the general public in the jurisdiction served. §406. And see *Open Meetings and Closed Minds: Another Road to The Mountaintop,* 53 Drake L. Rev. 11, 15 (2004) Pointing out that such acts are inconsistent since trial and appellate courts and single-headed administrative agencies are excluded; they are difficult to interpret and often impractical as applied; and that they are counterproductive, especially as applied to 'discussions' which precede public "deliberations,' that is, votes. It proposes that "...so long as members explain the basis and rationale for their votes – there is simply no rational reason to require all predecisional discussions among agency members to be open to the media and the public."

discuss and evaluate the evidence, decide on factual findings and confer with the Board Chair, solely as a group and at scheduled public meetings. Certainly public deliberations would "stifle freedom of debate and check independence of thought." [10] They would also increase the risk that the Board's decisions would be influenced by real or feared public perceptions, especially if those deliberations were recorded or broadcast. And the risk that Board members would be exposed to ex parte contact would increase as the public deliberations continued. [11] Such a construction of the statute is not in the public interest. *State v. Chittim*, 2001 ME 125, 775 A. 2d 381.

Fortunately the FOAA does not mandate this construction. Under 1 § 402(3) (B.) of the FOAA, drafts and legal memoranda are not public records because they are "within the scope of a privilege," under the M. R. Evid. 502 and M. R. Civ. P. 26(b) (3). [12] They are also protected by the deliberative process privilege, characterized by the Law Court as the "... general rule forbidding inquiry into the mental processes of an administrative decision maker." *Cutler Co., Inc. v. State Purchasing agent and Transco Dist.*, 472 A. 2d 913, 918 (Me. 1984)[13] This rule,

---

[10] See *Nasrallah v. Missouri State Board of Chiropractic Examiners, Court of Appeals of Missouri, Western District*, WD 51663, 1996 Mo. App. LEXIS 1944, at 5, and cases and statutes cited therein. This is especially true in a state like Maine, where the pool of potential Board members is small. Indeed, Ford sought the withdrawal of all three dealer-members of the Board partly because they were members of the Maine Auto Dealers Association or otherwise knew John Darling.

[11]. In the present case the Board heard three witnesses on Count VI in June and four witnesses on Counts V and VI in September. The Board admitted forty-three exhibits during the two hearings and the parties submitted closing arguments a month after each hearing. The arguments were some seventy five pages in length. Each Board member certainly thought about the evidence during this whole process. The practical reality is that the Board's deliberations are a process rather than an event. *Nasrallah, supra.*

[12] See *Springfield Terminal Railway Company v. Department of Transportation*, 2000 ME 126, 754 A.2d 353, and *Sawyer Environmental Recovery Facilities, Inc. v. Marie Baker et al.*, No. CV-99-69 (Me. Super. Ct., Pen. Cty., Dec. 2, 1999), holding that the work product doctrine applies to the FOAA; and see *Moffett et al. v. City of Portland*, 400 A.2d 340, 346, 348., 1979 Me. LEXIS 592. The Federal Freedom of Information Act includes it in Exemption 5, along with the attorney-client and work product privilege. See 5 U.S.C. § 552(b)(5). *Maine v. Norton*, 208 F. Supp.2d 63,65-69, 2002 U.S. Dist. LEXIS 10813, and *Maine v. U. S. D.O.I.*, 124 F. Supp. 2d 728, 738, 2001 U.S. Dist. LEXIS 1037; holding that matters protected by the work-product privilege are not subject to later disclosure; and see *Daily Gazette v. West Virginia Development Office*, 198 W. Va. 563, 428 S.E. 2d 180 (1996), for a state's adoption of the exemption.

[13] Citing *United States v. Morgan*, 313 U.S. 409, 422, 85 L. Ed. 1429, 1435-36, 61 S. Ct. 999, 1004-5 (1941), the Court ruled that the lower Court should not have allowed a deposition.

> ...But the short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding." *Morgan v. United States*, 298 U.S. 468, 480. Such an examination of

> a judge would be destructive of judicial responsibility. ... Just as a judge cannot be subjected to such a scrutiny, compare *Fayerweather v. Ritch,* 195 U.S. 276, 306-07, so the integrity of the administrative process must be equally respected. See *Chicago, B. & Q. Ry. Co.* v. *Babcock,* 204 U.S. 585, 593. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other.

Thirty years later, in *Citizens To Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 420, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971), the Court reviewed a decision of the Secretary of Transportation which contained neither formal findings nor reasons. The Court held that "...where there are administrative findings that were made at the same time as the decision, as was the case in *Morgan,* there must be a strong showing of bad faith or improper behavior before such inquiry may be made," but since there was no basis or explanation for the decision, the Court found it "necessary to remand the case to the District Court for plenary review of the Secretary's decision,"

In *Rubin v. Board of Environmental Protection,* Me Super. LEXIS 158, CV-85-36, CV-83-138 (Me. Super, Ct, Sagadahoc Cty., June 27, 1988), the court considered the rule at some length. It quoted *Morgan,* referred to *Chicago, Burlington and Quincy Railway Co. v. Babcock,* 204 U.S. 585, 593, 51 L. Ed. 636, 27 S. Ct. 326 (1907) "for a strong statement condemning the examination of board members concerning 'the operation of their minds in valuing and taxing the roads,'" and quoted *Davis* on the rule protecting deliberations. see *3 Davis, Administrative Law Treatise 2d ed., §§ 17.4, 17.5, 17.7.(1980),* Now revised as *Pierce, Administrative Law Treatise, Fourth Edition, § 8.* Judge Fritzsche concluded that unlike *Overton,* the Board had made findings of fact and conclusions of law and there was

> no indication of bad faith, improper behavior or bias [as]...is required before an inquiry can be made in a case such as this. ... However the inquiry is characterized it is an attempt to inquire into the mental processes of administrative decision-makers in the absence of a demonstration of sufficient good cause to permit that inquiry....A subsidiary issue is whether the typical prohibition ... also applies to staff members who did not actually make the final decision but only prepare a recommendation based on their analysis. There is no reason why the protection should not also apply to the three staff members as well as to the members of the Board of Environmental Protection. In *Overton Park* the deposition was ...not to be of ... the ultimate decision-maker. More importantly, as administrative proceedings have become increasingly complex and greater reliance must be placed on staff, particularly when the defendant board is comprised of part-time members, the protections must extend to staff members and not be limited only to the ultimate decision-maker or all the purposes for having such prohibitions will be defeated.

And see Brown v. Department of Manpower Affairs, 426 A.2d 880, 884 (Me. 1981), *Solmitz v. Maine S.A D. No. 59,* 495 A.2d 812, 818 (Me. 1985); *Carl L. Cutler, supra,; Frye v. Town of Cumberland,* 464 A.2d 195, 200 (Me. 1983), *Ryan v. Town of Camden,* 582 A.2d 973, 975 (Me. 1990). and *Probing the Mind of The Administrator,* 75 Col. L. Rev. 721, Russell Weaver and James Jones, *The Deliberative Process Privilege,* 54 Mo. L. Rev. 279, (1989) and most recently, Hoffman, *The Deliberative Process Privilege in Kentucky,* 25 J.NAALJ 485.

Many state courts have recognized this privilege as an implicit or explicit exception to their Sunshine Laws. See *Common Cause of Utah, v. Utah Public Service Commission,* 598 P.2d 1312, 1315, while boards with judicial duties and powers take evidence and entertain arguments in public, "they were entitled to deliberate, as would a court, in private." and see *LaValle et al. v. Pennsylvania,* 564 Pa. 482, 495, 769 A.2d 449, 457 (2001) and *Kennedy v. Upper Milford Township Zoning Hearing Board,* 575 Pa. 105, 834 A.2d 1104, (2003), *TBC Westlake, Inc., v. Hamilton County Board of Revision,* 81 Ohio St. 3d 58, 62; 689 N.E.2d 32, 36 (1998) and *Groff-Knight, Et AL, vs. Board of Zoning Appeals of Liberty Township,* 2004 Ohio App. LEXIS 2856, June 14, 2004, *Gwich'in Steering Committee v. Alaska,* 10 P. 3d 572, 2000 Alas.

which protects the deliberative process, is for the benefit of the public, not for the benefit of the "...officials who assert the privilege." *Pennsylvania v. Vartan,* 557 Pa. 390, 399, 733 A. 2d 1258, 1264 (1999). The Legislature certainly intended parties who appear before the Franchise Board to enjoy the same level of due proces they had enjoyed in court or before the Secretary of State before the Board took jurisdiction. Yet open deliberations would not just allow the parties access to the Board's mental processes, they would ensure that access without any showing of bad faith.

The FOAA also provided for deliberations in executive session under subsection (6)E. [14] The Board consists of six lay members who serve per diem and the attorney who chairs the Board, participates fully in deliberations (in executive sessions) and votes (in open meeting) if the Board deadlocks. Tit. 10 § 1187(2). Deliberations by such a Board are themselves extended "...consultations between a body or agency and its attorney concerning the legal rights and duties of the body or agency, pending or contemplated litigation..." as the chair offers his observations and analysis of the witnesses and other evidence as well as the facts and their legal meaning, all of which is fundamental to the board's authority and discretion.

In *Underwood v. City of Presque Isle,* 1998 ME 166, 715 A 2d 148, the Law Court held that that Board could consult with counsel about its legal rights and duties to grant or deny a special exception and whether to impose conditions on any permit it granted, but that it could not deliberate on the merits of the proposed special exception. Read narrowly, the decision arguably treated § 405(2), as surplusage, without discussing its meaning. That section states:

LEXIS 98, *Dr. Partners v. Clark Cty. Bd. of Comm,* 116 Nev. 616, 6 P. 3d 465(2000), *Colorado Springs v. White,* 967 P. 2d 1042, 1998 Colo. LEXIS 815, *Telegraph Herald, Inc., v. City of Dubuque,* 297 N.W.2d 529, 533; 1980 Iowa Sup. LEXIS 939, *McQuinn v. Douglas County Sch. Dist. 66,* 259 Neb. 720, 731, 612 N.W. 2d 198, 206, (2000), and *Gosnell, supra.*

[14] §405. Those bodies or agencies falling within this subchapter may hold executive sessions subject to the following conditions.... 2.... No ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official actions shall be finally approved at executive sessions.

6. Deliberations may be conducted in executive sessions on the following matters and no others: ...E Consultations between a body or agency and its attorney concerning the legal rights and duties of the body or agency, pending or contemplated litigation, settlement offers and matters where the duties of the public body's counsel to his client pursuant to the code of professional responsibility clearly conflict with this subchapter or where premature general public knowledge would clearly place the State, municipality or other public agency or person at a substantial disadvantage.

"No official actions shall be *finally* approved in executive sessions." (emphasis added) But if the Legislature had intended to prohibit even *discussion* of the merits of official actions in executive sessions, it would not have separately stated that such actions could not be finally approved in executive session. This rule of statutory construction is expressed in the maxim *expressio unius est exclusion alterius es. Violette v. Leo Violette & Sons, 597 A.2d 1356 (Me. 1991) 2A* Singer, *Sutherland Statutory Construction, 6th ed.* Neither *Underwood* nor the decision it cited preclude such deliberations. Those decisions disallowed executive session deliberations on the merits of an official action; they held the bodies in question must publicly decide whether or not to take an official action. The Legislature prohibited in executive session only final approval of this Board's decision, it allowed in executive session the conferences and deliberations which enabled the Board to finally approve that decision in a public session.

This was the holding of the Arizona Supreme Court in the case cited by the *Underwood* Court. In *City of Prescott v. Town of Chino Valley,* 803 P.2d 891, 894-895, (Ariz. 1990) *(en banc),* a town council had deliberated on a proposed tax ordinance in executive session. Arizona's statute provided for executive sessions so public bodies could consult with counsel for legal advice. But the lower court had followed an AG's Opinion and held that the exception protected confidential attorney-client communications, but would not shield deliberations and other consultations. Expressed in terms of Maine's FOAA, the lower court had treated the consultations with counsel as final approval of an official action and held that "all discussions, deliberations, considerations or consultation," had to be public. The Arizona Supreme Court said that would be an absurdity and reversed.[15]

---

[15] Obviously, if any meaningful action is going to take place in the closed executive session, 'deliberations and discussion' must take place... ...We believe a public body may provide its attorney with facts and information regarding proposed legislation, and the attorney may advise the public body regarding the legal ramifications of the facts and information given to him and the legality of the proposed legislation. ... Members of the public body also may question the attorney about the proposed legislation in order to obtain thorough and complete legal advice. In short, members of a public body may meet in executive session for discussion with attorneys regarding the legal propriety, phrasing, drafting, and validity of proposed legislation, including its meanings, legal scope, possible legal challenges, and counsels' views regarding constitutionality, construction, and the like. However, once the members of the public body commence any discussion regarding the merits of enacting the legislation or what action to take based upon the attorney's advice, the discussion moves beyond the realm of legal advice and must be open to the public.

In *Prescott,* the Board was an elected body performing a legislative function. Nevertheless, in executive session it could question and discuss with counsel "...the legal ramifications of the facts...[and]...the legal propriety, phrasing, drafting, and validity of proposed legislation, including its meanings, legal scope, possible legal challenges, and counsels' views regarding constitutionality, construction, and the like." It could deliberate fully on all aspects of the statute; in short, it could consider its merits. But it could not then deliberate on the merits of enacting the legislation or taking other action. Similarly, this quasi-judicial Franchise Board, including counsel, had first to evaluate the evidence and find the facts and then apply them to the law. These Board actions are inextricably bound up with its structure as created by the Legislature. As was the case in Arizona, the Franchise Board could deliberate fully on the facts and the law and all aspects of this matter in executive sessions. But it could take the official action of adopting this decision only in public.

The Superior Court has effectively reached the same result. Since there is no definition of official action in the FOAA, the court in *Lewiston Daily Sun v. S.A.D. 43,* CV-98-89 (Me. Super. Ct. Andro. Cty., January 20, 1999), focused on what happened at a challenged executive session. It held that it was appropriate for a school board to "...find out and discuss their attorney's recommendations and weigh their alternatives for action," and reach a consensus on how to proceed with an investigation of complaints against the Superintendent of Schools. Such was not official action which required a public vote.

This reading of Tit. 1 § 405(2) is consistent with § 402(2), which defines public proceedings as "transactions of any function affecting any or all citizens of the State." *Black's Law Dictionary,* 5th ed., at 53, defines affect as " [t]o act upon; influence; change...." *Webster's,* defines it as "1. To bring about a change in : INFLUENCE..." *Webster's II New College Dictionary,* 1995, at 18. Board deliberations do not affect anyone as they progress, only the Board's decision, once finally approved and issued, will affect any Maine citizen. The parties, who are the only citizens concerned, were not affected until the Board took official action by public vote.[16] That final approval is the transaction of a Board function affecting Maine citizens, so it

[16] Ford's motion sought to attend the Board's deliberations. Apparently counsel do attend and take part in agency deliberations, when permitted, or when counsel considers it necessary. Dingman, *The Decisionmaking Phase of the Administrative Process in Maine,* supplement to *Navigating Your Way Through the Administrative Process,* Maine Bar Assoc. Seminar May, 1995, noting that the FOAA "...provides at least the potential for direct involvement in the formulation of the decisions," at 3.

is a public proceeding. For a parallel construction see, *Angerman v. Medical Board of Ohio, 70 Ohio App. 3d 346, 591 N.E. 2d 3(1990)*

The later language of subsection 405(6) E also provides closed deliberations. Such deliberations are "matters where the duties of the public body's counsel to his client pursuant to the code of professional responsibility clearly conflict with this subchapter." In contrast to *Underwood*, the Franchise Board Chair not only serves as counsel, he is a permanent Board member who must fully take part in deliberations and may be required to vote.[17]

Finally, public deliberations would provide the parties with "premature ... knowledge [which] would clearly place the State, ... or other public agency or *person* at a substantial disadvantage." (emphasis added) This shield for Board deliberations parallels the protection offered by M.R.Evid 502(6).[18] But this section of the FOAA is consistent with other sections of that Act, such as 405(6) (A, B), which shield public officials, appointees, employees and minor students. It serves also to protect any "person" who might be affected by premature public knowledge. In the present case, the Board could discuss and weigh the testimony and other evidence fully and freely before publicly adopting a decision. This insulation protected the integrity of the Board's deliberations, it protected the privacy of the witnesses and it avoided placing any witness or party at a disadvantage. [19]

It is absurd to contend that the Legislature intended this Board to deliberate only with all present and in public, intended to *require* that the Board notify the parties and allow them to

[17] Under the Maine Bar Rules and the Rules of Professional Responsibility, the Board's chairman is the attorney for the Board. The Board is a client to whom he renders professional legal services as an officer of the court. Those legal services are governed by professional standards for the practice of law as that practice relates to the Board, the general public, other lawyers, the courts and state agencies. M. Bar Rules. 1(a), 2; 3.1(a), 3.2(f), 3.4 (b) (1) and (e-f); 3.6 (a, h); and 3.15(c) and see Flamm, *Lawyer Disqualification* § 32-1, and Koch, *Administrative Law and Practice, 2nd ed.* § 6.22, and Annotation, *Attorney-Client Exception Under State Law Making Proceedings By Public Bodies Open To The Public*, 34 A.L.R.5th 591

[18] That rule protects communications between a public agency and its lawyer where disclosure will "seriously impair" the agency's ability to process a pending claim, "or conduct a pending investigation, litigation or proceeding in the public interest."

[19] "When the release of information would have an important and harmful effect on the duties of the officials or agency in question, there is discretion not to release the requested documents." *Arizona Board of Regents, et. Al., vs. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 255; 806 P.2d 348, 349. And see *In the Matter of the Recall of Lakewood City Council*, 144 Wn. 2d 583, 586, 30 P. 3d 474, 476 (2001) rejecting a reading which would require public officials to determine beforehand whether disclosure "...is or is not likely to cause adverse legal consequence."and *Kheel v. Ravitch*, 93 A.D. 2d 422, 462 N.Y.S.2d 182.(1983)

attend, record and even broadcast its deliberations. The process would inhibit if not paralyze board deliberations and it is inconsistent with § 1189-B, which provides for an appeal of the decision, not the process of deliberating. The Board Law provides for appeals of Board decisions or orders as a matter of law or on factual matters; neither involves the deliberation process. But if records of the Board's deliberations were available, they would inevitably color any appeal of a Board decision. That is why the Deliberative Process Privilege requires a showing of bad faith or improper behavior before a party may probe the mental processes of a decision maker. The Board finds the facts and applies the law and provides the reasons for its actions in its written decision. The written decision will stand or fall on appeal, it precludes any inquiry into the mental processes of the Board without "...a strong showing of bad faith or improper behavior." *Overton,* 401 U.S. at 420. The Legislature did not create the Franchise Board only to render it incapable of performing its main function consistent with the Constitutions of Maine and the United States. §1189-B (1).

Count VI

Darling's complaint alleges a violation of section 1174(3) (G) of the act and seeks a civil penalty under section 1171-B. The complaint further alleges that Ford implemented a change in the franchise agreement in violation of section 1171. The parties stipulated to certain facts and matters; some of the facts are set forth below. At a hearing on June 27, 2005 exhibits 1-3, 8-17, 19, 25-30 were admitted. The parties entered into a Stipulation and Protective Order, signed by the chairman on April 15, 2005. Pursuant to that the order the parties agreed that exhibits 8-13, 15, and 17 were confidential. Complainant John B. Darling testified along with Daniel J. Merchak and Barry Levey on behalf of Ford.

Based upon the testimony exhibits, and the arguments of the parties, this Board finds that Darling's did not show that it was harmed by Ford's React program. It therefore had no standing to allege that that program, or the way Ford implemented it, was illegal. Count VI is Dismissed as Moot.

Findings of Fact

1. Darling's is a Ford Dealer and became one by a Sales and Service Agreement dated September 20, 1989. Darling's began submitting information to be considered for Ford's Inventory Management ("IMA") program in June 2004, and enrolled in the REACT! Program on December 23, 2004. This finding is based upon the parties' agreement.

2. Starting in 1998, Ford implemented the React Program, to obtain information on dealers' parts inventory and customer service. Enrolled dealers agreed that Ford could obtain the information directly from their computers. Ford intended the program to help dealers increase their parts and service business, so it sends a monthly report to dealers on their parts and service performance and identifies potential areas for growth. The Program cost dealers nothing. (Levey 201, 216, 221-22) Dealers who did not have computers could enroll in React by agreeing that Ford would have access to the information as soon as they began using computers. (Merchak, 148; Levey 159, 216)

3. From before 1989, when Darling's became a franchise, Ford dealers had ordered parts from Ford weekly, paying prices which varied depending upon when they ordered and how soon they needed the part. Starting In 2002, Ford changed the way it supplied parts to its dealers. The new system allowed dealers to order parts any day of the week, with discounts based upon how efficiently they managed their inventory. (Darling, 14-17; Merchak, 85-8, 103 et seq., 121-22; Levey 213)

4. In order to obtain those discounts, dealers also had to enroll in the React Program. (Darling, 21-33; Merchak, 102-110) Only one Maine Ford dealer is not enrolled in React, although there was no evidence why. (Merchak, 148; Levey 159, 216)

5. The monthly report from Ford is helpful to Darling's business. But the old ordering system was more profitable for Darling's than the new one. (Darling, 64-70, 81-82)

6. Darling's has argued that the old system by which Ford supplied parts to dealers was legal, because all dealers were under the same ordering program. It maintains that the React Program violates subsection (G), by requiring dealers to enroll in the React Program in order to be eligible for discounts on parts. Finally, Darlings argued that Ford violated the franchise agreement in the way it implemented the React Program without that the signature of the authorized individual. (BDF 0034 of Ex. 1)

7. Ford's response is that neither React nor any other incentive program automatically results in two-tier pricing in violation of the statute, that the same discounts are available to all dealers and that the sales and service agreement allows it to set up incentive programs and provides that

dealers must supply information to Ford. (Ex. 1 ¶¶ 6(g), 10) Finally, Ford renewed its argument that Darling's lacks standing to question the Program.

Conclusions of Law

8. In the pre hearing Order, this Board ruled that Darling's had standing to question Ford's REACT Program even though Darling's was enrolled in the Program. The Board so ruled because Darling's had alleged that it had been "adversely affected," under § 1173, and, therefore denied Ford's Motion to Dismiss Count VI.

9. Darling's did not establish that it had been adversely affected by the React Program in a way which would entitle it to relief under § 1173. Darling's produced no evidence that its relations with its customers were affected, nor that its business was affected in any way

10. "Standing is a threshold issue bearing on the court's power to adjudicate disputes." *Nichols v. City of Rockland, Me.*, 324 A.2d 295, 296 (1974). Further, standing is jurisdictional, so a court or a party can raise the issue at hearing or even on appeal. M.R.App. P. 4(d) *Delogu v. City of Portland*, 2004 ME 18, n.1, 843 A.2d 33, and see M.R.Civ.P. 12(h) (3)4(d) which governs Board Procedure under Maine Motor Vehicle Franchise Board Rule § 1(1.)

11. In denying Ford's motion before hearing, this Board implicitly ruled that "...the facts relating to personal jurisdiction are so intertwined with the facts relating to the merits of the case, that it would be difficult to decide jurisdiction..." before hearing the merits of the case. *Dorf v. Complastik Corp.*, 1999 ME 133, P15, 735 A.2d 984, 989. and see, *Unisys Corp. v. Dep't of Labor, 220 Conn.* 689, 600 A.2d 1019, 1023 (Conn. 1991). Now that the Board has heard the case, and found that Darling's does not have standing, Count VI must be dismissed as moot.

12. The Court in *Madore v. Maine Land Use Regulation Comm'n,* 1998 ME 178, P8, 715 A.2d 157, 160, set forth the concepts of standing and mootness.

> Standing and mootness are closely related concepts describing conditions of justiciability....A justiciable controversy involves a claim of present and fixed rights based upon an existing state of facts....To have standing, a party must have a sufficient personal stake in the controversy, at the initiation of the litigation, to seek a judicial resolution of the controversy. Mootness, in contrast, has been referred to as 'the doctrine of standing set in a time frame: The requisite personal interest that [existed] at

> the commencement of litigation (standing) must continue throughout its existence (mootness).' When a party initially holds the requisite personal interest, but is later divested of that interest, the justiciability concept at issue is best described as mootness. A court confronted with a claim of mootness must determine "whether there remain sufficient practical effects flowing from the resolution of the litigation to justify the application of limited judicial resources. (internal citations omitted)

13. There is only one Ford Dealer in Maine who is not enrolled in React. Based on this evidence, a Board decision would have insufficient practical effects for the Board to reach the merits of Count VI. *Lewiston Daily Sun v. School Administrative District No. 43, 1999 ME 143, 738 A2d. 1239, 1242.*

Counts IV and V

Darling's complaint also alleges that Ford violated section 1176 of the act and seeks a civil penalty at under section 1171-B. John Darling testified in support of his claims, and Paul Barry, Richard Reiber and Allen Taber testified for Ford at the September 19, 2005, hearing. Exhibits 31-43, 44-48, 62-63, and 66-67 were admitted at that hearing along with Board Ex. 1, the parties' Stipulation, and Judge Hornby's April 1, 1998, *Amended Recapitulated Findings of Fact and Conclusions of Law* in the matter of *Darling's v. Ford Motor Company* Civil No. 95-398-B-H. Pursuant to the Stipulation and Protective Order of April 15, 2005, the parties agreed that exhibit 47 was confidential. Based upon the testimony exhibits, and the arguments of the parties, this Board finds that Ford violated Tit. 10 § 1176, orders payment to Darling's and imposes a Civil Penalty

14. In order to be repaid by Ford for warranty repairs pursuant to § 1176, Darling's submits information pertinent to the repair, including dealer and customer participation in AWA claims, through Ford's ACES II computer system. Ford reviews those claims, confirms the nature and propriety of the repair, and the parts and labor claimed. If the claim is approved, Ford pays Darling's at Ford's "national" warranty reimbursement rate. The parties agree that this national rate is less than the Maine statutory rate which is the retail rate the dealer customarily charges non-warranty customers. (Stipulations ¶ 4; T. 245, 253-4, 273-274)

15. Darling's then seeks the difference between what Ford paid at the national average and Darling's customary retail rate for non-warranty customers pursuant to § 1176. To support its request, Darling's submits records of the warranty work it performed. (T.302-03)

16. In order to determine the amount of warranty reimbursement Darling's will seek, employee Larry Rolnick prepares electronic spreadsheets which contain all the relevant information on the repairs. (Ex. 34, 38; Tr. 286-287, 323-324, 363-365, 433.)

17. Between March of 1999, and April of 2000, Darling's submitted these spreadsheets themselves to Ford when it sought reimbursement for warranty work. (Tr. 363, 366, 382, 423.) Since April of 2000, Mr.Rolnick has used the spreadsheets to prepare a supplemental claim form. (Ex.39) This form contains less information about the claim than the spreadsheet. (Ex. 34) Darling's then submits the supplemental claim forms to Ford (T. 430-433, 437-438, 450-451.)

18. Darling's takes the extra step of creating a supplemental claim form from the spreadsheet in order to submit warranty claims to Ford with only the information mentioned by the court in *Darling's d/b/a Darling's Bangor Ford v. Ford Motor Company*, 1998 ME 232, 719 A.2d 111 ("*Darling's I*"). (Ex. 34, 39; T. 432)

19. Richard Reibel reviews warranty claims for Ford. He leaves Darling's for last among Maine dealers and goes through a lengthy process to reconstruct the claim and try to come up with the same mount as Darling's is seeking. He tries hard to make the numbers work and only rejects a claim if it has a real problem. "It is preferred to be able to adjust the claim," and pay something. (T.371 and Ex. 47; T.332-352, passim, 369-374, 419-420, 428-437)

20. Ford did not reject any of Darling's AWA warranty claims in January, February, and March of 2002. Rather, Ford paid most as submitted. Mr. Reibel adjusted seventeen of the claims during those months and paid them at less than the requested amount. (T.332-352, passim, 369-374, 419-420, 428-437)

21. From mid-March through the end of August, Paul Barry, Richard Reibel and Allen Taber were working on a project and had no time to review warranty claims; Ford paid all of Darling's warranty reimbursement claims as submitted during those months. (T.401-403.)

22. In late August 2002, Reibel resumed his review of warranty claims, but he no longer adjusted Darling's AWA warranty claims. Mr. Reibel still paid almost all of the claims, but he did not pay an adjusted amount on the ones he questioned, he simply rejected them altogether and paid nothing. (Ex. 47; T.375-379).

23. Mr. Taber offered Ford's reason.

> Well, when we can justify an adjustment, we can understand enough of a claim to make an adjustment versus rejecting, we like to try to do that. In certain cases, and a lot of cases we saw at the end of this period, we didn't have enough information or we

weren't sure enough as to what adjustment we should make.

Rather than compounding the problem of how much was paid or not paid, we rejected the claim and asked that Darling's please provide us with more detail on those specific claims, as well as to let us know if his pricing policy was in any way changed from...when we originally got his policy...." (T.403).

24. At the start of that period, on August 23, 2002, Mr. Reibel wrote to Paul Barry and Allen Taber that he expected "transgressions" in Darling's warranty claims. In testifying, he explained he meant that "there is a high anticipation that there's invalid claims in there and that I would need to make an adjustment." Later that day, he wrote to Mr. Barry that he was having trouble duplicating Darling's math and that he might have to pay the claims "without adjustment" since he was out of time. When Barry wrote back that that was ok, Reibel responded: "I need to find a way to review his claims and knock them down a bit. (Ex. 67, T. 369-373)

25. Several times between September and December of 2002, Ford had disapproved of warranty claims submitted by Darling's and supported by supplemental claim forms alone. When Ford rejected such claims in September, October and November, it asked Darling's for the information on which he based his summaries. Darling's sent the spread sheets, and Ford agreed to pay in January, 2003. Allen Taber thanked John Darling for sending the spreadsheets. "As long as you continue to provide that level of detail, we will no longer experience difficulty in verifying amounts owed and payments due to Darling's can be made without first being rejected for lack of clarity." (Ex. 35 and 31, 32, 34, 36, 38, 40, 42, 62, 63; T. 246-247, 249, 288, 397-398, 443-444, 451.)

26. Darling's submitted the eleven claims at issue here on supplemental claim forms.(Stip. ¶ 4; Ex. 39; Tr. 288:13-20.) Darling's never submitted the spreadsheets to Ford.(T. 364:1-3, 450:25 to 451:2.)

27. The parties stipulated that Ford disapproved the eleven claims now before the Board because Richard Reibel was unable to reproduce the amounts that Darling's claimed as its retail rates for parts and labor. (Stipulations ¶ 4; and Ex. 39, 1/24/03 letter) Allen Taber and Richard Reibel rejected the claims because they "...could not apply the pricing guidelines...and get the exact numbers that Mr. Darling had submitted for payment." (T.304-305, 347-348, 394)

28. The unpaid claims at issue in this dispute total $1978.13. (Ex.39). Ford has never paid anything on these claims. (Stip. ¶ 4; T.394)

29. The Board rejects Mr. Reibel's explanation of his August 23, 2002, e-mail that there was

a high anticipation of invalid claims. (¶ 24) When he reviewed Darlings warranty claims between January and March, 2002, he had adjusted around 1% of those submitted; he had not reviewed any of Darling's warranty claims between March and August, 2002.

30. Mr. Reibel went through the long process of reviewing Darling's claims during the first three and the last four months of 2002. During the first three months he paid an amount he could justify. During the last four months he went through that same process and then rejected the whole claim rather than paying something. Mr. Riebel did as much work to deny the claims as he had done to adjust them and pay in good faith the amount he could justify and therefore narrow the amount in dispute.

31. The Board rejects Mr. Taber's explanation of the change from adjusting to rejecting warranty claims it questioned. There was no evidence that adjusting the claims had created any problems, let alone that it "compounded the problem of how much was paid or not paid." (¶ 24) Neither does Ford's inability to exactly duplicate the amount Darling's had requested explain the change. That inability was almost always the reason Ford adjusted or rejected a warranty claim.

32. Ford decided to reject rather than adjust Darling's warranty claims when it began to review them again in August. Its explanations are inconsistent with Mr. Riebel's testimony that Ford preferred to adjust rather than reject claims. It is also inconsistent with the language of exhibit 67.

33. Ford was not honest in rejecting rather than adjusting warranty claims it questioned. It wanted Darling's to resume sending the spreadsheets, as it alluded in no fewer than six letters to him at the time. (Ex. 32, 35, 36, 39, 40, 42)

Conclusions of Law

34. It is settled law that manufacturers are entitled to impose on dealers submitting warranty claims "reasonable verification requirements." Section 1176 requires dealers to make warranty claims with enough particularity to allow the manufacturer fairly to evaluate the claim. *Darling's d/b/a Darling's Bangor Ford v. Ford Motor Company*, 1998 ME 232, ¶¶ 6, 19, 719 A.2d 111, 114, 117. (*Darling's I*)

35. Title 10 MRSA § 1176 does not require a one-step procedure. *General Motors Corp. v. Darling's d/b/a Darling's Auto Mall*, U.S. Dist. Ct., Dist. Me., Civil No. 01-151-B-S, Findings

of Fact and Conclusions of Law (July 13, 2004) at 5-8, 20-27. Indeed, the present parties have litigated over what a supplemental warranty claim must consist of. *See Darling's I, supra.*, in which the Law Court responded to questions from the federal district court.

36. Contracts governed by the Maine version of the Uniform Commercial Code are subject to an implied covenant of good faith. "Every contract or duty within this Title imposes an obligation of good faith in its performance or enforcement." Tit. 11 M.R.S.A. § 1-203. "Good faith" is defined by statute as "honesty in fact in the conduct or transaction concerned." Tit. 11 M.R.S.A. § 2-103 (1995). "The sole test of 'honesty in fact' is whether the person was honest." *Zapatha v. Dairy Mart Inc.*, 381 Mass. 284, 296, 408 N.E.2d 1370, 1378, (1980) The U.C.C. also imposes the more onerous duty of objective good faith in certain commercial situations. §§ 2-103, 3-406, 3-419(3) and 9-318(2). "Objective good faith" is defined by statute as conduct that incorporates the "observance of reasonable commercial standards of fair dealing." Id. at 2-103. *John Niedojadlo v. Central Maine Moving & Storage Co.*, 1998 ME 199 [¶9]; and see *Reid v. Key Bank.*, 821 F.2d 9,12 (1st Cir., 1987), citing, Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 Harv. L. Rev. 369 (1980).* 4 *Me. Rev. Stat. Ann. tit. 11, § 1-203* (1964), and *The Restatement (Second) of Contracts § 205* (1979); *Watseka First Nat. Bank v Ruda,* 552 N.E. 2d 775, 778-79 (Il.,1990), quoting Patterson, *Wittgenstein and the Code: A Theory Of Good Faith Performance and Enforcement Under Article Nine, 137 U. Pa. L. Rev. 335, 371 (1988),* on the objective standard of good faith under 2-103 (1)(b).

37. In *Darling's I, supra,* ¶¶ 13-14, the Law Court quoted the definition of "bad faith" from a First Circuit case, "although the Maine statute does not define 'bad faith,' it does provide a definition of 'good faith' as 'honesty in fact and the observation of reasonable commercial standards of fair dealing in the trade' as defined and interpreted in § 2-103(1)(b) of the U.C.C. A party presumably acts in bad faith when one of these two elements is missing."(quoting *Schott Motorcycle Supply, Inc. v. American Honda Motor Co.*, 976 F.2d 58, 63 (1st Cir. 1992)); and see *Violette v. Ajilon Finance,* 2005 U.S.Dist. LEXIS 22859, at 7-8. "Bad faith normally connotes an ulterior motive or sinister purpose. ... A defendant may be liable for a breach of the covenant of good faith and fair dealing even if it does not violate an express term of a contract." (citations omitted), and *Wilson et al. v. Amerada Hess Corp., et al,* 168 N. J. 236, 246, 773 A.2d 1121, 1127 (2001), quoting Burton, 94 *Harv. L. Rev.*, at 386. A party fails to perform in good

faith if it "... uses its discretion for a reason outside the ... risks assumed by the party claiming the breach."

38. The Restatement of the Law, Second, Contracts provides:§ 205 Duty of Good Faith and Fair Dealing. Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

Comment:

> *a. Meanings of "good faith."* Good faith is defined in Uniform Commercial Code § 1-201(19) as "honesty in fact in the conduct or transaction concerned." "In the case of a merchant" Uniform Commercial Code § 2-103(1) (b) provides that good faith means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." The phrase "good faith" is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness. The appropriate remedy for a breach of the duty of good faith also varies with the circumstances.

> *d. Good faith performance.* Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

39. The covenant of good faith and fair dealing calls for parties to a contract to refrain from doing "anything which will have the effect of destroying or injuring the right of the other party to receive" the benefits of the contract. *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Associates*, 182 N.J. 210, 225-26, 864 A.2d 387, 396.(2005), and see *Bertha Chrysler Plymouth Inc., v. Chrysler Corp.*, 992 F. Supp. 64, 70 (D. Ma. 1998)

40. Ford's witnesses established that the customary and reasonable practice when an automobile manufacturer questions a Maine dealer's request for supplemental warranty reimbursement is as follows. The manufacturer first decides whether anything is due. If some amount is due, the manufacturer determines the amount to reimburse the dealer based upon the information the dealer supplied. The manufacturer then pays the dealer. If the amount determined and paid by the manufacturer is less than the dealer claimed, the manufacturer rejects the rest of the claim pending receipt of more information from the dealer. *Schott*

Motorcycle Supply, Inc. v. American Honda Motor Co., 976 F.2d 58, 63 (1st Cir. 1992)) and see *IBP. Inc., v. Hady Enterprises, Inc.*, 267 F. Supp.2d 1148, 1159 (N. D. Fl. 2002)

41. Darling's lessened the amount of information it sent Ford on supplemental warranty claims because it wanted Ford to institute a one step process. Given Darling's submission of the supplemental claim forms, it should not be surprised by adjustments to those claims. Ford followed reasonable commercial standards when it adjusted claims in January, February, and March of 2002. But Ford decided to reject rather than adjust Darling's warranty claims because it wanted Darling's to send the spreadsheets rather than the truncated forms. This was bad faith conduct which violated the Franchise Act.

Assessment of Penalties

42. When this Board finds that a manufacturer has violated the law, §1171-B requires it to impose a civil penalty of not less than $1,000, nor more than $10,000 for each violation In determining the amount of the civil penalty, the Board considered the factors set out in the law and found as follows.

43. Ford's violation o f the warranty section (1176) is not especially grave, nor did it harm the safety of the public. But Ford's violation of the law was purposeful. The nature and circumstances as here found, make that violation more serious.

44. Ford's violation caused no economic damage to the public.

45. Ford has violated this section of the law in the past.

46. A substantial civil penalty is necessary to deter future violations;

47. Ford made no efforts to correct the violation; rather, having complied with the law between January and March, it changed its practice and violated the law starting in September.

This Board held a public meeting at 9:30 on March 27, 2006. Counsel for the parties and Board members Carol Kontos, Adam Lee, William Dowling and John McCurry were present, Nelson Carlson and Wallace Camp participated by telephone. The Board decided to adopt this decision in a public vote: Nelson Carlson, Adam Lee, Wallace Camp and William Dowling concurred in the result. Carol Kontos concurred in the result in all but Counts IV and V and the Penalty. Nelson Carlson and Adam Lee believed that Ford's violation of the law warranted a

Civil Penalty of $10,000. Wallace Camp and William Dowling sought to impose a Civil Penalty of $6,000. Pursuant to 10 M.R.S.A. §1187 (2).D., Chairman McCurry voted to break the deadlock.

Wherefore,

Count VI of Darlings complaint is dismissed; Counts IV and V are granted; Ford is ordered to pay Darling's $1978.13; and is ordered to pay a Civil Penalty of $6,000 to the Highway Fund pursuant to §§1188 and 1171-B(3), within 30 days of this order.

Pursuant to Tit. 10 §§1188 and 1173, Darling's shall file a Motion under Maine Motor Vehicle Franchise Board R.§ 7(3) within twenty one days of this decision, if it seeks costs and attorney's fees.

So Ordered

Dated: March 31, 2006

John C. McCurry, Chairman

Either party may appeal this decision to the Superior Court within 30 days of the date of this order. A party appealing an order of the board to the Superior Court shall indicate in the appeal whether it is an appeal on issues of law or on factual matters, pursuant to Title 10 §1189-B. Appeal