minimally confiscatory rate at the outset. Proposition 103 as construed in *Calfarm* does not require the commissioner to take a passive role when an active one is not barred."

• On the details of the ratemaking formula and the factors used therein, the court rejected a wide variety of insurer contentions: "Not only is the ratemaking formula not internally inconsistent, it is also not confiscatory or arbitrary, discriminatory, or demonstrably irrelevant to legitimate policy." According to the court, a ratemaking scheme which is "novel" or "formulaic" is not necessarily invalid; a challenged price control mechanism which is not confiscatory and is enacted to further a legitimate public interest should be upheld against a constitutional challenge "unless no reasonably conceivable set of facts could establish a rational relationship between the regulation and the government's legitimate ends" (citation omitted).

Here, the court found that Proposition 103 "is demonstrably relevant to the policy of protection of consumer welfare—a policy that the voters were free to adopt, and did in fact adopt....Further, it is not arbitrary, taking an approach to rates that is a reasonable one, although not the only such approach. Lastly, it is not discriminatory. To the extent that it may be said to disfavor insurers and favor their insureds, it does so well within the limits marked out by due process jurisprudence since at least the late 1930's."

• The Supreme Court also reversed Judge Janavs' invalidation of the so-called "relitigation bar" in section 2646.4(e), Title 10 of the CCR, which precludes insurers involved in quasi-adjudicative proceedings to apply the rollback regulations from relitigating matters already determined either in the regulations or by a generic determination. The court called section 2646.4(e) "unobjectionable" because "[i]n adjudication, the judge applies declared law; he does not entertain the question whether its underlying premises are sound." Additionally, the court noted that section 2646.4(e) expressly permits insurers to introduce, and requires the ALJ to admit, evidence relevant to the determination whether a proposed rate is confiscatory.

• On the validity of the rate regulations as to rollbacks as applied to 20th Century, the Supreme Court disagreed with nearly every finding of the superior court. The high court found that most of Judge Janavs' findings in this area were "fatally tainted" by her "erroneous belief that confiscation does not require 'deep financial hardship'" within the meaning of *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168 (D.C. Cir. 1987). *[13:2&3 CRLR 140]* On this issue, the Supreme Court agreed with ALJ LaPorte that proof of confiscation requires a showing of deep financial hardship, which 20th Century failed to allege and did not prove. At most, 20th Century alleged and proved that compliance with Commissioner Garamendi's rollback order would cause a "slowdown in growth....Put otherwise, its business would have been 'less prosperous as a result of' the rate rollback....Such a 'diminution in value, however has never mounted to the dignity of' confiscation" (citations omitted).

As a result of the court's reinstatement of Commissioner Garamendi's order, 20th Century must refund to its 1989 policyholders a total of $119 million. At this writing, 20th Century intends to petition the U.S. Supreme Court to review the decision.

Another major Proposition 103 case is still pending before the California Supreme Court. In ***Amwest Surety Insurance Company v. Wilson***, 20 Cal. App. 4th 1275 (Dec. 8, 1993), the Second District Court of Appeal struck down a 1990 statute exempting surety companies from the rollback and prior approval provisions of Proposition 103 because it does not "further the purposes" of the initiative and is thus beyond the authority of the legislature. *[14:2&3 CRLR 139; 14:1 CRLR 108; 13:2&3 CRLR 130]* At this writing, the case is being briefed and no date for oral argument has been set.

On rehearing in ***Manufacturers Life Insurance Company, et al. v. Superior Court (Weil Insurance Agency, Real Party in Interest)***, 27 Cal. App. 4th 67 (July 29, 1994), the First District Court of Appeal held that an insurance brokerage may not bring a private cause of action for redress of an unlawful group boycott under the Unfair Insurance Practices Act (UIPA), Insurance Code section 790 *et seq.*, but it may pursue antitrust remedies under the Cartwright Act, Business and Professions Code section 16720 *et seq.*, and injunctive and restitutionary relief under the Unfair Competition Act (UCA), Business and Professions Code section 17200 *et seq. [14:2&3 CRLR 139]*

Plaintiff Weil was a broker of and consultant on a form of life insurance known as "settlement annuities"; a settlement annuity is an annuity purchased by a liability carrier to fund a structured (periodic payment) settlement in a personal injury action. It was plaintiff's practice to advise and educate injury claimants and their attorneys with information concerning the underlying features of settlement annuities, in particular their actual costs. According to the court, "[s]uch disclosures were inimical to a plan defendants had formed to market settlement annuities as a way for liability carriers to settle injury claims below their cash settlement value." Thus, defendants allegedly coerced and induced suppliers of annuities to stop doing business with plaintiff; as a result, plaintiff's business was destroyed.

Weil brought suit against the insurers, asserting (among other things) statutory claims under the UIPA, the Cartwright Act, and the UCA. The trial court sustained defendants' demurrers on the Cartwright Act claims, but concluded that Weil had stated claims under the UIPA and the UCA. Defendants appealed.

The primary issue on appeal was the insurers' contention that the UIPA, which prohibits acts of "boycott, coercion, or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance," supplants the Cartwright Act and the UCA "so as to provide the sole basis by which unlawful conduct of the type alleged here may be subjected to legal restraint or may otherwise produce legal consequences." The court noted that the UIPA itself "expresses an affirmative intention and expectation that it will preserve intact existing remedies for insurance industry misconduct," and observed that "[i]f the legislature wished to exempt the insurance industry from the Cartwright Act, it knew full well how to do so." Additionally, the court "observe[d] a certain illogic in referring to the UIPA as providing an 'exclusive remedy' when...it provides no private remedy at all [under *Moradi-Shalal v. Fireman's Fund Insurance Companies*, 46 Cal. 3d 287 (1988)]. Nor does it empower the Commissioner to redress private injuries." Further, the First District found that violations of the Cartwright Act may constitute the predicate acts for a claim under the UCA. Accordingly, the appellate court ordered the trial court to vacate its prior orders, reinstate the Cartwright Act and UCA claims, and dismiss the UIPA claims.

At this writing, the insurers plan to petition the California Supreme Court to review the First District's decision.

DEPARTMENT OF REAL ESTATE

Interim Commissioner:
John R. Liberator
(916) 739-3684

The Real Estate Commissioner is appointed by the Governor and is the chief officer of the Department of Real

Estate (DRE). DRE was established pursuant to Business and Professions Code section 10000 *et seq.*; its regulations appear in Chapter 6, Title 10 of the California Code of Regulations (CCR). The commissioner's principal duties include determining administrative policy and enforcing the Real Estate Law in a manner which achieves maximum protection for purchasers of real property and those persons dealing with a real estate licensee. The commissioner is assisted by the Real Estate Advisory Commission, which is comprised of six brokers and four public members who serve at the commissioner's pleasure. The Real Estate Advisory Commission must conduct at least four public meetings each year. The commissioner receives additional advice from specialized committees in areas of education and research, mortgage lending, subdivisions and commercial and business brokerage. Various subcommittees also provide advisory input.

DRE primarily regulates two aspects of the real estate industry: licensees (as of September 1993, 255,158 salespersons and 115,974 brokers, including corporate officers) and subdivisions. Certified real estate appraisers are not regulated by DRE, but by the separate Office of Real Estate Appraisers within the Business, Transportation and Housing Agency.

License examinations require a fee of $30 per salesperson applicant and $60 per broker applicant. Exam passage rates averaged 56% for salespersons and 48% for brokers (including retakes) during the 1991–92 fiscal year. License fees for salespersons and brokers are $170 and $215, respectively. Original licensees are fingerprinted and license renewal is required every four years.

In sales, or leases exceeding one year in length, of any new residential subdivisions consisting of five or more lots or units, DRE protects the public by requiring that a prospective purchaser or tenant be given a copy of the "public report." The public report serves two functions aimed at protecting purchasers (or tenants with leases exceeding one year) of subdivision interests: (1) the report discloses material facts relating to title, encumbrances, and related information; and (2) it ensures adherence to applicable standards for creating, operating, financing, and documenting the project. The commissioner will not issue the public report if the subdivider fails to comply with any provision of the Subdivided Lands Act.

The Department publishes three regular bulletins. The *Real Estate Bulletin* is circulated quarterly as an educational service to all current licensees. The *Bulletin* contains information on legislative and regulatory changes, commentaries, and advice; in addition, it lists names of licensees who have been disciplined for violating regulations or laws. The *Mortgage Loan Bulletin* is published twice yearly as an educational service to licensees engaged in mortgage lending activities. Finally, the *Subdivision Industry Bulletin* is published annually as an educational service to title companies and persons involved in the building industry.

DRE publishes numerous books, brochures, and videos relating to licensee activities, duties and responsibilities, market information, taxes, financing, and investment information. In July 1992, DRE began offering one-day seminars entitled "How to Operate a Licensed Real Estate Business in Compliance with the Law." This seminar, which costs $10 per attendee and is offered on various dates in a number of locations throughout the state, covers mortgage loan brokering, trust fund handling, and real estate sales.

The California Association of Realtors (CAR), the trade association joined primarily by agents and brokers working with residential real estate, is the largest such organization in the state. CAR is often the sponsor of legislation affecting DRE. The four public meetings required to be held by the Real Estate Advisory Commission are usually scheduled on the same day and in the same location as CAR meetings.

Former DRE Commissioner Clark Wallace resigned from his position during the summer; DRE Chief Deputy Commissioner John Liberator is currently serving as Interim Real Estate Commissioner.

MAJOR PROJECTS

DRE Newsletter Items. In the Summer 1994 edition of its *Real Estate Bulletin*, DRE discussed the types of information which it will disclose regarding its licensees. In addition to licensing status, the following information is available upon request: the name of the licensee (if the licensee is a corporation, the name must be filed with the Secretary of State); address; the identification number issued with each real estate license; a broker's fictitious business name; salesperson(s) employed by brokers; a broker's branch office location(s); a broker's corporate affiliation; a salesperson's employing broker; and DRE disciplinary action taken against the person's license.

The *Bulletin* also identified the ten most common types of enforcement problems which are investigated by DRE's Enforcement Section. According to DRE, the most common complaint involves verbal misrepresentations by licensees in connection with a purchase or financing transaction. Other common problems include the mishandling of trust fund money belonging to others by real estate licensees; fraud against lenders; criminal convictions substantially related to licensed activity; unlicensed activity; Ponzi schemes; brokers renting their license out to enable others to engage in real estate activity; subdivision violations; false advertising; and lack of professionalism and discourteous conduct.

DRE also announced in the *Bulletin* that its Information Systems Section (ISS) is planning for the replacement of DRE's obsolete data processing system, which is no longer supported by the manufacturer. The project will involve the transfer of DRE's current database to the state's Teale Data Center (TDC); thereafter, DRE will contract with the TDC for a specified level of computing ability, and DRE will no longer maintain its own mainframe computer.

The second phase of the project will involve the implementation of a new Enterprise Information System (EIS), which will allow DRE employees to access all database information from their workstations. The plan additionally calls for an increased number of workstations, which will expand and improve DRE's ability to respond to consumer inquiries. The EIS project is scheduled to begin in January 1995.

Long-term plans include an imaging system to contain DRE master files and aid in the license application process; electronic testing of DRE applicants; touchtone and voice response telephone systems to allow inquiries into DRE files; public access to DRE databases; online publications and mailing lists; and many other automated capabilities.

Rulemaking Update. DRE's current rulemaking package consists of the proposed adoption of new sections 2717 and 2804, amendments to sections 2785, 2790.1, 2792.8, 2792.21, 2792.23, 3003, 3007, and 3007.6, and the repeal of section 3007.5, Title 10 of the CCR. *[14:2&3 CRLR 140–41]* After making modifications to some of its originally proposed changes, DRE released the revised language for an additional 15-day public comment period which ended on July 19. The rulemaking file awaits review and approval by the Office of Administrative Law.

LEGISLATION

AB 3358 (Frazee). Under existing law, real estate brokers engaging in certain activities with respect to transactions involving real property that meet certain criteria

are subject to specified advertising requirements. As amended June 28, this bill provides that these advertising provisions are permissive, rather than mandatory, and imposes a fee for the submission of an advertisement to DRE for approval. The bill also provides that an advertising approval is effective for five years.

Existing law regulates the sale of accessible urban subdivisions, as defined, under the law relating to out-of-state land promotions. This bill eliminates the term "accessible urban subdivision" from existing law and provides, instead, for the regulation of improved out-of-state residential subdivisions and improved out-of-state time-share projects, as defined. This bill further provides that these subdivisions and projects are not subject to specified requirements relating to real property securities. The bill also requires the Commissioner to take specified actions to afford substantially the same protection to purchasers of these subdivisions or projects as is afforded to purchasers of subdivisions in this state.

Existing law prescribes various fees for permits issued under the provisions governing out-of-state land promotions. This bill increases these fees.

Existing law requires a person who sells a lot or parcel in an accessible urban subdivision to deliver an appraisal to the buyer. This bill eliminates these provisions.

Existing law authorizes the Commissioner to issue a preliminary permit for an accessible urban subdivision, as provided. This bill instead authorizes the Commissioner to issue a preliminary permit and a conditional permit, as provided, for an improved out-of-state residential subdivision. This bill also provides that the term of any final permit issued under the provisions governing out-of-state land promotions shall be one year, except as provided, and provides certain requirements applicable to nonresident applicants for permits.

Existing law provides that the Commissioner may issue a conditional public report for specified subdivisions, if certain requirements are met, the application for the report has been determined to be qualitatively complete, and all requirements for issuance of the report have been met except as specified, including the filing of a final map that has not yet been recorded. This bill provides instead that the Commissioner may issue a conditional public report for specified subdivisions, if certain requirements are met, all deficiencies and substantive inadequacies in the documents that are required to make an application for a final public report for the subdivision substantially complete have been corrected, the material elements of the setup of the offering to be made under the authority of the report have been established, and all requirements for issuance of a public report set forth in the regulations of the Commissioner have been satisfied except as specified, including the fact that a final map has not been recorded.

Existing law provides that it is unlawful for an owner, subdivider, agent or employee of a subdivider, or other person to use false advertising to sell or lease property. This bill provides that these individuals may submit an advertisement concerning subdivided lands to DRE for approval, with the specified fee.

Existing law requires certain subdividers to submit reports listing persons who agreed to purchase property and subsequently withdrew; this bill eliminates this requirement. This bill was signed by the Governor on September 28 (Chapter 1108, Statutes of 1994).

The following is a status update on bills reported in detail in CRLR Vol. 14, Nos. 2 & 3 (Spring/Summer 1994) at pages 141–43:

AB 3302 (Speier). Under existing law, DRE is required at the time of issuance or renewal of a license to require that any licensee provide its federal employer identification number if the licensee is a partnership or his/her social security number for all others. As amended August 22, this bill provides that DRE may not process any application for an original license or for renewal of a license unless the applicant or licensee provides its federal employer identification number or social security number where requested on the application. This bill was signed by the Governor on September 30 (Chapter 1135, Statutes of 1994).

SB 1509 (Leonard). Existing law prescribes the duty of a licensed real estate broker to a prospective purchaser of residential real property comprising one to four dwelling units to conduct a visual inspection of the property and to disclose all facts materially affecting the value or desirability of the property, if the broker has a written contract with the seller to find or obtain a buyer; existing law provides that this inspection does not include an inspection of areas that are reasonably and normally inaccessible to such an inspection. As amended June 23, this bill extends this duty of brokers to licensed salespersons; provides that it is the duty of a licensed real estate broker or salesperson to comply with these requirements and any regulations imposing standards of professional conduct adopted pursuant to a specified provision of law; provides that the inspection described above does not include an affirmative inspection of areas off the site of the property or public records or permits concerning the title or use of the property; and provides that it is intended to clarify the obligations of real estate licensees and is not intended to change any existing duty of a broker or salesperson to disclose material facts within the knowledge of the licensee, including the existence of nuisances or other conditions of nearby properties that may affect the value of the property. This bill was signed by the Governor on August 26 (Chapter 339, Statutes of 1994).

SB 1542 (Kopp), as amended August 26, would have transferred the Business, Transportation and Housing Agency to the existing Trade and Commerce Agency. This bill would have established the Office of Business and Housing in the Trade and Commerce Agency to consist of the Department of Alcoholic Beverage Control, the Department of Corporations, the Department of Housing and Community Development, the Department of Real Estate, the Department of Savings and Loan, the State Banking Department, the Stephen P. Teale Data Center, and the California Housing Finance Agency. On September 27, Governor Wilson vetoed this bill, contending that "the reorganization of state government is the prerogative of the executive branch, not the legislative branch of government." Moreover, Wilson claimed that the Secretary of Business, Transportation and Housing is already addressing many of the concerns which prompted the introduction of this legislation.

AB 1718 (Peace). Under existing law, it is unlawful for a real estate broker to employ an unlicensed person to perform acts for which a license is required, for an unlicensed person to perform specified acts for which a real estate license is required, and for a person to advertise as a real estate broker without being licensed. As amended August 12, this bill authorizes the DRE Commissioner to levy an administrative fine for employing or compensating an unlicensed person to solicit borrowers or lenders or negotiate real property loans. This bill was signed by the Governor on September 11 (Chapter 500, Statutes of 1994).

SB 172 (Russell). Existing law requires a real estate broker who negotiates a loan secured by a lien on real property to deliver to the borrower a written statement containing specified information concerning the loan. As amended March 23, this bill requires specified notices prior to a borrower becoming obligated on any loan secured by a dwelling that provides for

balloon payments if any agreement includes a promise, representation, or similar undertaking to extend or seek the extension of the term of the loan or refinancing of the loan. This bill was signed by the Governor on May 20 (Chapter 86, Statutes of 1994).

The following bills died in committee: **AB 3272 (Bornstein)**, which would have required all disputes with an amount in controversy of $50,000 or less between buyers and sellers, prospective buyers and sellers, and their agents, arising out of real estate contracts, to be submitted to mediation before the parties resort to court action; **SB 945 (Hart)**, which would have, among other things, provided that a license issued to a real estate broker operating from a location outside California pursuant to a specified exemption shall be conditioned upon the licensee agreeing in writing to either (1) make the licensee's books, accounts, and files available to the Commissioner in California, or (2) pay the reasonable expenses for travel, meals, and lodging of the Commissioner incurred during any investigation made at the licensee's location outside California; and **SB 307 (Calderon)**, which, as amended June 22, would have provided that any homeowner whose home was rendered uninhabitable by the Northridge earthquake or the October and November 1993 wildfires, and who is using temporary housing not covered by insurance, may delay payment of principal and interest on a mortgage for a period not to exceed six months from the notification of the mortgagee or until 12:01 a.m. on January 17, 1996, whichever occurs first.

DEPARTMENT OF SAVINGS AND LOAN

Interim Commissioner:
Keith Paul Bishop
(213) 897-8202

The Department of Savings and Loan (DSL) is headed by a commissioner who has "general supervision over all associations, savings and loan holding companies, service corporations, and other persons" (Financial Code section 8050). DSL is part of the larger Business, Transportation, and Housing Agency. The Savings and Loan Association Law is in sections 5000 through 10050 of the California Financial Code. Departmental regulations are in Chapter 2, Title 10 of the California Code of Regulations (CCR). The Department, which has been recently downsized by the Wilson administration *[13:4 CRLR 128]*, now consists of four employees regulating only 14 state-chartered savings and loan institutions. The DSL staff includes the Interim Commissioner, an examiner, a staff analyst, and a part-time assistant.

Although recent state budgets refer to DSL as the "Office of Savings and Loan," DSL is still officially a department. Its responsibilities technically include licensing, examination, and enforcement, but the trend is away from state chartering of S&L institutions, DSL no longer performs field audits of state-chartered S&Ls, and its enforcement powers have been reduced to reviewing analyses performed by the federal Office of Thrift Supervision.

LEGISLATION

SB 1333 (Lockyer). Existing law requires banks and other financial institutions to maintain certain information concerning charges and interest on accounts, and to make that information available to the public; existing law also requires banks and other financial institutions to furnish depositors with statements concerning charges and interest on accounts. As amended August 18, this bill authorizes a supervised financial organization, defined to include banks, savings associations, savings banks, and credit unions, or charge card issuer, as defined, to charge and collect fees pursuant to a consumer credit agreement. This bill also limits the fees that a supervised financial organization may charge its credit cardholder customers under a consumer credit agreement as follows: $7 per monthly billing cycle as a late payment charge on the minimum payment due on a consumer credit agreement that is not paid within five days after the date the payment is due; $10 per monthly billing cycle as a late payment charge on the minimum payment due on a consumer credit agreement that is not paid within ten days after the date the payment is due; $15 per monthly billing cycle as a late payment charge on the minimum payment due that is not paid within fifteen days after the date the payment is due; and $10 on any overlimit charge that exceeds the credit limit by $500 or 120% of the credit limit as set forth in the consumer credit agreement, whichever is less.

The bill also provides that, in lieu of the $7 fee described above, if the consumer has already incurred two such late payment fees during the preceding twelve-month period, a supervised financial institution may charge no more than $10 per billing cycle as a late payment charge on the minimum payment due that is not paid within five days after the date the payment is due. Also, the bill requires that there must be at least 23 days between the monthly billing statement date and the date upon which the minimum payment is due, exclusive of the applicable late payment grace period, if the issuer is charging the $7 fee described above; if the issuer is charging the $10 or $15 late payment described above, there must be at least twenty days between the monthly billing statement date and the date upon which the minimum payment is due, exclusive of the applicable late payment grace period. The late payment grace period must be disclosed in the consumer credit or charge card agreement but need not be disclosed in any monthly or other billing statement. Finally, this bill authorizes supervised financial institutions to assess a finance charge at the rates set forth in the consumer credit agreement on the outstanding balance, which may include any late payment or overlimit fee charged on a prior billing statement.

According to an August 26 analysis by the Senate Rules Committee, SB 1333 represents major concessions by interested consumer credit providers and consumer groups to resolve an issue which has been the subject of intense debate involving three different bills over the course of two years (*see* description of AB 2830 below). SB 1333 is seen as offering credit providers with certainty regarding the validity of the fees they may impose on customers who pay late or exceed their credit limits, while providing California consumers with mandatory late payment grace periods and a reduction in the incidence of future overlimit fees. This bill was signed by the Governor on September 28 (Chapter 1079, Statutes of 1994).

H.R. 3841 (Neal), the Interstate Banking and Branching Efficiency Act of 1994, is federal legislation which allows for interstate banking transactions, mergers, and acquisitions. Among other things, the bill allows for the continuation of certain state powers, and allows state governments to opt out of allowing branching before June 1, 1997.

Another provision of H.R. 3841, however, will prevent federal regulators from proceeding with negligence actions against officers and employees of failed S&Ls; although an early version of the bill would have extended the statute of limitations for pursuing such actions, the final version of the bill extends the time only for actions involving fraud and willful misconduct. This will effectively bar most actions, since fraud and willful misconduct account for only about 20% of the failed S&Ls. This bill was signed by President Clinton on September 29 (Public Law No. 103-328).