certain administrative penalties for any violation of that requirement. *[S. Appr]*

AB 998 (Tucker). Existing law prohibits as an unfair method of competition and as an unfair and deceptive practice in the business of insurance the making of any misleading statement or representation as to specified terms of insurance policies. In addition, the Insurance Commissioner may disapprove the form of credit life and disability policies if they contain misleading provisions, and shall disapprove the forms of specified extended health insurance policies if the Commissioner finds they are misleading. As introduced March 1, this bill would specifically authorize the Insurance Commissioner to examine policy forms and to prohibit the use of forms that are deceptive or misleading. *[S. InsCl&Corps]*

AB 1782 (Tucker). Existing law prohibits certain discriminatory practices by admitted insurers, as specified. As amended July 8, this bill would create, in DOI, an Insurance Availability Study Commission for specified purposes. The bill would specify membership and require a report to be issued to the Governor, legislature, and Insurance Commissioner no later than October 1, 1995. The bill would appropriate $500,000 from the Insurance Fund for specified purposes. These provisions would be repealed on January 1, 1996. *[S. InsCl&Corps]*

SB 286 (Presley), as amended August 19, is no longer relevant to the Department of Insurance.

LITIGATION

On June 3, the California Supreme Court granted the petitions of Commissioner Garamendi and Voter Revolt and agreed to transfer their appeals of the trial court's decision in ***20th Century Insurance Company v. Garamendi***, No. BS016789 (Feb. 26, 1993), from the Second District Court of Appeal to the high court. In her February ruling, Los Angeles County Superior Court Judge Dzintra I. Janavs invalidated the Commissioner's regulations implementing Proposition 103's rollback requirement, and declared null and void the Commissioner's order requiring 20th Century to refund over $100 million to its 1989 auto, home, and business insurance policyholders. *[13:2&3 CRLR 139–40]* At this writing, briefing in the matter is ongoing; the case has not been set for oral argument.

In a related ruling, the Supreme Court refused to consolidate the ***20th Century*** case with the insurance industry's appeals of the Second District Court of Appeal's decisions in ***Safeco Insurance Co. v. Garamendi***, 14 Cal. App. 4th 1141 (1992) *[13:1 CRLR 86]*, and ***State Farm Mutual Automobile Insurance Co. v. Garamendi***, 15 Cal. App. 4th 546 (1993). In those cases, the appellate court held that Commissioner Garamendi is authorized to scrap the rollback regulations of his predecessor and adopt his own rules to guide calculation of a company's rollback liability.

On August 19, a panel of the Second District Court of Appeal heard oral argument in ***Amwest Surety Insurance Company v. Wilson***, No. B05839, regarding the extent to which the legislature may amend Proposition 103. The initiative states that the legislature may amend it only to "further its purpose." In this matter, the Commissioner and Voter Revolt contend that the legislature's passage of AB 3798 (Johnston) (Chapter 562, Statutes of 1990), which exempted surety companies from the rollback and prior approval provisions of Proposition 103, does not "further the purpose" of the initiative and is thus beyond the authority of the legislature. *[13:2&3 CRLR 130; 11:3 CRLR 133–34]* Resolution of this issue is critical, as several bills are pending in the legislature which would eviscerate the provisions of Proposition 103 enacted by the voters (*see* LEGISLATION).

On August 24 in ***ACL Technologies, Inc. v. Northbrook Property and Casualty Insurance Company***, 17 Cal. App. 4th 1773, the Fourth District Court of Appeal affirmed the trial court's decision and ruled that the "sudden and accidental" exception to the pollution exclusion contained in the 1973 version of the standard comprehensive general liability (CGL) insurance policy does not require coverage for damage arising from gradual leakage from underground storage tanks. *[11:4 CRLR 139]* Focusing on the language of the policy and finding that a covered pollution incident must be both "sudden" and "accidental," the court held that "there is no way that we could come to any other conclusion than that...the 'sudden and accidental' language in the CGL pollution exclusion does not allow for coverage for gradual pollution." In the words of the court, "gradual is the opposite of sudden"; thus, the exception to the exclusion does not apply, the pollution exclusion applies, and clean-up costs are not covered under a standard CGL policy.

On June 29, the U.S. Supreme Court issued a splintered decision in ***Hartford Fire Insurance Co., et al. v. California, et al.***, No. 91-1111, affirming in part and reversing in part the decision of the U.S. Ninth Circuit Court of Appeals in *In Re Antitrust Litigation*, 938 F.2d 919 (1992). In that decision, the Ninth Circuit held that domestic insurers lose their antitrust immunity under the federal McCarran-Ferguson Act when they engage in a group boycott with foreign insurers. *[13:1 CRLR 86]* On this issue, the Supreme Court unanimously reversed, holding that McCarran-Ferguson Act immunity applies to activities (not entities), and extends to otherwise unlawful conspiracies that include foreign reinsurers. However, a 5–4 majority found that plaintiffs' (nineteen states) group boycott allegations against the industry fit within the narrow boycott exception to the Act's immunity, such that they should proceed to trial. A different 5–4 majority held that foreign-owned companies may be sued under U.S. antitrust law for activities taken outside the United States. The Court remanded the matter back to the Ninth Circuit, which—barring settlement—presumably will remand it to the district court for discovery proceedings and trial.

DEPARTMENT OF REAL ESTATE

Commissioner: Clark E. Wallace
(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 $25 per salesperson applicant and $50 per broker applicant. Exam passage rates av-

eraged 56% for salespersons and 48% for brokers (including retakes) during the 1991–92 fiscal year. License fees for salespersons and brokers are $120 and $165, 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.

MAJOR PROJECTS

DRE Provides Update on Section Activities. The Fall 1993 *Real Estate Bulletin* provides recent information regarding DRE's enforcement program, mortgage lending activities, its licensing, information systems, legal, education and research sections, and its audit and subdivision programs. Among other things, the *Bulletin* notes the following activities:

• ***Enforcement Section.*** The DRE Commissioner is required to enforce the Real Estate Law in a manner which achieves maximum protection for the purchasers of real property and those persons dealing with real estate licensees. DRE's enforcement section accomplishes this through investigating consumer complaints and, when warranted, recommending disciplinary action to DRE's legal section and the Commissioner. During the 1992–93 fiscal year, the enforcement section reported receiving and screening 8,521 complaints; 4,076 of those complaints were assigned for investigation. DRE closed 2,589 complaints with no discipline recommended; referred 1,263 for disciplinary action; and issued 107 corrective action letters.

In conjunction with DRE's audit section, the enforcement section developed a Broker Compliance Evaluation manual to assist brokers in determining their compliance with Real Estate Law. The manual, which is designed primarily for residential brokers, contains many of the questions that a broker would be asked by a DRE representative. DRE notes that the manual was not designed to encompass all of a broker's obligations and responsibilities under the Real Estate Law; rather, it is intended to be used as a single tool among many that a broker may use to ensure compliance.

The enforcement section's long-range plans include an evaluation of the most effective methods to investigate mortgage loan broker (MLB) complaints, including the formation of a separate MLB investigative unit and streamlining the current investigative process. The section will also evaluate the use of an electronic court record access system, the development of disciplinary guidelines for consistency in penalty settlements, and the voluntary surrender of a license pending disciplinary action.

• ***Mortgage Lending Activities Section.*** This section is responsible for a variety of activities associated with real estate brokers engaged in the mortgage business. In fiscal year 1992–93, this section reviewed 2,000 proposed advertising drafts submitted by brokers on both a voluntary and mandatory basis; reviewed 158 proposed contracts of brokers who collect fees from principals in advance of performance under the contract; monitored 850 brokers who meet a prescribed threshold level of mortgage loan activity; monitored lending activity for discriminatory practices; and produced the *Mortgage Loan Bulletin*. Additionally, DRE finalized new mortgage loan disclosure statements during fiscal year 1992–93.

• ***Licensing Section.*** DRE's licensing section, which is responsible for administering examinations and issuing licenses, experienced a downward trend in most areas of licensing during fiscal year 1992–93. Specifically, the number of salesperson examinations declined by 13% from 1991–92 figures; the number of broker examinations declined by 7%; the issuance of new salesperson licenses declined by 16%; and the issuance of new broker licenses declined by 11%.

DRE also noted that Psychological Research, Inc. (PSI) recently completed an occupational analysis of the real estate profession to identify the knowledge, skills, and abilities currently necessary for the practice of real estate, so that DRE's licensing examinations can be updated accordingly. One of the recommendations resulting from the study is that the knowledge categories, and weights given to each category, be restructured for both the salesperson and broker examinations to place more emphasis on agency disclosure requirements, other disclosure laws, and contracts. PSI also recommended that DRE emphasize the areas of trust fund handling, broker supervision, misrepresentation, and illegal compensation in the licensing examinations; this recommendation is based on the frequency with which violations in these areas form the basis for disciplinary actions.

The licensing section also implemented pilot projects to determine the feasibility of instituting an Automated Examination Telephone System, accepting examination fees by credit card, and utilizing faxed copies of examination applications and supporting documentation. The Automated Examination Telephone System pilot project provided 24-hour access to information concerning examination requirements, procedures, and scheduling. In addition, voice mail was available to accept requests for exam applications and duplicate results notices. These pilot projects concluded on September 14; staff is currently reviewing the results to determine if they should be made permanent programs. Staff is also studying the possibility of expanding these types of programs to other DRE program areas.

• ***Information Systems Section.*** DRE announced that its office automation sys-

tem has been installed and is fully operational; the system provides word processing, spread sheet, and local database functions. All DRE offices are now connected by a communications network which supports electronic mail. According to DRE, the new system has effectively improved the efficiency of its entire staff.

• ***Legal Section***. DRE reports that in fiscal year 1992–93, its legal section received 1,263 investigative files from the enforcement section recommending some kind of formal legal action against licensees; filed 301 accusations initiating disciplinary actions to suspend or revoke licenses; and filed 288 statements of issues to deny applications for licensure. As a result of the disciplinary actions prosecuted by the legal section, 587 licenses were revoked, 135 licenses were suspended, and 200 license applications were denied.

• ***Education and Research Section***. This section is responsible for processing continuing education (CE) and pre-licensure course approval applications; it also oversees activities associated with research projects funded by DRE. According to the *Bulletin*, 350 sponsors currently offer 1,110 DRE-approved CE courses on a wide variety of subjects; and 162 private vocational schools offer over 565 DRE-approved pre-license (college equivalent) courses.

In fiscal year 1993–94, this section is expected to evaluate the possible implementation of procedures whereby CE course sponsors will provide data relating to CE credits earned by licensees, rather than the current system whereby licensees provide such data at the time of license renewal; the implementation of three-hour "Trust Fund Accounting and Handling" and Housing" CE course requirements; and the development of a new elective, pre-license, college-level course on "Mortgage Loan Brokering and Lending" (*see* AB 1902 (Knowles) in LEGISLATION).

• ***Subdivision Program***. California's subdivision laws, which cover most lot subdivisions, various types of common interest developments (of five or more lots or units), timeshares, land projects, certain undivided interests, and out-of-state subdivisions offered for sale to California residents, seek to ensure that subdividers deliver to buyers what is agreed upon at the time of sale. Before a subdivision may be marketed in California, the subdivider must obtain a public report from DRE; the public report discloses to prospective buyers pertinent information about the subdivision. The *Bulletin* notes that for the fourth consecutive year, the number of applications for final subdivision public reports has declined—down 38% from 1989–90 levels. The *Bulletin* also notes that AB 2490 (Brulte), which became effective on January 1, 1993, allows for the issuance of a conditional public report (CPR) and allows DRE to impose a $500 fee for processing the related application. *[12:4 CRLR 156]* A CPR may be issued if DRE is confident that certain required documents will be obtained by the subdivider in a timely manner; the CPR would allow a subdivider and a purchaser to enter into a binding contract subject to specific conditions to be completed at a future date.

DRE is pursuing proposals to streamline the subdivision approval process, including the creation of guidelines for master plan communities; evaluation of DRE's role in the oversight of homeowners' associations; evaluation of the security device (*i.e.*, bond, letter of credit, etc.) program; and review of the multi-location timeshare project program.

• ***Audit Program***. This program is charged with performing random and investigative audits of brokers to ensure compliance with the Real Estate Law and the Subdivided Lands Law relating to trust fund handling, recordkeeping, and other compliance areas. During 1992–93, the section performed 1,516 audits, detected 452 major violations, issued 702 corrective action letters, and found no or only minor violations in only 362 of the audits performed (24%). The section found shortages in 352 of the trust funds audited, for a total shortage of $7,869,751; 138 shortages (in the amount of $848,450) were cured during or soon after the audit.

To assist in standardizing DRE's policies and procedures, the audit program developed a new mortgage loan broker audit program; this standardized program is expected to ensure thorough and uniform examinations of mortgage loan brokers. In addition, the audit program developed an audit statistical database which will be used as a tool to monitor the efficiency of the audit production.

The audit program's 1993–94 goals include developing a new property management audit program; developing a new manual for review of threshold mortgage loan broker reports; and computerization of its reports, including the audit time report analysis and travel expense summary.

DRE Discusses Brokers' Duties Regarding Escrow Services. The summer issue of the *Real Estate Bulletin* discussed the circumstances under which a licensed broker may engage in an escrow transaction in California. DRE noted that Financial Code section 17000 *et seq.* defines an escrow agent as anyone, licensed or unlicensed, who receives escrows for deposits or delivery and requires escrow agents to be licensed by the Commissioner of Corporations, unless otherwise exempt. The exemption for real estate brokers is set forth in Financial Code section 17006(a)(4) and applies to any licensed broker while performing acts in the course of or incidental to a real estate transaction in which the broker is a party or an agent performing an act for which a real estate license is required. Thus, a licensed broker engaging in escrow transaction outside the scope of the exemption is required to obtain a license as an escrow agent under the Escrow Law.

The *Bulletin* noted that the two essential requirements for a valid sale escrow are a binding written contract between buyer and seller, and the conditional delivery of transfer instruments to a third party. The binding contract may appear in any legal form including a deposit receipt, agreement of sale, exchange agreement, option, or mutual escrow instructions of the buyer and seller. Escrow instructions implement and may also supplement the original purchase contract. An escrow contains all the necessary instructions which reflect the understanding of the parties and all the essential requirements of the transaction. An escrow holder is the depository, agent, or impartial third person having and holding possession of money, written instruments, or personal property to be held until the occurrence of the designated conditions. The escrow holder acts to ensure that all parties to the transaction comply with the instructions and conditions of the agreement as set forth in the escrow instructions; an escrow is complete when all instructions and conditions have been met. An escrow agent is normally held liable for violating the written instructions of the parties to the escrow.

DRE notes that the duties of an escrow holder are quite different from those of a real estate broker. According to the Department, the following are some major escrow principles:

–Escrow instructions must be clear, concise, and certain as to the intentions of the parties to the transaction.

–The escrow holder may not act as a mediator or advisor, and is prohibited from offering legal advice.

–Escrow is a limited agency relationship, governed by the content of the escrow instructions. As agent for both parties, the escrow holder acts only upon specific written instructions of the principals. Oral instructions should not be accepted or acted upon. Any detrimental or

new material information affecting the principals should be disclosed to them for their instructions in the matter. The escrow holder must remain strictly impartial.

–When all parties to the escrow have signed mutual instructions, the escrow becomes effective. If only one party has signed, that party may terminate the proposed escrow at any time prior to the other party's signing.

–The use of vague or ambiguous terms and provisions in instructions and documents prepared by the escrow holder must be strictly avoided.

–Any documents which are to be part of the escrow and which are to be recorded or approved by any party should be deposited immediately so that their sufficiency can be determined in order to avoid possible delay in the closing of escrow. Documents and funds not contemplated by the escrow instructions should not be accepted by the escrow holder without authority of the principals affected.

–The escrow trust account must be maintained with extreme care. Overdrawn accounts are strictly forbidden and may lead to disciplinary action against the broker's license. Brokers are required to maintain the same records for their escrow trust account that are maintained for their brokerage trust account.

–Escrows are confidential.

–Escrow records and files must be maintained daily. Before closing, an escrow holder should carefully audit the file. The escrow holder must not disburse any funds from an escrow account until all checks, drafts, etc. have cleared.

–The escrow holder must facilitate a prompt settlement, using forms which are simple and clear.

DRE also notes that while escrow procedures may vary according to local custom, the basic escrow procedures include preparing escrow instructions, which are signed by all principals to the escrow; ordering a title search and examining the report carefully; requesting demands and/or beneficiary statements; accepting structural pest control reports and other reports and obtaining any necessary approval from the parties; accepting loan instructions and documents; determining that the buyer has satisfied all lender's instructions prior to using the lender's funds to complete the transaction; accepting fire insurance policies and complete settlements; requesting closing funds, which are deposited into escrow by the party owning them; auditing the file to determine if escrow is in a position to close; ordering a recording, authorizing the title company to run the seller's title to date and instructing the title officer to record documents; and closing escrow, preparing settlement statements for both the buyer and seller, disbursing all funds, and delivering the closing documents to the party or parties entitled thereto.

Finally, DRE noted that the selection of an escrow agent in a real estate transaction is one of the terms of the contract to be resolved by a meeting of the minds of the principals to the transaction. Buyers and sellers have the right to compare escrow services and charges, and to negotiate between themselves as to where the escrow will be held. Business and Professions Code section 10177.4 states that the DRE Commissioner may suspend or revoke the license of a real estate licensee who claims, demands, or receives a commission, fee, or other consideration as compensation or inducement for referral of customers to any escrow agent or controlled escrow company; DRE noted that this prohibition includes salespersons and/or broker associates who may claim, demand, or receive a fee for referring an escrow in-house to his/her employing broker.

DRE Rulemaking Update. On March 19, the Commissioner published notice of his intent to amend sections 2810.1, 2792.16, 2792.18, 2820.2, 2831, 2831.1, 2832.1, 2834, 2840, 2841, 2842.5, 2848, 2949.01, 2951, 3006, 3010, and 3010.5, repeal sections 2819.85, 2820.3, 2820.4, 2821.1, 2822.1, 2822.2, 2822.3, 2822.4, 2823, and 2823.1, and adopt new sections 2790.2, and 2840.1, Chapter 6, Title 10 of the CCR. On May 4, DRE conducted a public hearing on these proposals; after making minor amendments, the Commissioner adopted all of the proposed rules. *[13:2&3 CRLR 141]* At this writing, the changes await review and approval by the Office of Administrative Law.

Licensees Warned of Impostors. The summer issue of the *Real Estate Bulletin* cautioned that several licensees have received calls in which the caller identifies him/herself as a DRE employee; the caller then informs the licensee that he/she is in violation of the Real Estate Law. Some of these licensees have checked with DRE, to find that DRE did not make the call. In one instance, a licensee received a letter purportedly from DRE which contained a forged signature of a DRE employee. The *Bulletin* informed licensees that if they receive a call or letter apparently from DRE, they may call the Department to verify authenticity.

LEGISLATION

SB 1002 (Craven). Existing law defines the term "real estate broker" for purposes of the Real Estate Law and provides for the licensure and regulation of mineral, oil, and gas brokers. As amended June 28, this bill provides that a real estate broker is also a person who acts for another for compensation with respect to specified activities involving mineral, oil, or gas property, or who engages in specified businesses as a principal involving mineral, oil, or gas property; provides that a real estate broker's license shall not be required to engage in specified activities with respect to a mineral, oil, or gas property; and eliminates the examination requirement for mineral, oil, and gas brokers.

Under the Real Estate Law, the holder of a license who fails to renew it prior to the expiration of the period for which it was issued and who has otherwise qualified for such license, may renew it within two years from such expiration upon proper application and the payment of a late renewal fee in an amount equal to one and one-third times the regular renewal fee. This bill instead provides for a late renewal fee of one and one-half times the regular renewal fee.

The Real Estate Law provides for various examination fees, license fees, and subdivision public report application fees. This bill increases those fees for a specified period of time. The bill provides for the repeal of these provisions if any funds are transferred from the Real Estate Fund to the general fund, as specified, and for the reenactment of the existing fee provisions. *[12:4 CRLR 1]* The bill also provides for the repeal of these provisions and the reenactment of existing fee provisions, if the balance of funds in the Real Estate Fund exceeds a specified amount and the DRE Commissioner does not reduce these fees, as specified.

Existing law provides for separate accounts in the Real Estate Fund which are known as the Education and Research Account and the Recovery Account, and provides that 8% of any license fee collected shall be credited to the Education and Research Account and 12% shall be credited to the Recovery Account. This bill instead provides that the Commissioner may, by regulation, require that up to 8%, or such lesser amount as he/she deems appropriate of any license fee collected, be credited to the Education and Research Account. The bill also provides that 12% of the amount of any license fee collected shall be credited to the Recovery Account, unless the account contains a specified amount of funds, then any excess funds shall be credited to the Real Estate Fund.

Existing law also authorizes the Commissioner to transfer any amount over $400,000 in the Education and Research

Fund Account to the Real Estate Fund. This bill provides that, notwithstanding that provision, if at any time the amount of funds credited to the Real Estate Fund, including any amounts credited to the Education and Research Account and the Recovery Account, is less than 25% of DRE's authorized expenditures for the following fiscal year, the Commissioner may transfer any or all of the funds credited to the Education and Research Account to the Real Estate Fund. The bill also provides that the Commissioner may authorize the return to the Education and Research Account of all or part of any amount previously transferred to the Real Estate Fund. This bill was signed by the Governor on September 20 (Chapter 416, Statutes of 1993).

AB 1535 (Caldera). Existing law requires specified trust funds reports to be filed with the Real Estate Commissioner by real estate brokers who negotiate or collect payments or provide servicing with respect to certain loan transactions or real property sales contracts if the annual dollar volume thereof exceeds a prescribed threshold. Existing law also requires real estate brokers who are exempt from making these trust funds reports to the Commissioner, because their annual dollar volume does not exceed that threshold, to complete these reports according to specified requirements, and retain them on file at the broker's office, where they would be available for inspection by representatives of the Commissioner on 24 hours' notice. As amended April 13, this bill changes the requirements for completing those reports. This bill was signed by the Governor on June 16 (Chapter 34, Statutes of 1993).

AB 1846 (Peace). Under existing law, provisions regulating transactions in trust deeds and real property sales contracts, and real property securities dealers, as specified, do not apply to any person whose business is that of acting as an authorized representative, agent, or loan correspondent of any person or employee thereof doing business relating to specified state and federal financial institutions and other entities, including pension trusts, or when making loans qualified for sale to those institutions. As amended May 25, this bill additionally provides that those provisions do not apply to any person who is an approved lender, mortgagee, seller, or servicer for specified federal agencies or entities when making a loan to be sold to, or serviced on behalf of and subject to audit by, any of those agencies or entities with respect to those loans. This bill was signed by the Governor on September 8 (Chapter 373, Statutes of 1993).

AB 1902 (Knowles). Existing law requires an applicant for a real estate broker license to successfully complete one of several specified courses on subjects relating to real estate. As amended June 15, this bill includes among the list of specified courses, a course on mortgage loan brokering and lending.

Existing law requires real estate licensees to comply with continuing education requirements. These include requiring an applicant for license renewal to successfully complete 45 clock hours of education on specified subjects. This bill, upon the initial renewal of all real estate licenses after December 31, 1995, requires a real estate broker, as part of the 45 clock hours of education, to complete a three-hour course in trust fund accounting and handling and a three-hour course in fair housing. This bill also requires a real estate broker, for all subsequent renewals after the initial renewal, to successfully complete 45 clock hours of education in specified courses, during the four-year period preceding the renewal application. This bill was signed by the Governor on September 26 (Chapter 541, Statutes of 1993).

AB 1195 (Moore). Existing law requires certain instruments, before they are recorded, to be acknowledged by the person executing them and the acknowledgement certified as prescribed by law, except as specified. Existing law also permits the execution to be proved by a subscribing witness or as provided in specified provisions of law and certified as prescribed by law. As amended May 3, this bill exempts any mortgage, deed of trust, or security agreement from the provision permitting proof of execution of an instrument by a subscribing witness or as provided in specified provisions of law. This bill was signed by the Governor on July 30 (Chapter 282, Statutes of 1993).

AB 2151 (Aguiar). Existing law requires any defined representative of an equity purchaser, deemed to be the agent, employee or both of an equity purchaser, to provide specified proof of real estate licensure and bonding to the equity seller, and certain sworn statements regarding this licensure and bonding to all parties to the contract. As introduced March 5, this bill would exclude certain representatives who are licensed real estate professionals from these requirements. *[A. Jud]*

AB 647 (Frazee). Existing law requires that an application by an aggrieved person to DRE for payment from the Recovery Account specify that the application was mailed or delivered to the Department no later than one year after the underlying judgment became final. As introduced February 23, this bill would change that requirement to no later than one year after the most recent judgment became final. *[A. F&I]*

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 May 17, this bill would authorize the Real Estate Commissioner to levy an administrative fine for a violation of those provisions after first having issued a desist and refrain order, as specified. The fines would be credited to the continuously appropriated Recovery Account in the Real Estate Fund. *[A. F&I]*

AB 2293 (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 requirements as to advertising, reporting, and trust funds. As amended May 13, this bill would remove the specified requirements relating to advertising.

Existing law requires a real estate broker, prior to the use of any proposed advertisement in connection with specified activities, to submit a copy of the advertising to the Real Estate Commissioner for clearance. Existing law exempts from this requirement advertising that is used exclusively in connection with an offering authorized by permit issued pursuant to provisions applicable to real property securities dealers or the corporate securities law. This bill instead would authorize a broker to submit a copy of the advertising to the Commissioner for approval, subject to a fee. The bill would delete the exemption relating to real property securities dealers and corporate securities.

Existing law regulates certain out-of-state land promotions and defines the term "accessible urban subdivision" for those purposes. Existing law, with specified exceptions, makes the sale or lease, or offering for sale or lease, of lots in out-of-state subdivisions subject to provisions regulating real property securities dealers. This bill would delete the term "accessible urban subdivision" and instead would define and regulate the sale or lease, or offering for sale or lease, of lots in an "improved out-of-state residential subdivision" and an "improved out-of-state time-share project." The bill would revise the applicability of the law regulating real property securities dealers to those out-of-state land promotions. The bill would also provide that with respect to out-of-state land promotions the final permit issued shall be for one year. The bill

would make changes respecting service of process on nonresident applicants.

Existing law authorizes the Commissioner to issue a preliminary permit for an accessible urban subdivision. This bill instead would refer to a preliminary permit for an improved out-of-state residential subdivision and authorize the Commissioner to issue a conditional permit for an improved out-of-state residential subdivision.

Existing law makes it unlawful for owners or subdividers to use or distribute any advertisement concerning subdivided lands which contains a false or misleading statement. This bill would allow owners, subdividers, or their agents or employees, prior to the use, publication, and distribution of any advertisement concerning subdivided lands to submit the advertisement to DRE for approval, accompanied by a fee. *[A. LGov]*

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 August 31, this bill would require 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. *[A. F&I]*

SB 945 (Hart). Existing law requires every licensed real estate broker to have and maintain a definite place of business in California to serve as his/her office for the transaction of business. As amended July 13, this bill would exempt from that requirement a licensed real estate broker whose licensable California activities are limited to collecting payments or performing services, in connection with loans secured by a first lien on real property, for specified investors. The bill would also provide that a license issued to a real estate broker operating from a location outside California pursuant to this 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. *[A. W&M]*

SB 307 (Beverly). Under existing law, if private mortgage insurance or mortgage guaranty insurance is required as a condition of a loan secured by a deed of trust or mortgage on real property, the lender or person making or arranging the loan is required to notify the borrower whether or not the borrower has the right to cancel the insurance, and if the borrower has that right, to notify the borrower in writing of certain information. Under existing law, except when prohibited by a statute, regulation, or rule of an institutional third party applicable to notes or evidence of indebtedness secured by a deed of trust or mortgage and purchased by the institutional third party, if a borrower requests termination of private mortgage insurance or mortgage guaranty insurance issued as a condition to the extension of credit in the form of a loan evidenced by a note or other evidence of indebtedness secured by a deed of trust or mortgage on real property, and if specified conditions are satisfied, the borrower may terminate future payments. As amended June 7, this bill would specify that the latter provision does not apply to any note or evidence of indebtedness providing certain private mortgage insurance or mortgage guaranty insurance where the premiums are paid by the lender and not charged to the borrower separately and in addition to the interest payments on the note or evidence of indebtedness. The bill would provide that if the lender or the person arranging the loan makes any representation to the borrower with respect to the deductibility of the payment of the mortgage insurance costs for income tax purposes, that person shall also advise the borrower in writing that the borrower should consult with the borrower's tax advisors with respect to the deductibility. The bill would also allow a lender or other person arranging a loan who offers private mortgage insurance or mortgage guaranty insurance to make that insurance available to the borrower, as specified, and if the insurance is required for the loan and both types are offered, to provide a specified comparison. The bill would also provide that if the borrower does not have the right to cancel the insurance because the premiums are paid by the lender, the lender or the person making or arranging the loan shall notify the borrower in writing, at the time of application for the loan, that the lender will purchase mortgage insurance for the lender's benefit, that the borrower does not have the right to cancel the insurance, and that cancellation of the insurance will not reduce the borrower's monthly obligation. *[A. F&I]*

LITIGATION

In ***Loughrin v. Superior Court of San Diego County (Irwin Barr, Real Party in Interest)***, 15 Cal. App. 4th 1188 (May 11, 1993), as modified May 26, 1993, Andrew Loughrin sought a writ of mandate directing the superior court to reverse its order granting summary adjudication as to the first cause of action in Loughrin's complaint against Irwin Barr, a seller of residential real estate; the first cause of action was based on Barr's alleged negligent failure to make appropriate disclosures of defects in the real property in accordance with the statutory duty set forth in Civil Code section 1102 *et seq.* Barr completed and delivered the disclosure form required by section 1102.6, and also added an "as is" provision to the sales agreement. Barr's sole ground of defense was that his potential liability for nondisclosure of defects was waived by the insertion in the sales agreement of a provision to the effect that the property was purchased "as is."

The Fourth District Court of Appeal noted that the issues presented for review, as framed by Barr, are whether the disclosure requirements of section 1102 *et seq.* may be waived by a buyer, and whether the waiver is accomplished by a sale in "as is" condition. In considering whether the disclosure requirements may be waived, the court noted that Civil Code section 3513 provides that "[a]nyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." The court concluded that no "public interest" exists in the typical private real estate purchase and sale transaction; accordingly, the court concluded that the disclosure requirements in section 1102 *et seq.* are waivable, stating that "a knowing and explicit waiver of the benefits of section 1102 *et seq.* can be effective."

However, the court then considered whether the insertion of an "as is" clause, either in general or in the expanded detail utilized in this transaction, will achieve "a knowing and explicit waiver." The court noted that "[t]he theoretical difficulty encountered here is that, contrary to the apparent assumptions of many people dealing in real estate (including some brokers), a sale 'as is' is not the equivalent of a waiver of potential claims of misrepresentation...[T]he 'as is' sale simply means the buyer accepts the property in the condition visible or observable by him." The court also noted that "[a]n added provision in the waiver clause, such as contained in this case, indicating the buyer relies on his own inspection of the property, presumably waives any obligation the seller or his broker may otherwise have to inspect the property for defects, and hence may avoid a claim for negligent failure to know of and advise of such defects." However, the court found that even such an augmented "as is" clause does not address the issues of intentional misrepresentation, fraudu-

lent concealment, or even negligent concealment not related to failure to inspect. The court then held that "[i]f the use of an 'as is' clause will not protect against claims based on common law misrepresentation, *a fortiori* it will not insulate the seller from claims based on the disclosure requirements of section 1102 *et seq.*"

The Fourth District therefore concluded that it is possible for Loughrin to prevail in his contention that the purchase contract was not intended to insulate Barr from liability for misrepresentation in the preparation of the statutory disclosure form; accordingly, the court held that the question could not be decided as a matter of law, and it was error for the trial court to issue its order denying recovery under the first cause of action.

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). 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 regulates 15 state-chartered S&L institutions.

MAJOR PROJECTS

DSL Undergoes Quiet Transformation, Reduction. With hardly a word to the press or public, and in the absence of any legislative alteration of the Savings and Loan Association Law and its delegation of regulatory authority to DSL, the Wilson administration apparently closed down the Department of Savings and Loan on March 31 and created a three-person Office of Savings and Loan Administration (OSLA) comprised of an administrator, a financial analyst, and a secretary. According to the March 22 issue of *National Mortgage News*, DSL's thrift examination staff had already been completely eliminated in January, and California was no longer examining any of the 15 remaining state-chartered thrifts. In June, Governor Wilson appointed Rosendo Castillo to serve as OSLA's administrator; Castillo previously served as a mortgage loan consultant for Great Western Bank.

Although reformation of DSL into an office has been widely expected as the number of state-chartered S&Ls has declined and since the Governor vetoed SB 506 (McCorquodale) in September 1992 (which would have merged DSL into the State Banking Department *[12:4 CRLR 157]*), the Wilson administration has neither introduced legislation to amend the Savings and Loan Association Law which creates DSL nor suggested a reorganization plan to accomplish the transformation. However, the state's 1993–94 budget allocates $449,000 to the "Office of Savings and Loan"—an entity which technically does not exist in state law, and which may not legally be created through the budget bill. The $449,000 allocation represents a severe cutback from DSL's 1992–93 allocation of $3.7 million. Also in the 1993–94 budget bill, the Governor and legislature transferred over $1.9 million from the Department's special fund (funded by assessments against state-chartered institutions) to the state's general fund to help balance the budget.

In the absence of legislation creating OSLA, DSL apparently reopened as the "Department of Savings and Loan" on July 1. Castillo was replaced with Keith Paul Bishop, named by the Governor as Interim Commissioner of the Department. According to Bishop, DSL's reduced budget, which he says "reflects the reduced number of state-chartered associations, the increased federal oversight of associations and an effort to streamline government and reduce costs," has resulted in a much-reduced DSL staff and regulatory program. In addition to Bishop, DSL employs one full-time examiner, one full-time executive assistant, and a part-time executive assistant. Further, according to Bishop, "[t]he Department no longer conducts examinations of state-chartered institutions. Federal thrift regulators examine these institutions. The Department's examiner reviews the federal examination reports. In addition, state-chartered associations must seek the Department's approval prior to taking a number of actions [*e.g.*, under Financial Code section 5654], and the Department continues to review and act on these applications."

National Commission Recommends Abolition of S&Ls. On July 27, the bipartisan National Commission on Financial Institution Reform, Recovery and Enforcement, created by Congress to investigate the causes of the S&L crisis and to suggest actions to prevent its recurrence, released its findings and recommendations in a report entitled *Origins and Causes of the S&L Debacle: A Blueprint for Reform*. Among other things, the Commission's report concludes that the best way to avoid a repeat of the S&L bailout is to abolish the S&L industry, reduce federal deposit insurance coverage ("the 'necessary condition' for the debacle," according to the Commission), and consolidate financial institution regulation. The study cites ineffective government regulation as the main reason for the scandal; according the Commission, fraud or corruption accounted for only 10–15% of the S&L crisis.

The Commission was created by the Comprehensive Crime Control Act of 1990; its members were appointed by the President, the Speaker of the House, and the President Pro Tempore of the Senate. The Commission included co-chairs Andrew Brimmer, a former member of the Federal Reserve Board who heads an economic and financial consulting firm, and John Snow, Chair of CSX Corporation, an international transportation company. Other members included Elliott Levitas, a former Democratic congressmember from Georgia; Robert Litan, director of the Center for Law, Economics and Politics of the Brookings Institution; and Joseph Califano, Jr., former Democratic Secretary of Health, Education and Welfare.

The report notes that when federally chartered S&Ls were hit by the interest rate crisis of the late 1970s and early 1980s, federal regulators relaxed accounting rules to avoid closing institutions, all but eliminating net worth requirements. According to the report, states had to compete with the lax federal regulations by becoming equally permissive; to keep their S&Ls from switching to federal charters, states such as California, Florida and Texas gave their S&Ls unlimited authority to invest in just about any activity, far in excess of what federally chartered S&Ls might do. *[10:4 CRLR 1]* Further, instead of monitoring S&Ls more closely in this critical time, state and federal regulators did the opposite, according to the Commission. The Commission notes that "[r]egulators, the [Reagan] Administration, and Congress must share blame with the industry for the S&L debacle....By allowing accounting schemes that made insolvent S&Ls look healthy, by virtually abolishing net worth requirements, and by not raising red flags, regulators permitted the powerful S&L lobby to convince the public and many in Congress that the situation was under control."

The report also concludes that other factors, including the following, contributed to the S&L crisis:

–The 1981 Tax Act provided a substantial tax preference for real estate investments and helped create an unsustainable