



ber and information identifying the consumer, and would permit a licensee, or his/her agent or employee, in order to prevent a violation of the prohibition on furnishing alcohol to minors, to refuse to rent, lease, or sell a beer keg to a consumer who is unable to produce the specified information and identification. [A. GO]

## LITIGATION

In *American Drug Stores, Inc., v. Stroh*, 10 Cal. App. 4th 1446 (Nov. 13, 1992), the Fourth District Court of Appeal considered whether a liquor licensee, threatened with suspension or revocation of its license, may avoid the statutory limitations on judicial review of ABC disciplinary actions by filing a declaratory relief action in superior court before ABC has acted on the disciplinary action. American Drug Stores, Inc. (American) is the holder of a liquor license from ABC and operates SavOn Drugs, a retail store in El Cajon at which alcoholic beverages are sold. ABC accused American of selling alcoholic beverages to minors in violation of article XX, section 22 of the California Constitution, which prohibits the sale of such beverages to anyone under the age of 21; the alleged sales occurred in October and December of 1990. ABC, in conjunction with local police departments, operates "sting" operations in which it uses minors as decoys to purchase alcoholic beverages from licensees; the alleged sales were made during a sting operation in which minors acted as undercover agents in cooperation with the El Cajon police. As a result of the unlawful sales, American is in jeopardy of suspension or revocation of its license.

American filed a complaint for declaratory and injunctive relief and a motion for a preliminary injunction in superior court, seeking to prevent ABC from imposing any penalties based on the results of the sting operation. American contended that the sting operation violated the constitutional prohibition against selling alcoholic beverages to a minor or purchasing of same by a minor. Claiming that ABC's activity itself violated constitutional principles, American argued that the sting operation should not be permitted to serve as the basis for ABC's disciplinary action, and further contended that ABC should be enjoined from taking disciplinary action based upon sting operations.

ABC demurred to the complaint on the ground that the superior court lacked jurisdiction to entertain the complaint or grant the requested relief; ABC relied upon Business and Professions Code section 23090.5, which provides that only the California Supreme Court and courts of

appeal have jurisdiction to interfere with ABC's performance of its duties. American opposed the demurrer, claiming that the exclusivity provisions of section 23090.5 apply only to actions attacking the validity of an ABC "order, rule, or decision"; American argued that because no order had yet been issued, and because its action sought only a declaration rendering the sting operation invalid, the superior court had jurisdiction.

In response to American's contention that the exclusivity provisions apply only when the challenge is to an ABC "order, rule, or decision," the Fourth District "reject[ed] the notion that jurisdictional limitations can be circumvented by a preemptive lawsuit." The court noted that American is seeking an advance declaration rendering disciplinary action against it void, based on the alleged unconstitutionality of the method by which the evidence was gathered; because the thrust of American's action would disable ABC from taking disciplinary action, the court concluded that such a judgment on its face would violate the proscriptions of section 23090.5 by annulling an order or decision in advance, or at minimum would restrain, enjoin, or interfere with ABC in the performance of its duties. The Fourth District therefore concluded that where a matter is within the purview of ABC, an action seeking a judgment which will interfere with the Department's prospective disciplinary orders is beyond the jurisdiction of the superior court, even though the licensee styles the action as one for injunctive or declaratory relief.

In a related matter, the First District Court of Appeal is currently considering the constitutionality of ABC's use of minor decoys to catch ABC licensees violating the law regarding sales to minors. In *Proviso Corporation v. Alcoholic Beverage Control Appeals Board* and *Lucky Stores v. Alcoholic Beverage Control Appeals Board*, Nos. A058137 and A058534, the First District has consolidated two appeals in which licensees are protesting the suspension of their licenses by arguing—among other things—that ABC's use of underage police agents to purchase alcoholic beverages is unconstitutional and requires dismissal of the charges. [12:4 CRLR 138] The First District's decision is expected to be issued in early 1993.

In another proceeding, Judge D. Lowell Jensen of the U.S. District Court for the Northern District of California ruled on October 28 that federal officials in the Department of the Treasury's Bureau of Alcohol, Tobacco, and Firearms (BATF) acted without cause and exceeded their statutory authority when they imposed a

ban on the import of Black Death Vodka in April. The ruling prevents BATF from canceling the vodka's label approval which it originally received in 1989; loss of label approval would have effectively forced Black Death out of the United States.

BATF claimed that its actions were necessary because the Black Death name, the brand's grinning skull logo, and its slogan, "Drink in Peace," combined to create the misleading impression of Bubonic plague and poison; the Bureau also complained that the label made a mockery of health warnings on the effects of alcohol. However, the court rejected the Bureau's claims, ruling that the action was "arbitrary and capricious" and that the government violated the constitutional rights of the plaintiffs, importer Cabo Distributing Company of South El Monte and Black Death USA.

## BANKING DEPARTMENT

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Pursuant to Financial Code section 99 *et seq.*, the State Banking Department (SBD) administers all laws applicable to corporations engaging in the commercial banking or trust business, including the establishment of state banks and trust companies; the establishment, operation, relocation, and discontinuance of various types of offices of these entities; and the establishment, operation, relocation, and discontinuance of various types of offices of foreign banks. The Department is authorized to adopt regulations, which are codified in Chapter 1, Title 10 of the California Code of Regulations (CCR).

The superintendent, the chief officer of the Department, is appointed by and holds office at the pleasure of the Governor. The superintendent approves applications for authority to organize and establish a corporation to engage in the commercial banking or trust business. In acting upon the application, the superintendent must consider:

- (1) the character, reputation, and financial standing of the organizers or incorporators and their motives in seeking to organize the proposed bank or trust company;
- (2) the need for banking or trust facilities in the proposed community;
- (3) the ability of the community to support the proposed bank or trust com-



pany, considering the competition offered by existing banks or trust companies; the previous banking history of the community; opportunities for profitable use of bank funds as indicated by the average demand for credit; the number of potential depositors; the volume of bank transactions; and the stability, diversity, and size of the businesses and industries of the community. For trust companies, the opportunities for profitable employment of fiduciary services are also considered;

(4) the character, financial responsibility, banking or trust experience, and business qualifications of the proposed officers; and

(5) the character, financial responsibility, business experience and standing of the proposed stockholders and directors.

The superintendent may not approve any application unless he/she determines that the public convenience and advantage will be promoted by the establishment of the proposed bank or trust company; conditions in the locality of the proposed bank or trust company afford reasonable promise of successful operation; the bank is being formed for legitimate purposes; the capital is adequate; the proposed name does not so closely resemble as to cause confusion with the name of any other bank or trust company transacting or which has previously transacted business in the state; and the applicant has complied with all applicable laws.

If the superintendent finds that the proposed bank or trust company has fulfilled all conditions precedent to commencing business, a certificate of authorization to transact business as a bank or trust company will be issued.

The superintendent must also approve all changes in the location of a head office; the establishment, relocation, or discontinuance of branch offices and ATM facilities; and the establishment, discontinuance, or relocation of other places of business. A foreign corporation must obtain a license from the superintendent to engage in the banking or trust business in this state. No one may receive money for transmission to foreign countries or issue money orders or travelers checks unless licensed.

The superintendent examines the condition of all licensees when necessary, but at least once every two years. The Department is coordinating its examinations with the Federal Deposit Insurance Corporation (FDIC) so that every year each agency examines certain licensees. New and problem banks and trust companies are examined each year by both agencies.

The superintendent licenses Business and Industrial Development Corporations

which provide financial and management assistance to business firms in California.

Acting as Administrator of Local Agency Security, the superintendent oversees security pools that cover the deposits of money belonging to a local governmental agency in any state or national bank or savings and loan association. All such deposits must be secured by the depository.

## MAJOR PROJECTS

**The Color of Money: Banks Slow to Close the Minority Lending Gap.** On October 27, the Federal Reserve Board reported that there is still a wide disparity between home mortgage loan approval rates for whites and minorities. According to the Board, 37.6% of African-American applicants were turned down nationwide for conventional home purchase loans in 1991, compared with denial rates of 26.6% for Latino applicants; 15% for Asian applicants; and 17.3% for white applicants. In 1990, the denial rates were 33.9% for African-Americans, 21.4% for Latinos, 12.9% for Asians, and 14.4% for whites. This information was compiled under the Home Mortgage Disclosure Act, which requires financial institutions to disclose information on the disposition of home mortgage loan applications and on the race or national origin, gender, and annual income of loan applicants. The information submitted is used to measure financial institutions' compliance with equal credit laws such as the Fair Housing Act, the Equal Credit Opportunity Act, and the Community Reinvestment Act (CRA).

The banking industry was quick to respond to the Board's findings, contending that strong minority lending programs are currently in place, but were established too late to be reflected in the Board's analysis of 1991. Alternatively, other industry officials acknowledged that minority applicants are denied loans more frequently than white applicants, but contended that the disparate rejection rates are due to high debt burdens and poor credit histories among minority applicants rather than to discrimination. However, critics contend that when a nonracial reason for rejecting a loan is present, lenders are more likely to overlook minor deficiencies for white applicants than for African-American or other minority applicants.

In response to the Federal Reserve Board's findings, U.S. Senator Donald W. Riegle Jr. (D-Michigan), chair of the Senate Banking Committee, warned that Congress will take action to end loan discrimination if regulators do not. While conceding that lending discrimination cannot be corrected instantaneously, Riegle con-

tended that the industry's attempts to improve lending practices are not occurring quickly enough. Senator Riegle requested that top federal banking regulators formulate a "concrete plan to step up enforcement of antidiscrimination and community reinvestment laws." Similarly, U.S. Representative Henry B. Gonzalez (D-Texas), chair of the House Banking Committee, stated that the Federal Reserve Board report shows that more minorities and women must be represented among bank regulators in order to force changes in the status quo.

In late October, the California Bankers Association (CBA), which represents 400 of the state's 419 banks, recommended that its member banks increase efforts to eliminate bias against minority applicants. For example, CBA spokesperson Nancy Badely suggested that banks send "testers" into a bank to determine if lending officers exhibit any bias toward minority applicants; conduct education seminars in low-income and minority neighborhoods to educate residents on how to apply for home loans; and institute a multiple-review policy in which loan applications from minority or low-income applicants are double- or triple-checked to make sure any decisions to deny a loan is unbiased.

According to CBA, some large California banks have already instituted loan education programs and loan-denial review panels. However, San Francisco-based Sumitomo Bank of California, the state's seventh-largest bank, is taking such action only after the Federal Deposit Insurance Corporation (FDIC) found that the bank marketed itself more as "an Asian bank for Asian people" than a bank which lends to other borrowers. According to a report by San Francisco's Greenlining Coalition and the Boston-based National Community Redevelopment Network, Sumitomo extended only two mortgages to African-Americans during 1990, out of a total home loan portfolio of \$25 million. The FDIC ordered Sumitomo to improve its compliance with the CRA, which requires banks to extend credit to low- and moderate-income communities.

Other California banks claimed that their minority-lending practices improved during 1991. For example, BankAmerica, now California's largest bank, states that its home loans to African-Americans statewide increased to 1,907, 36% over 1990 figures; its loans to Latinos rose to 5,987, a 17% increase; its loans to whites rose to 56,670, a 12% increase; and its loans to Asian-Americans and Pacific Islanders rose 5% to 5,863. Wells Fargo, the state's second largest bank, increased the number of loans granted to African-



Americans in 1991, yet still rejected more than two-thirds of minority applicants for home loans in the same year. The bank reported that it rejected 67.5% of minority applicants for home mortgages in 1991, compared to 55% of white applicants. Throughout the state, minorities continue to be rejected for mortgages at a much higher rate than whites, although that statistic also seems to be improving. BankAmerica denied 1.5 loan applications for African-Americans and Latinos for every one application from whites denied in 1991. This figure is down from the 1.6:1 ratio in 1990.

While the recession may be partly to blame for minorities' plight in obtaining loans, and while California banks seem to be showing some signs of decreasing the lending gap, there is room for much improvement. "We're pleased that we showed progress in 1991, but we are not satisfied. We believe we can do better," said BankAmerica Executive Vice President Donald Mullane. James Ketcham, a senior vice president of Wells Fargo's mortgage division, stated, "In a nutshell, we are not happy with the level of activity that Wells Fargo has in minority communities." The spotlight will be on lenders in 1993, as minority and low-income groups and advocates watch to see whether bankers follow through with their stated plans to decrease the minority lending gap.

**BofA/Security Pacific Merger Update.** In August 1991, two leading banks in California, BankAmerica Corporation and Security Pacific, announced their intention to merge into one financial service giant; the new bank is called BankAmerica. [11:4 CRLR 123] After the merger, which occurred in April 1992, BankAmerica had a total of 1,440 branches statewide. In November, the company announced that 450 of those offices, the majority in southern California, will be closed over the next eight months. According to BankAmerica officials, southern California will bear the brunt of the closures because of the close proximity of many former Security Pacific and BofA offices; in such instances, the majority of closures will be the Security Pacific branches. Experts estimate that the closures will result in the loss of approximately 9,000 jobs statewide.

**SBD Releases Third Quarter Report.** In December, SBD released its quarterly report covering the third quarter of 1992. According to SBD, at the close of business on September 30, the 262 state-chartered banks with 1,818 branch offices had total assets of \$111.1 billion, an increase of \$2.9 billion, or 2.7%, from September 30, 1991. From September 30, 1991, to September 30, 1992, the state experienced a

net decrease of ten banks and a net increase of 61 branch offices.

**Cease and Desist Warnings Issued.** On November 6, the Superintendent of Banks issued a warning to cease and desist doing business in California without a license to John H. Thaler, Industrial Bank of Kibris, Ltd., United States Representative Office, and Premier Bancorp, Inc., all of Beverly Hills. Recently, a number of cashier's checks were issued by the Industrial Bank of Kibris, U.S. Representative Office, which bear the signature of John H. Thaler. SBD is asking that all persons who have communicated with Thaler, the Industrial Bank of Kibris, U.S. Representative Office, or Premier Bancorp, Inc., contact its legal division in Los Angeles. SBD noted that Premier Bancorp, Inc., is not affiliated in any way with Premier Bank, which is licensed by the Superintendent of Banks to conduct banking business, is headquartered in Northridge, and maintains branch offices in Thousand Oaks and Warner Center.

**Interim Guidance Concerning Restrictions on Activities of FDIC-Insured State Banks.** On November 27, the FDIC issued interim guidelines on the implementation of the federal FDIC Improvement Act of 1991. That Act added new section 24 to the Federal Deposit Insurance Act, which generally limits the activities and equity investments of insured state banks and their subsidiaries to those permissible for national banks and their subsidiaries. The FDIC adopted final regulations implementing the equity investment restrictions on November 13, but is still in the process of developing regulations to implement the activity restrictions of section 24, which became effective on December 19. Thus, the FDIC provided the following interim guidelines until its final regulations are adopted.

Under section 24, an insured state bank may not directly or indirectly through a subsidiary engage as principal in any activity that is prohibited for a national bank unless specifically excepted in section 24 or the FDIC gives its consent for the bank or its subsidiary to engage in the activity. A state-chartered bank that is, as of December 19, engaging in such a prohibited activity should seek interim approval to continue the activity by writing to the appropriate FDIC Division of Supervision (DOS) regional office. A state-chartered bank that is not, as of December 19, engaging in such an activity but wishes to receive approval should similarly contact the appropriate DOS regional office. A bank that is unsure whether a particular activity is permissible for a national bank should first seek the advice of its counsel

and then contact the appropriate DOS regional office. The FDIC will not take enforcement action against a bank that continues to engage in an impermissible activity without receiving the necessary temporary approval provided the bank is was acting in good faith based on an opinion of counsel.

**Superintendent Participates in International Conference.** In November, SBD Superintendent James Gilleran attended the International Conference on Russian Banking held in Moscow. Gilleran, who attended in his capacity as a representative of the Conference of State Bank Supervisors, participated in panels discussing the organization, structure, regulation, and supervision of the banking industry in the United States. According to SBD, the Russian banking system has had significant expansion during a very short period of time, currently having 1,600 new commercial bank charters.

## DEPARTMENT OF CORPORATIONS

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The Department of Corporations (DOC) is a part of the cabinet-level Business, Transportation and Housing Agency and is empowered under section 25600 of the California Code of Corporations. The Commissioner of Corporations, appointed by the Governor, oversees and administers the duties and responsibilities of the Department. The rules promulgated by the Department are set forth in Chapter 3, Title 10 of the California Code of Regulations (CCR).

The Department administers several major statutes. The most important is the Corporate Securities Act of 1968, which requires the "qualification" of all securities sold in California. "Securities" are defined quite broadly, and may include business opportunities in addition to the traditional stocks and bonds. Many securities may be "qualified" through compliance with the Federal Securities Acts of 1933, 1934, and 1940. If the securities are not under federal qualification, the commissioner must issue a "permit" for their sale in California.

The commissioner may issue a "stop order" regarding sales or revoke or suspend permits if in the "public interest" or if the plan of business underlying the securities is not "fair, just or equitable."