provision means a wine importer. The bill would modify the above condition to delete the requirement that the wine to be sampled at the instructional event be wine that is used in blending the wines being featured. *[S. GO]*

S. 674 (Thurmond) is federal legislation to enact the Sensible Advertising and Family Education Act which would, among other things, require specified health warnings to be included in alcoholic beverage advertisements. This bill is pending in the Senate Commerce, Science, and Transportation Committee.

LITIGATION

In ***California Beverage Retailer Coalition v. City of Oakland***, No. 726329-3, filed in Alameda County Superior Court on November 10, the Coalition challenges an Oakland ordinance which would make it possible for the city to revoke an alcoholic beverage retailer's permit to sell alcohol if activities such as vandalism, drug sales, assaults, gambling, or prostitution take place anywhere in the surrounding neighborhood (*see* MAJOR PROJECTS). The Coalition contends that the ordinance violates the California Constitution and the California Beverage Control Act by purporting to regulate in an area which is reserved for state regulation and by placing additional zoning and fee requirements on existing licensed beverage establishments; the Coalition also claims that the ordinance violates retailers' rights to due process because it fails to require a causal link between a local business operation and the conduct of third parties outside the business, and fails to provide business owners with guidelines for controlling local crime. The City of Oakland counters that the ordinance is merely an effort to control a variety of problems associated with liquor stores in high-crime neighborhoods, and is not aimed at shutting down the stores.

On December 21, Superior Court Judge James Lambden agreed with the Coalition and held that the ordinance is preempted by the state's constitutional authority to regulate the sale of alcohol; Judge Lambden therefore issued the preliminary injunction sought by the Coalition prohibiting the ordinance's enforcement. At this writing, the Oakland City Council has not decided whether it will appeal the judge's ruling.

In ***Provigo Corporation v. Alcoholic Beverage Control Appeals Board*** and its companion case, No. S031492, the California Supreme Court will review the First District Court of Appeal's decision regarding the constitutionality of the use of underage youths as decoys in the enforcement of the prohibition against selling alcohol to minors. *[13:4 CRLR 99; 13:2&3 CRLR 120]* In both cases, ABC suspended the licenses of petitioners for selling alcohol to minors; the minors who purchased the alcoholic beverages were working in a decoy program for their respective police departments. Petitioners argued that the use of underage police agents to purchase alcoholic beverages is unconstitutional and requires dismissal of the charges. Petitioners also raised the defense of entrapment and violation of due process in the failure of the local police departments to follow ABC guidelines for a decoy program. In its decision reversing ABC's action, the First District found that the constitutional provision which states that "[n]o person under the age of 21 shall purchase any alcoholic beverage" is clear and unambiguous and contains no exceptions; the court also noted that no exception has been created by statute. At this writing, the Supreme Court is scheduled to hear oral argument in this case on February 16.

The decoy issue is also being addressed in the legislature; ACA 6 (Tucker) and its companion measure, AB 1208 (Tucker), would permit the use of minor decoys but require ABC and enforcement agencies to show "probable cause" before proceeding with a minor decoy operation (*see* LEGISLATION).

BANKING DEPARTMENT

Superintendent:
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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 company, 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

Federal Government Publishes New Community Reinvestment Act Regulations. Last July, President Clinton asked the four major banking regulatory agencies—the U.S. Comptroller of the Currency, Federal Reserve Board, Federal Deposit Insurance Corporation (FDIC), and Office of Thrift Supervision (OTS)—to work together to "reform the Community Reinvestment Act enforcement system by developing new regulations and procedures that replace paperwork and uncertainty with greater performance, clarity, and objectivity." In response, the four agencies held six public hearings around the country to obtain public input on improving federal enforcement of the CRA, which requires financial institutions to provide services to and invest in the communities in which they are located. *[13:4 CRLR 100]*

On December 21, the four agencies jointly proposed new regulations to implement the CRA; the proposed regulations would replace the existing CRA regulations in their entirety. According to the agencies, the proposed new regulations are designed to provide clearer guidance to financial institutions on the nature and extent of their CRA obligation and the methods by which the obligation will be assessed and enforced; emphasize performance rather than process, to promote consistency in assessments and permit more effective enforcement against institutions with poor performance; and reduce unnecessary compliance burden while stimulating improved performance.

As background information, the notice of proposed rulemaking explains that the CRA is designed to promote affirmative and ongoing efforts by regulated financial institutions to help meet the credit needs of their entire communities, including low- and moderate-income areas, consistent with safe and sound operations; however, despite the CRA's notable successes, bank and thrift industry, community, consumer, and other groups maintain that its full potential has not been realized because, in large part, compliance efforts have focused on process at the expense of performance. According to the agencies, the proposed regulations substitute for the current process-based assessment factors a new evaluation system that would rate institutions based on their actual performance in meeting community credit needs. In particular, the new system would evaluate the degree to which an institution is providing loans, branches and other services, and investments to low- and moderate-income areas. The proposed regulations also clarify how an institution's CRA performance would be considered in the corporate application process and seek to make the regulations more enforceable.

In addition to this rulemaking, the agencies are proposing to work together to improve examiner training and to increase interagency coordination regarding application of standards, performance of examinations, assignment of ratings, and use of enforcement tools. The agencies will also work together to improve public access to data collected pursuant to the Home Mortgage Disclosure Act (HMDA) and the proposed regulations. According to the agencies, these efforts should produce a CRA assessment process that is less burdensome for many institutions and yields more results for the local communities the law is intended to benefit.

Within days of the release of the proposed rules, banking industry trade associations began to voice opposition to various elements of the plan. For example, the proposed rules would require smaller banks—those with assets below $250 million—to meet a 60% loan-to-deposit ratio in order to receive a satisfactory CRA rating; critics contend that this sets up an absolute standard that may force banks to engage in risky lending practices in order to meet the lending ratio. However, the rules also provide that a small bank's overall CRA performance will be considered satisfactory if the bank has a reasonable loan-to-deposit ratio (a ratio of 60%, adjusted for seasonal variation, is presumed to be reasonable) given its size, its financial condition, and the credit needs in its service area; makes the majority of its loans in its service area; has a good loan mix (*i.e.*, makes, to the extent permitted by law and regulation, a variety of loans to customers across economic levels); has no legitimate, *bona fide* complaints from community members; has not engaged in a pattern or practice of illegal discrimination that it has not corrected fully; and has not committed isolated acts of illegal discrimination, of which it has knowledge, that it has not corrected fully or is not in the process of correcting fully; and, in the case of a bank already subject to reporting home mortgage lending data under HMDA, has a reasonable geographic distribution of such loans.

At this writing, the deadline for submitting comments to the proposed action is February 22; however, the deadline may be extended.

SBD Responds to Southern California Fires. On October 29, the Superintendent of Banks commended financial institutions which had initiated special programs to help customers affected by the multiple fires in southern California, and encouraged all banks to expedite the approval of loans to help rebuild the homes and businesses impacted by the fires.

Bank Closings. On September 24, the Superintendent of Banks took possession of Westside Bank of Southern California, ordered that it be liquidated, and appointed the FDIC as receiver of the bank; the FDIC accepted the appointment. The Resolution Trust Corporation (RTC) then arranged for OTS to form an interim federal savings bank (FSB-1) and appoint the RTC as receiver of FSB-1. All of the assets and liabilities of the bank were then transferred by the FDIC to the RTC. As part of this arrangement, OTS also formed a second federal savings bank (FSB-2) and appointed the RTC as conservator of FSB-2; all of the assets and some of the liabilities were then transferred from FSB-1 to FSB-2. The conservatorship will operate under the name of "Westside Bank, a federal savings bank," which will allow insured depositors of the bank to continue business with a minimum of disruption to banking services.

On October 29, SBD closed the Bank of San Diego; the insured deposits of the San Diego County branches were assumed by Grossmont Bank, and those depositors became depositors of Grossmont Bank. The insured deposits of the Santa Ana and Long Beach branches were assumed by Harbor Bank, which also acquired certain assets of the bank, and those depositors became depositors of Harbor Bank.

Mergers. On September 27, an application was filed to merge San Diego Trust and Savings Bank with and into First Interstate Bank of California, and to operate all existing offices of San Diego Trust and Savings Bank as offices of First Interstate Bank of California. *[13:4 CRLR 100]*

On October 12, an application was filed to merge Barbary Coast National Bank with and into Sunrise Bank of California and to operate all existing offices of Barbary Coast National Bank as offices of Sunrise Bank of California.

On November 1, an application was filed to merge Pacific Western Bank with and into Comerica Bank-California and to operate all existing offices of Pacific Western Bank as offices of Comerica Bank-California.

On November 2, SBD approved an application to merge Heart Federal Savings and Loan Association with and into U.S. Bank of California and to operate all existing offices of Heart Federal Savings and Loan Association as offices of U.S. Bank of California.

On December 6, SBD approved the application filed June 13 to merge California Republic Bank with and into First Interstate Bank of California and to operate all existing office of California Republic Bank as offices of First Interstate Bank of California was approved; the merger was effected on December 10. *[13:4 CRLR 100]*

New Banks Approved. On October 21, SBD approved an application for EverTrust Bank to open as a new bank in the City of Industry. On November 3, SBD approved the application for Heritage Bank of Commerce to open as a new bank in San Jose.

SBD Releases Third Quarter Report. According to SBD's quarterly report for the third quarter of 1993, at the close of business on September 30, the 252 state-chartered banks with 1,854 branch offices had total assets of $110.6 billion, an increase of $492,000 (0.4%) from September 30, 1992. During the preceding twelve months, there was a net decrease of ten banks and a net increase of 36 branch offices.

LEGISLATION

SB 1145 (Boatwright). 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 May 24, this bill would authorize a supervised financial organization, defined to include banks, savings associations, savings banks, and credit unions, to charge and collect fees pursuant to a consumer credit agreement, as specified.

Civil Code section 1671 sets forth the standard for determining the validity of a liquidated damages provision in a contract; section 1671(d) provides that a contract liquidated damages provision is void except that the parties may agree upon an amount contractually presumed to be the measure of damages for a contract breach when, from the nature of the case, it would be impractical or extremely difficult to fix the actual damage. *Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d 1383 (1991), applied section 1671 to limit credit card fees which may be assessed by a bank for a late payment or over-the-limit use of the credit card. *[12:1 CRLR 111]* SB 1145 would nullify *Beasley* and make section 1671 inapplicable to determine the validity of fees charged under a credit card agreement; instead, the bill would permit supervised financial institutions to charge and collect fees for late payment, over-the-limit usage, and bounced checks at the rates and amounts set forth in the credit card agreement. Those fees would be presumed valid, notwithstanding any other state law or regulation, if the fee is "commercially reasonable," defined by the bill as "less than or equal to a comparable fee used by at least one of the ten largest lenders headquartered outside of California providing a similar type of open-end credit."

The stated purpose of this bill is to allow banks to charge fees similar to those charged by out-of-state deregulated banks and to avoid litigation challenging the validity of such fees. However, opponents such as Consumers Union contend that SB 1145 is a back-door attempt to exempt credit card fees from the Civil Code requirement that penalty fees be reasonably related to the costs they are supposed to cover. Opponents point out that Civil Code section 1671(d) and caselaw interpreting it require that credit card penalty fees such as late and overlimit fees must be reasonably related to the actual damages expected to be caused by the event triggering the fee, and note that SB 1145 would exempt banks, savings associations, savings banks, credit unions, and their subsidiaries from these consumer protections. *[S. Jud]*

AB 320 (Burton). Existing law does not prescribe interest rates for bank credit card accounts, but prohibits defined usurious interest rates for any loan or forbearance made by a nonexempt lender. As introduced February 4, this bill would prescribe a maximum interest rate or finance charge which could be charged on credit card accounts issued by a bank, savings association, or credit union. Except as otherwise provided, the interest rate or finance charge assessed with respect to any account for which charges may be added by the use of a bank credit card shall not exceed an annual rate equal to 10% plus the savings account interest rate paid by the financial institution issuing the card. *[A. F&I]*

AB 1756 (Tucker), as amended June 9, would prohibit state, city, and county governments from contracting for services with financial institutions with $100 million dollars or more in assets unless those companies file Community Reinvestment Act reports annually with the Treasurer. The Treasurer would be required to annually submit a report to the legislature and to make summaries available to the public. These reports would include specified information regarding the nature of the governance of the companies, and their lending and investment practices with regard to race, ethnicity, gender, and income of the governing boards and of the recipients of loans and contracts from the institutions. *[A. Inactive File]*

AB 1640 (Bates). Existing law authorizes the Treasurer to deposit funds belonging to the state or in the custody of the state in various financial institutions. As introduced March 4, this bill would require the Treasurer to annually report to the Governor and the legislature on the amounts deposited in each financial institution and to include the institution's rating under the federal Community Reinvestment Act. *[A. F&I]*

SB 179 (Hughes), as introduced February 3, would prohibit the Treasurer from depositing or investing state moneys with financial institutions that receive specified ratings from federal authorities pursuant to the federal Community Reinvestment Act. *[S. GO]*

AJR 17 (Costa), as introduced March 5, would request the federal government and the state to conduct a thorough review of banking regulations, and to revise those that are unnecessarily burdensome and barriers to effective community lending. *[A. Rls]*

AJR 19 (Polanco), as amended September 1, would resolve that the legislature urge the United States Congress to repeal those laws found to be unduly restrictive, burdensome, and unnecessary to protect the safety and soundness of the banking system and to direct the federal agencies responsible for banking regulations to modify and rescind those regulations that may inhibit lending to small businesses, women, communities of color, and agricultural borrowers. This measure would also resolve that the legislature urge the President of the United States to use the authority of the executive branch of the federal government to reduce overregulation of the banking system by administrative act and to seek necessary legislative changes. *[S. Rls]*

AB 1995 (Archie-Hudson), as introduced March 5, would authorize state-chartered banks, savings associations, and credit unions to restructure a loan or extend credit terms and obligations to minority or women business enterprises in accordance with safe and sound financial operations. Any loan so restructured or extended shall not be classified as delinquent, and the financial institution shall not be required to increase its reserves or be subject to adverse regulatory action because of that loan. *[A. F&I]*

AB 2165 (Areias). Existing law requires the Secretary of Trade and Commerce to coordinate state policy on economic development and trade. As introduced March 5, this bill would require the Secretary, in conjunction with SBD, to develop a program to assist and encourage the banking industry to form a privately owned consortium to assist business relocation in California. *[A. F&I]*

AB 2232 (McDonald), as introduced March 5, would direct SBD to conduct a study and make recommendations to the legislature on or before July 1, 1994 on the regulatory process and procedures for banks engaged in making small business loans. *[A. F&I]*

AB 2349 (Polanco). Existing law prohibits any person from engaging in the business of receiving money for the purpose of transmitting the money or its equivalent to foreign countries, unless the person has first obtained a license from the Superintendent of Banks or is exempt. Under existing law, specified fees are charged for services performed by the Superintendent, including a $400 dollar per day fee for the services of an examiner, which a licensee must pay within ten days after receipt of a statement from the Superintendent for those services. As introduced March 5, this bill would change the time period for payment for those services from ten days to twelve days. *[A. F&I]*

SB 161 (Deddeh). Existing law requires banks to furnish depositors, if not physically present at the time of the initial deposit into an account, with a statement concerning charges and interest not later than ten days after the date of the initial deposit. As introduced February 1, this bill would instead require the statement to be furnished not later than seven business days after the date of the initial deposit. With respect to an increase in the rate of account charges or a variance in the interest rate, the bill would reduce the notice time from fifteen days prior to date of change or variance to seven business days.

Existing law, with specified exceptions, prohibits a commercial bank from lending in the aggregate an amount in excess of 70% of the amount of its savings and other time deposits upon the security of real property. This bill would specify that the percentage limitation applies with respect to the aggregate amount of accounts subject to a negotiable order of withdrawal, savings deposits, money market accounts, super now accounts, and other time deposits of a commercial bank, including certificates of deposit. *[S. BC&IT]*

SB 203 (Deddeh). Existing law provides that the failure of a bank or trust company to open a branch office within one year after the Superintendent of Banks approves the application terminates the right to open the office, except that prior to the expiration of the one-year period a one-year extension may be granted by the Superintendent in which to open and operate a branch office upon filing an application with the Superintendent and the payment of a $100 fee. As introduced February 4, this bill would increase that fee to $350. *[S. BC&IT]*

SB 632 (Deddeh). Under existing law, if a draft, such as a check, is unaccepted by the bank and is dishonored, the drawer is obliged to pay the draft according to its terms. As introduced March 2, this bill would, in addition, provide that the drawer is obligated to pay any service charges resulting from dishonor of the draft. *[S. Jud]*

HR 20 (Burton), as amended May 4, states that the Bank of America (BofA) is known as the leading bank in the West; BofA is one of the most profitable financial institutions in America, making a profit of $1.5 billion in 1992; BofA has achieved this success in part through federal subsidies of FDIC guaranteed borrowing and mergers approved by the federal government; BofA's Chief Executive Officer earned a salary of $1.6 million in 1992 and approximately $12 million in stock options between 1987 and 1991; BofA is opening overseas offices in Vietnam while at the same time closing neighborhood banks in California communities; BofA has asked all employees to sign "at will" statements acknowledging that the bank may fire them without cause at the employer's pleasure, work hours may be cut and health care and other benefits taken away, and employees may be transferred anywhere in the bank's system; this personnel action compromises the principle of employer responsibility by implying that the cutting of employee hours, salaries, and benefits is acceptable behavior while the bank continues to earn large profits; the elimination of employee benefits by BofA may place an additional burden on the state budget by increasing the costs of the Medi-Cal system and of state hospitals for uncompensated care; BofA is moving its credit card operations to Arizona and transferring 1,600 jobs out of San Francisco and Glendale in order to escape California consumer protection laws that do not apply if the credit card business is headquartered in a state with weaker regulations; BofA is the dominant bank in the State of California and is the depository bank for the State of California; in the 1991–92 fiscal year, the State of California's total dollar investment in BofA was $3.9 billion; 91% of all deposits from California state agencies are deposited with BofA; and the State of California has $131 million in debt issuance corporate notes from the Pooled Money Account with the BofA.

Accordingly, the measure would state the Assembly's request that the State Treasurer consider withdrawing all deposits from BofA and investing them in other banks within California in accordance with the care, skill, prudence, and diligence that a prudent person would use in conducting or making state financial investments; that the Treasurer discontinue any investment in BofA's corporate notes and invest in other banks within the state of California in accordance with the care, skill, prudence, and diligence that a prudent person would use in conducting or making state financial investments; and that all state agencies consider withdrawing their deposits from BofA and investing them in other banks within California in accordance with the care, skill, prudence, and diligence that a prudent person would use in conducting or making state financial investments. *[A. Inactive File]*

■ LITIGATION

Badie v. Bank of America, No. 944916, filed in San Francisco Superior Court in August 1992, challenges BofA's policy which requires that customer disputes over deposit and credit card accounts be sent to binding arbitration. *[13:4 CRLR 103]* On October 27, Judge William Cahill denied the bank's second motion for summary judgment, finding that it was essentially the same as the one denied by Judge Lucy Kelly McCabe a few months earlier. At this writing, trial is scheduled to commence on January 18.

In ***Leary v. Wells Fargo Bank***, No. 866229 (August 17, 1993), plaintiffs alleged that in 1966 or 1967, defendants Wells Fargo Bank, First Interstate Bank, Crocker National Bank, and Bank of America began a conspiracy to fix the interest rates on bank credit cards, and ultimately charged California customers nearly 5% more interest than they should have; Bank of America was the only defendant who did not settle. In August, following a ten-week trial, the jury found for BofA, finding that plaintiffs failed to prove the bank conspired to fix prices on credit cards. *[13:4 CRLR 103]* On December 7, BofA filed a motion seeking more than $500,000 in sanctions and attorneys' fees from the plaintiffs; the bank claims that plaintiffs misrepresented the testimony of their expert witness to defeat a motion for nonsuit and that this alleged misrepresentation caused an unnecessary trial. Also on December 7, plaintiffs filed a notice of intention to seek a new trial on the grounds that jury instructions were "uneven." At this writing, a hearing on both motions is set for January 14.

In ***California Grocers Association, Inc. v. Bank of America***, Nos. A055112 and A056217 (December 9, 1993), plaintiffs alleged that a $3 fee imposed by BofA on depositors such as CGA for checks deposited by them which are returned due to insufficient funds in the checkwriter's account constitutes unfair competition and breaches the implied covenant of good faith and fair dealing. After a nonjury trial, the trial court found for CGA, concluding that the fee is unconscionably high and violates the covenant of good faith and fair dealing and thus constitutes an unfair business practice under state law; the court awarded nominal damages and issued an injunction requiring BofA to lower its deposited item returned (DIR) fee to not more than $1.73 for a ten-year period.

On appeal, the First District Court of Appeal reversed the trial court's decision; although the First District agreed that the contract between CGA and BofA containing the DIR provision is adhesive in nature, it found that the $3 fee is not unconscionable. In reading this conclusion, the court found that BofA's $3 DIR fee is actually at the low end of fees charged for DIRs by other financial institutions (many of which charge between $4 and $10), and that the $3 fee is not so exorbitant as to shock the conscience. According to the court, assuming that BofA's cost of processing a DIR is $1.50, as estimated by the trial court, "the markup is only 100 percent." According to the court, "[t]his may be a generous profit, but it is wholly within the range of commonly accepted notions of fair profitability. Cases of price unconscionability generally involve much greater price-value disparities." The court found that the huge volume of DIRs, and the consequent cumulative profit to BofA, is "inconsequential."

The court also held that the trial court erroneously found that the $3 fee violates the implied covenant of good faith and fair dealing, since an implied contractual term should not be read to vary an express term (such as the $3 fee in the deposit agreement).

Finally, the court found that the injunction issued by the trial court "is an improper use of the unconscionability doctrine and an inappropriate exercise of judicial authority." The court noted that the doctrine of unconscionability has historically provided only a defense to enforcement of a contract, and thus may not be used offensively to obtain mandatory injunctive relief.

In ***Youngberg v. Bank of America***, No. 953812, filed July 30, 1993, in San Francisco Superior Court, the plaintiff alleges that Security Pacific Bank, now owned by Bank of America after a 1992 merger, overcharged its trust account customers. Specifically, the case challenges the fee charged for a practice known as "sweeping"—a process in which banks channel otherwise idle trust funds into interest-bearing accounts. The suit seeks unspecified damages for an undetermined number of trust account holders and the beneficiaries of those trusts who may have been affected by excessive sweep fees. Bank of America contends that the fees in question were lawful and appropriate and that proper notification was made to customers. *[13:4 CRLR 103]* At this writing, no trial date has been set.

In ***People v. Mortgage Partners Group, et al.***, the Superintendent of Banks, as co-plaintiff with the California Attorney General, obtained an October 12 judgment against Robert Merritt and William Rising in Los Angeles County Superior Court; allegations in the lawsuit included fraud, misrepresentation, and violations of various provisions of banking, consumer protection, and corporate securities laws. The judgment calls for the defendants to pay civil penalties and costs amounting to $50,000 and restitution to investors in the approximate sum of $135,000, plus interest. In addition, the court issued a permanent injunction restraining the defendants from engaging in specified conduct and activities relating to the offer or sale of securities and representations made in the course of such offers or sales. The judgment follows a similar permanent injunction against other entities related to Robert Merritt in June 1993.

DEPARTMENT OF CORPORATIONS

Commissioner: Gary S. Mendoza
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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."

The commissioner may refuse to grant a permit unless the securities are properly and publicly offered under the federal securities statutes. A suspension or stop order gives rise to Administrative Procedure Act notice and hearing rights. The commissioner may require that records be kept by all securities issuers, may inspect those records, and may require that a prospectus or proxy statement be given to each potential buyer unless the seller is proceeding under federal law.

The commissioner also licenses agents, broker-dealers, and investment advisors. Those brokers and advisors without a place of business in the state and operating under federal law are exempt. Deception, fraud, or violation of any regulation of the commissioner is cause for license suspension of up to one year or revocation.

The commissioner also has the authority to suspend trading in any securities by summary proceeding and to require securities distributors or underwriters to file all advertising for sale of securities with the Department before publication. The commissioner has particularly broad civil in-