membership or unreasonably prevents the full enjoyment of the club on the basis of the person's color, race, religion, ancestry, national origin, sex, or age; enlarge the scope of ABC's authority to deny licenses due to "undue concentration"; authorize written protests against the exchange of a license where no public notice of intent to sell alcoholic beverages is required; and add a condition to existing law which requires ABC to deny an application for a license or for the exchange of a license if either the applicant or premises do not qualify. This two-year bill is pending in the Assembly Government Organization Committee.

AB 268 (Hauser), which would have required beer kegs to clearly display a registration number, and required every person who rents, leases, or sells a beer keg to a consumer to maintain a record of the registration and information identifying the consumer, was dropped by its author.

AB 1246 (Murray) was substantially amended on July 16 and is no longer relevant to ABC.

SB 21 (Marks) was substantially amended on July 17 and is no longer relevant to ABC.

LITIGATION:

On June 12, in ***In the Matter of the Accusation Against Fortune Three Inc.***, No. 208606, Administrative Law Judge (ALJ) Milford A. Maron ruled that Vertigo, a trendy disco in downtown Los Angeles, violated California's Unruh Civil Rights Act by refusing to admit all customers. (See CRLR Vol. 11, No. 2 (Spring 1991) p. 113 for background information.) ALJ Maron ordered the club to stop using its "priority admission policy," under which a door guard selects patrons at random according to an unspecified dress code, and to post a large sign by the entrance stating that Vertigo is open to the general public in an indiscriminate manner, in accordance with California law. The ALJ found Vertigo's door policy to be "nothing more than a smokescreen for blatant discriminatory behavior, with awesome potential for abuse," and ruled that because Vertigo holds a state liquor license, it must be open to the general public and obey state laws, including those requiring equal access.

In the action brought by ABC after it received an anonymous complaint about the club's admission policy, the judge revoked Vertigo's liquor license, but suspended the revocation for one year and placed Vertigo on probation. One condition of probation is that the club write and enforce a nondiscrimination policy; if the club adheres to the ruling, it may keep its liquor license. Vertigo representatives vowed to appeal the ALJ's decision, and stated that the club's admission policy will remain in effect pending the appeal.

In a similar action, a Los Angeles Municipal Court commissioner ruled earlier this year that the Mayan, a downtown Los Angeles nightclub, illegally discriminated against four people by denying them admission without a stated reason while allowing others to enter. In ***Sotlzer v. Ten Thirty Eight, Inc.***, No. 735730, the commissioner awarded monetary damages of $1,112 but did not order the club to change its door policy.

The legal basis for these proceedings is the Unruh Civil Rights Act, a wide-ranging law which, among other things, prohibits businesses from discriminating against customers based on such criteria as race, gender, or religion. In the Vertigo case, ALJ Maron agreed with ABC's argument that the Act bans all types of arbitrary discrimination against any group or individual, not just the racial- and gender-based discrimination specified in the language of the Act. Contrary to the argument advanced by Vertigo, the ALJ found that the constitutionally protected rights of assembly and free speech do not protect an establishment's right to select patrons, and found that the Constitution does protect the right of equal access. Neither of these decisions are binding on any court but, if affirmed on appeal, would establish precedent and increase the contexts in which the Unruh Act could provide consumer protection.

BANKING DEPARTMENT

Superintendent: James E. Gilleran
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Toll-Free Complaint Number: 1-800-622-0620

Pursuant to Financial Code section 200 *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 proposed name does not so closely resemble as to cause confusion 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 or relocation of branch offices and the establishment 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 travelers checks unless licensed. The superintendent also regulates the safe-deposit business.

The superintendent examines the condition of all licensees. However, as the result of the increasing number of banks and trust companies within the state and the reduced number of examiners following passage of Proposition 13, the superintendent now conducts examinations only when necessary, but at least once every two years. The Department is coordinating its examinations with the FDIC so that every other 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 all 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:

Agency Secretary Announces DSL Merger with SBD. On September 25, Carl Covitz, the newly-confirmed Secretary of the Business, Transportation and Housing Agency, announced that the Department of Savings & Loan (DSL) will be consolidated with SBD; Covitz estimated that the merger would take place by June 30, 1992, the end of the current fiscal year. Tough federal regulations instituted in 1989 eliminated the advantages of a state S&L charter; as a result, many former state-chartered S&Ls have converted to federal charters, reducing the number of state-chartered S&Ls from a peak of 158 in the mid-1980s to only 47 today. (*See infra* agency report on DSL for related discussion.)

Covitz said that DSL staffers will be transferred to SBD and that no layoffs are currently planned. Until bank examiners master the particulars of S&L practice, the transferred DSL examiners will continue to examine the remaining state-chartered S&Ls.

Bank of America and Security Pacific Announce Intent to Merge. On August 12, the two leading banks in California, BankAmerica Corp. and Security Pacific, announced their intention to merge into one financial service giant. The new bank, to be called BankAmerica, will be the second largest bank in the United States with over $190 billion in assets.

Both of the banks are national banks; as such, their merger must be approved by the Federal Reserve Board, not by SBD. However, SBD expects to consult with federal regulators as they analyze the potential impact of the merger. Some analysts believe the merger could hurt consumers by reducing competition, which could result in lower interest rates on checking and savings accounts, increased service charges, reduced availability of loans, and higher interest rates and initiation fees on loans that are made. Nevertheless, most observers expect the merger to be approved.

California Branch of BCCI Seized by SBD. On July 5, the Superintendent of Banks took possession of the Los Angeles branch of the Bank of Credit and Commerce International (BCCI). SBD took possession to protect California creditors of the institution; the action was part of a coordinated plan by banking regulators nationwide and throughout the world. The California office of BCCI had no domestic deposits but held approximately $40 million in foreign deposits. The assets of BCCI are to be liquidated. The first round of bids for BCCI assets was found to be inadequate; at this writing, state regulators continue to control the operations of BCCI's Los Angeles office until the liquidation is completed.

Update on Federal Bank Reforms. At this writing, both the U.S. Senate and House of Representatives continue to pursue banking reform laws designed to modernize the banking industry. (See CRLR Vol. 11, No. 3 (Summer 1991) p. 118 and Vol. 11, No. 2 (Spring 1991) p. 116 for background information.) Key features of S. 543 and H.R. 6 include the following:

-Both bills would make it easier for banks to undertake interstate branching.

-Both bills would repeal the Glass-Steagall Act of 1933, which limits the services that commercial banks may offer. Repeal of this law would allow commercial banks to sell securities through separately incorporated and capitalized affiliates.

-Both bills would require the FDIC to develop and introduce some form of risk-based premium financing. However, neither bill would reduce the current coverage limit of $100,000 per account or the total number of insured accounts an individual may have, although H.R. 6 would limit the number of insured accounts an individual may have with a single institution.

-Both bills would authorize the FDIC to borrow up to $70 billion from the U.S. Treasury, with the loan to be repaid out of future deposit insurance premiums.

At this writing, H.R. 6 is expected to go to the House floor for debate and a vote by late October; the full Senate is expected to begin debate on S. 543 in November.

SBD Adopts Amendments to Conflict of Interest Code. Following a public comment period ending on July 1, the Department adopted several amendments to its conflict of interest code, which is set forth at Article 3, Subchapter 5, Chapter 1, Title 10 of the CCR. The amended provisions conform SBD's code to the model code established by the Fair Political Practices Commission (FPPC) at section 18730, Title 2 of the CCR. On July 10, SBD transferred its amended code to the FPPC for approval. (See CRLR Vol. 11, No. 3 (Summer 1991) pp. 117–18 for background information.)

LEGISLATION:

The following is a status update on bills reported in detail in CRLR Vol. 11, No. 3 (Summer 1991) at pages 118–19:

SJR 24 (Vuich), as amended August 19, memorializes the President, Congress, and U.S. Department of the Treasury to retain and continue the essential components of the dual banking system; ensure that any reforms to the federal deposit insurance system apply equally to all depositors in financial institutions of any size; and recognize that it is imperative that any changes in federal banking laws do not impair California's ability to tax banks in this state. This resolution was enrolled on September 6 (Chapter 140, Resolutions of 1991).

AB 697 (Lancaster). As amended April 30, this bill, among other things, establishes a minimum annual assessment of $5,000 which will be collected by the Superintendent from banks and trust companies to meet SBD expenses and contingencies, and eliminates the prior limitation that borrowing by a commercial bank be for temporary purposes. This bill was signed by the Governor on July 26 (Chapter 180, Statutes of 1991).

AB 938 (Speier), as amended June 7, among other things, would have limited the fees which may be charged for dishonored checks, and provided that no insufficient funds check charge shall be imposed by a financial institution if the account balance is positive after posting all items received for that business

day. This bill was rejected by the Assembly on June 18.

AB 1593 (Floyd), as amended April 18, and *SB 506 (McCorquodale)*, as amended August 19, would both transfer the licensing and regulatory functions of SBD, the Department of Savings and Loan (DSL), and the Department of Corporations to a Department of Financial Institutions, which both bills seek to create; both bills would abolish SBD. AB 1593 is pending in the Assembly Committee on Banking, Finance and Bonded Indebtedness and SB 506 is pending in the Senate Committee on Banking, Commerce, and International Trade.

SB 893 (Lockyer), as introduced March 7, would, among other things, authorize the establishment of the California Financial Consumers' Association, a private, nonprofit public benefit corporation established to inform and advise consumers on financial service matters, represent and promote the interests of consumers in financial service matters, intervene as a party or otherwise participate on behalf of financial service consumers in any regulatory proceeding, sue on behalf of members in regard to any financial service matter, and take related actions. This two-year bill is pending in the Senate Banking Committee.

AB 696 (Lancaster). Existing law provides that with the prior written approval of the Superintendent, a bank may change the location of a place of business from one location to another in the same vicinity upon application and a fee of $100. As introduced February 25, this bill would increase that fee to $250. This two-year bill is pending in the Senate Banking Committee.

SB 949 (Vuich). Existing law provides that the failure of a bank or trust company to open a branch office within one year after the Superintendent 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 March 8, this bill would increase that fee to $300. This two-year bill is pending in the Senate Banking Committee.

AB 1596 (Floyd). The California Public Records Act requires that records of state and local agencies be open to public inspection, with specified exceptions, including specified documents filed with state agencies responsible for the regulation or supervision of the issuance of securities or of financial institutions. As amended April 30, this bill would revise this exception and limit it to records of any state agency responsible for the regulation or supervision of the issuance of securities or of financial institutions, when the records are received in confidence and are proprietary and their release would result in an unfair competitive disadvantage to the person supplying the information or the records constitute filings or reports whose disclosure would be counterproductive to the regulatory purpose for which they are used. This two-year bill is pending in the Assembly Governmental Organization Committee.

SB 950 (Vuich) and *AB 1463 (Hayden)*. With specified exceptions, existing law 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. SB 950, as introduced March 8, and AB 1463, as introduced March 7, 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. SB 950 is pending in the Senate Banking Committee and AB 1463 is pending in the Assembly Banking Committee.

AB 1195 (Lancaster), as introduced March 6, would provide that for compensation or in expectation of compensation, a bank or trust company may, on behalf of another or others, sell, buy, lease, exchange, or offer to sell, buy, lease, or exchange, or solicit prospective sellers, purchasers, or lessees of, or negotiate the sale, purchase, lease, or exchange of any business opportunity. This two-year bill is pending in the Assembly Banking Committee.

LITIGATION:

In *Sanford v. Garamendi* (formerly "*Sanford v. Gillespie*"), No. C006971 (Aug. 28, 1991), plaintiffs—individual insurance agents and brokers and their trade associations—sought to prohibit the Insurance Commissioner from issuing insurance agency and brokerage licenses to state banks and their subsidiaries and to rescind any such licenses already granted. Plaintiffs' contentions stem from Proposition 103, an insurance reform initiative measure approved by the voters in the November 1988 general election; Proposition 103 expressly repealed Insurance Code section 1643, which provided that no bank, bank holding company, subsidiary, or affiliate thereof may be licensed as or act as an insurance agent or broker in California. A January 4, 1989 "interpretive opinion" of the Superintendent of Banks concluded that Proposition 103 impliedly repealed Financial Code sections 1208 and 722(b). Section 1208 provides that a commercial bank located in a community not exceeding 5,000 in population "may act as agent for any fire, life or other insurance company authorized to do business in California" if specified conditions are met. Section 722 states in relevant part: "(a) A bank may invest in one or more corporations. (b) No such corporation may act as an insurance company, insurance agent, or insurance broker." Based on this interpretive opinion, the Insurance Commissioner announced that the Department of Insurance would not reject an application from a state-chartered bank for an insurance agency or brokerage license. (See CRLR Vol. 9, No. 2 (Spring 1989) pp. 81 and 88 for background information.)

Plaintiffs filed a writ of mandate, asking the court to declare the Superintendent's interpretive opinion legally erroneous; direct the Commissioner to rescind the insurance licenses issued to banks pursuant to the invalid interpretation; and enjoin the Commissioner from further licensing banks to engage in the general insurance agency or brokerage business. The trial court denied the requested relief, ruling that Proposition 103 impliedly repealed Financial Code sections 772(b) and 1208, thus eliminating any statutory impediments to the licensure of banks and their subsidiaries as insurance agents or brokers.

The Third District Court of Appeal agreed with the trial court's conclusion that "as a result of Proposition 103's express repeal of Insurance Code section 1643, banks may now engage in the insurance agency and brokerage business," noting that "[o]ne of the main purposes of Proposition 103 as set forth in the ballot summary was to allow banks to engage in insurance activities."

However, the Third District rejected the trial court's finding that Proposition 103 impliedly repealed Financial Code sections 1208 and 772(b). The court noted that there is "a strong presumption against the implied repeal of a statute or constitutional provision by subsequent enactment.... To overcome the presumption the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation." The court held that "there is nothing within Financial Code

section 1208 which is inconsistent with the notion that all banks may now enter the insurance marketplace. Financial Code section 1208 is an express grant of authority to a limited class of banks to sell specified types of insurance.... It does not, merely because of its limited permissive application, impliedly prohibit all banks not described therein generally from selling insurance."

Regarding section 772(b), the Third District noted that neither Proposition 103 nor the ballot materials accompanying the initiative made any mention of bank subsidiaries, finding "no hint either in the initiative itself or in the accompanying ballot materials that Proposition 103 was designed to allow bank subsidiaries entry into the insurance business." The court thus rejected the Superintendent's conclusion that "the clear intent of the initiative was to allow both banks and their subsidiaries to enter the insurance marketplace." The court noted that Proposition 100, a competing insurance reform initiative on the November 1988 ballot, would have expressly repealed Financial Code section 722(b). "In rejecting Proposition 100 the voters rejected the express repeal of Financial Code section 722, subdivision (b). This rejection is not insignificant."

As a result, the court affirmed the trial court's decision insofar as it denied plaintiffs' request for a writ of mandate commanding the Commissioner to cease granting insurance licenses to banks and to rescind any such license previously issued to banks, and otherwise reversed the decision, directing the trial court to issue a writ of mandate commanding the Commissioner to cease granting insurance license applications to bank subsidiaries and to rescind any insurance license previously issued to any such entity.

In ***Karoutas v. HomeFed Bank***, No. A050085 (July 23, 1991), the First District Court of Appeal recognized a common law duty requiring lenders with actual knowledge of facts materially affecting the value of property to disclose those facts to prospective bidders at a trustee's sale. HomeFed was the beneficiary under a trust deed on real property; the owners of the property subsequently defaulted. At a trustee's sale, the Karoutases purchased the property for $155,001. Prior to the sale, the Karoutases did not and could not inspect the property; after the sale, the Karoutases discovered that soil conditions and other defects in the residence would cost in excess of $250,000 to repair. The Karoutases filed a complaint against HomeFed for rescission, declaratory relief, fraud, and negligent nondisclosure, claiming that HomeFed know about the defects prior to the sale. The trial court sustained HomeFed's demurrer, finding that the absence of a disclosure duty defeated all of plaintiffs' claims.

On appeal, the principal issue was whether HomeFed, given its alleged knowledge of defects in the property and residence, had a duty to disclose the defects to the Karoutases. The court readily found that, based on precedent, the facts as stated by the Karoutases are "sufficient to raise ... a common law duty to disclose." HomeFed did not contend that the allegations failed to establish a common law duty to disclose; rather, it argued that the comprehensive nature of the nonjudicial foreclosure statutes, which do not contain a duty to disclose, precludes the court from imposing such a duty on a beneficiary. The First District rejected HomeFed's contentions, finding, among other things, that caselaw interpreting the nonjudicial foreclosure statutes does not eliminate common law duties owed to prospective bidders over and above those required by the statutes. Additionally, the court noted that the "public interest in the prevention of fraud" overcomes the public interest in the speedy disposition of property under deeds of trust.

DEPARTMENT OF CORPORATIONS

Commissioner: Thomas Sayles
(916) 445-7205
(213) 736-2741

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 investigative discovery powers; he/she can compel the deposition of witnesses and require production of documents. Witnesses so compelled may be granted automatic immunity from criminal prosecution.

The commissioner can also issue "desist and refrain" orders to halt unlicensed activity or the improper sale of securities. A willful violation of the securities law is a felony, as is securities fraud. These criminal violations are referred by the Department to local district attorneys for prosecution.

The commissioner also enforces a group of more specific statutes involving similar kinds of powers: Franchise Investment Statute, Credit Union Statute, Industrial Loan Law, Personal Property Brokers Law, Health Care Service Plan Law, Escrow Law, Check Sellers and Cashiers Law, Securities Depositor Law, California Finance Lenders Law, and Security Owners Protection Law.

A Consumer Lenders Advising Committee advises the commissioner on policy matters affecting regulation of consumer lending companies licensed by the Department of Corporations. The committee is composed of leading