awarded Huijers $76,300 in damages and $134,996.72 in attorneys' fees and costs.

On appeal, the DeMarraises contended that Larson's failure to provide them with an agency relationship disclosure statement prior to entering into the listing agreement made the listing agreement voidable; they also argued that their signatures on the sales contract were obtained through the misrepresentation that they were liable for Larson's commission even if they did not sign the contract. The court noted that for residential real estate sales, Civil Code section 2373 *et seq.* requires real estate agents to make certain disclosures about the agent's duties to the parties and about which party or parties to the transaction the agent is representing, and found that there "is no dispute that Larson failed to provide the DeMarraises with the disclosure form required by section 2375 prior to entering into the listing agreement."

However, Huijers contended that Larson was in substantial compliance with the law by providing the disclosure form at the time the purchase contract was signed. The Second District noted that substantial compliance with a statute is sufficient unless the intent of the statute may be served only by demanding strict compliance. According to the court, the objective of the statute requiring disclosure prior to signing the listing agreement is to allow the seller to make a more intelligent decision about whether to sign, and concluded that the full measure of protection that the legislature intended to provide to the seller is not achieved if the listing agent fails to provide the disclosure form prior to entering into the listing agreement.

Finding that Larson failed to substantially comply with the disclosure statute, the court reviewed the remedies available to the DeMarraises. The court noted that although there is no mention of any specific remedies in the relevant Civil Code provisions, section 2382 provides that "[n]othing in this article shall be construed to either diminish the duty of disclosure owed buyers and sellers by agents and their associate licensees, subagents, and employees or to relieve agents and their associate licensees, subagents, and employees from liability for their conduct in connection with acts governed by this article or for any breach of a fiduciary duty or a duty of disclosure." Thus, the court found that the legislative scheme added statutory duties to the common law duties of disclosure, while leaving common law remedies for failure to disclose intact; and noted that the remedy for a real estate agent's breach of a duty to disclose a dual representation of both buyer and seller is that the principal is not liable to pay the agent's commission, and the principal may avoid the transaction.

In support of its holding, the Second District expressed doubt that the legislature intended the remedy for violation of the statute to be confined to discipline by the Real Estate Commissioner, noting that such a statute providing exclusively for discipline against a licensee would ordinarily be found in the Business and Professions Code and not the Civil Code. Thus, the court found that Larson's failure to disclose prior to entering into the listing agreement relieved the DeMarraises from the obligation to pay her commission, thus rendering Huijers' statement regarding the DeMarraises' obligation to pay Larson's commission incorrect. However, the court also found that the failure to disclose does not in itself relieve the DeMarraises from their obligation under the purchase contract, and remanded this issue to the trial court to determine whether Huijers' misstatement regarding the DeMarraises' obligation to pay the commission constituted grounds for rescission.

In conclusion, the Second District cautioned that the failure to provide a disclosure form will not always result in a voidable listing agreement, noting that a seller who has sufficient knowledge concerning the information contained in the disclosure form may still be held to the listing agreement even though he/she did not receive the disclosure form.

## DEPARTMENT OF SAVINGS AND LOAN

*Commissioner:*
*Wallace T. Sumimoto*
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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 holds no regularly scheduled meetings, except when required by the Administrative Procedure Act. 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).

### ■ MAJOR PROJECTS

**OTS Director Resigns.** In December, T. Timothy Ryan, who presided over the seizure of more than 700 failed thrifts, resigned as director of the federal Office of Thrift Supervision (OTS) and a director of the Resolution Trust Corporation (RTC). Prior to his 1990 appointment by President Bush, Ryan was a partner in the law firm Reed Smith Shaw and McClay; he also served as a solicitor for the U.S. Department of Labor from 1981 to 1983. Ryan is expected to pursue employment in the private sector. OTS deputy director Jonathan Fiechter was named to replace Ryan until President-elect Bill Clinton names his successor; Fiechter has been at OTS since 1987.

**OTS Raises Assessment Fees.** In December, OTS announced that S&Ls will pay an additional 4% in assessment fees beginning in January, due to a significant decline in both the number and holdings of thrifts from which OTS derives much of its revenue.

Although OTS has continued to reduce its operating expenses since 1990, it contends that additional funds are still needed to meet its projected 1993 budget of $195 million; despite the fact that OTS is proposing to spend 34% less during 1993 than it did in 1990, critics of the fee hike argue that the agency should be cutting its costs and streamlining rather than raising fees. OTS responded to such comments by noting that it will continue its efforts to streamline and downsize operations, but not at the expense of effective regulation of the thrift industry.

**Thrifts Switch Charters to Avoid Regulation Costs.** Across the nation, many thrifts are switching to savings bank charters to avoid the fees associated with regulation by OTS. In the last eighteen months, 91 state and federal thrifts—about 5% of all private thrifts—have switched to savings bank charters. Most of the conversions have occurred in the six states that recently passed laws allowing such conversions. The fees paid to switch to bank charters are quickly recouped because an S&L with $100 million in assets saves about $25,000 in annual supervisory and examination fees. Former OTS Director Timothy Ryan questioned the ability of state regulators to monitor S&Ls as closely as federal regulators. According to Ryan, "We were told by Congress in 1989 to examine annually. That's not going to happen" under state regulation. A state or federal S&L must petition both the OTS and the state regulator to convert to a savings bank charter; typically, only the most stable S&Ls are permitted to convert.

**Federal Officials Release S&L Prosecution Figures.** On November 23, the U.S. Department of Justice (DOJ) released

figures regarding the status of major S&L prosecutions during the period of October 1, 1988 through October 31, 1992. According to DOJ, the estimated S&L losses during that period exceeds $9 billion; the number of persons charged with federal offenses is 1,331; the number of those persons convicted is 1,028, or 93%; 672 of the defendants found guilty were sentenced to prison, 174 are awaiting sentence, and 198 were sentenced without prison or had their sentence suspended; and over $561 million in restitution and $16 million in fines have been imposed.

**HomeFed Troubles Continue.** HomeFed Corporation, parent company of HomeFed Bank until the S&L was seized by federal regulators in July, filed for federal bankruptcy protection on October 22 *[12:4 CRLR 157]*; officials explained that the corporation filed for protection under Chapter 11 of the federal Bankruptcy Code because it was faced with a deadline to answer a bondholder-filed petition seeking to place it in bankruptcy.

Further, federal authorities announced in late October that they are investigating whether HomeFed Bank illegally originated and processed loans to its customers. According to documents filed with the Securities and Exchange Commission, the Justice Department and the Resolution Trust Corporation are examining the thrift's records, and are also trying to determine if HomeFed used illegal means when servicing its mortgage loans. Prior to its seizure, San Diego-based HomeFed was the eighth-largest savings and loan institution in the country, with assets of $13.5 billion.

## LITIGATION

After nearly two months of testimony and legal arguments, the federal criminal trial against former savings and loan boss Charles Keating and his son Charles Keating III on charges of racketeering, bank and securities fraud, and the interstate transportation of stolen goods went to the jury in late December; the charges stem from the $2.6 billion collapse of Lincoln Savings and Loan, and its parent company, American Continental Corporation (ACC), both owned by Keating. A 77-count federal indictment alleges that the two Keatings and three other officers of Lincoln and ACC, who have entered into a plea bargain, created sham profits for ACC through fraudulent sales of undeveloped land, and sold ACC junk bonds based on those false profits. The Keatings, who have pleaded innocent, face up to 510 years in prison if convicted on all 77 counts, as well as fines of $17 million and forfeiture of assets up to $250 million. The elder Keating is already serving a ten-year state court sentence for defrauding 25,000 investors out of $268 million by persuading them to buy worthless junk bonds instead of government-insured certificates.

Last July, in one of the numerous civil lawsuits stemming from Lincoln's failure, a federal jury ordered Keating and three co-defendants to pay over $3 billion in damages for conspiring to defraud investors; specifically, the jury awarded the 20,000 class action plaintiffs $600 million in compensatory damages and $1.5 billion in punitive damages from Keating, and $1.4 billion in compensatory damages and $900 million in punitive damages from Keating's three co-defendants. *[12:4 CRLR 159]* However, in October, U.S. District Judge Richard M. Bilby reduced the total award to approximately $1 billion, cutting the total compensatory damages to $288.7 million, dismissing the punitive damages against all defendants except Keating, and reducing punitive damages against Keating to $750 million.

On November 23, the accounting firm of Ernst & Young agreed to pay $400 million to the federal government to settle claims that the firm improperly audited federally-insured banks and S&Ls which have since failed. According to OTS, Ernst & Young was the auditor for a number of institutions which subsequently were involved in some of the most costly collapses, such as Lincoln Savings & Loan, Silverado Banking Savings & Loan, Vernon Savings & Loan, and Western Savings & Loan. Although the combined cost to the government resulting from all the failures at Ernst & Young-audited institutions is not yet known, four of the cases alone cost taxpayers $4.5 billion. OTS' charges against the firm included failure to make adequate allowances for loan losses, improper accounting for mergers, improper counting of income from phone sales, and failure to disclose dubious deals between the financial institution and some of its customers. According to Ernst & Young chair Ray Groves, the firm's insurance carriers will cover $300 million of the settlement, and the firm—which admitted no wrongdoing—will pay the other $100 million over the next four years. Groves indicated that the payment will not have a significant effect on the yearly earnings of the firm's partners.

In ***Resolution Trust Corporation v. State of California***, No. CV-92-6230, filed in U.S. District Court for the Central District of California on December 21, the state of California is challenging the RTC's right to seize an estimated $64 million in unclaimed deposit accounts at 55 insolvent California-chartered S&Ls. Although the RTC claims that unclaimed funds become federal property eighteen months after an S&L is seized, State Controller Gray Davis contends that under California's Unclaimed Property Law, the accounts must be turned over to the state controller's office, which tries to return the money to the rightful owners; the state law sets no time limit for owners to claim inactive accounts. Davis is also demanding that the RTC disclose the names on the accounts seized, so the controller's office can locate the depositors and return their money.

RTC spokesperson Anne Freeman characterized the filing as "quite a surprise," stating that federal officials had been engaged in ongoing discussions with California officials regarding the disposition of the funds. Freeman also contended that the RTC had even set up a trust fund into which the unclaimed deposits were deposited until the two sides resolved their differences; according to Freeman, $7.5 million in unclaimed California deposits has been placed in the trust fund. Further, Freeman contends that the RTC has only $30 million in unclaimed deposits nationwide, and questioned how California officials determined the $64 million figure.