

CONSTRUCTION AND DESIGN REGULATORY AGENCIES

listed in the California Building Standards Law, which the bill would recast to refer to the most recent edition of specified model codes, or to specified amendments to a model code. The bill would also require the California Building Standards Commission to specify a model code when the model code writing body becomes defunct or ceases publication and to report the change to the legislature. [S. H&CD]

RECENT MEETINGS

At its October 14 meeting, CAB reviewed recent pass rates on its newly-restructured California Supplemental Examination, the oral exam required for California licensure. [16:2 CRLR 77-78] The CSE was administered to 138 candidates in May in Irvine, with a pass rate of 42%; the July administration to 130 candidates in South San Francisco yielded a 55% pass rate; and the September administration to 138 candidates in Irvine resulted in a 46% pass rate.

Also in October, CAB discussed the concerns expressed by some licensees that their home addresses will be displayed on the "licensee look-up" function of the Board's website. Licensee addresses will be displayed, and some licensees who

use their home address as their "address of record" have expressed alarm. Pending direction from the Board, staff has deleted the address line temporarily. CAB directed staff to write a letter to all licensees explaining that their "address of record" will be made public on the Internet, provide them with a change of address card and an opportunity to change their "address of record" on file with the Board, place an article regarding "addresses of record" in the Board's newsletter, and restore licensee addresses to the Internet site in 2000 after affected licensees have been given an opportunity to respond.

FUTURE MEETINGS

- December 3, 1999 in San Francisco.
- January 14-15, 2000 in San Diego.
- March 17, 2000 in Burbank.
- May 24, 2000 in Irvine.
- September 15, 2000 in San Diego.
- December 8, 2000 in the Bay Area.

Contractors' State License Board

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MAJOR PROJECTS

Board Prepares for Sunset Review

On October 1, in preparation for its upcoming sunset review hearing, CSLB submitted a report to the Joint Legislative Sunset Review Committee (JLSRC) documenting the actions it has taken to resolve problems identified by the JLSRC during CSLB's 1996-97 sunset review. [16:2 CRLR 86; 16:1 CRLR 104-07]

The Board's October 1999 report updates an October 1, 1998 report that it submitted in anticipation of a fall 1998 sunset review. However, that review was postponed until the fall of 1999, and SB 1306 (Committee on Business and Professions) (Chapter 656, Statutes of 1999) has extended the existence of the Board to accommodate the new schedule (see LEGISLATION). The October 1999 report summarizes the

Board's progress on resolving outstanding issues remaining after its 1997 sunset review:

♦ **New Guidelines for B-General Building Contractors.** While the Board was undergoing sunset review in 1996-97, the Fourth District Court of Appeal disagreed with CSLB's interpretation of Business and Professions Code section 7057,

Created in 1929, the Contractors' State License Board (CSLB) licenses contractors to work in California, handles consumer complaints, and enforces existing laws pertaining to contractors. A consumer protection agency within the Department of Consumer Affairs (DCA), CSLB is authorized pursuant to the Contractors' State License Law (CSLL), Business and Professions Code section 7000 *et seq.*; the Board's regulations are codified in Division 8, Title 16 of the California Code of Regulations (CCR). CSLB currently licenses over 278,000 contractors in California.

CSLB licenses general engineering contractors, general building contractors, and approximately 40 specialty contractor categories; in addition, the Board registers home improvement salespersons who market contractor services to consumers. The thirteen-member Board consists of seven public members (one of whom must be an active building official), one general engineering contractor, two general building contractors, two specialty contractors, and one member from a labor organization representing building trades. The Board currently maintains five committees: executive, contractor and consumer education, enforcement, licensing, and legislation.

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as codified in section 834(b), Title 16 of the CCR. The regulation prohibited a B-general building contractor from taking a prime contract (excluding framing and carpentry) "unless it requires at least three unrelated building trades or crafts, or unless he/she holds the required specialty license(s)." In *Home Depot, U.S.A., Inc. v. Contractors State License Board*, 41 Cal. App. 4th 1592 (1996), a licensee cited for violation of section 834(b) challenged the regulation as being inconsistent with the statute, which at that time defined a B-general building contractor as one "whose principal contracting business is in connection with any structure built, being built, or to be built, for the support, shelter and enclosure of persons, animals, chattels or movable property of any kind, requiring in its construction the use of more than two unrelated building trades or crafts, or to do or superintend the whole or any part thereof." The court held that section 7057 required a general building contractor's "principal contracting business" to require the use of more than two unrelated building trades or crafts; it "does not limit a general building contractor's operation solely to contracts involving more than two unrelated building trades or crafts" (emphasis original). The decision thus allowed a general contractor to take a contract when the job involved only a single specialty trade, such as plumbing.

Subsequently, the Board sponsored legislation, SB 857 (Polanco) (Chapter 812, Statutes of 1997), which amended section 7057 and superseded the court's ruling. Section 7057 now specifies that a B-general building contractor may legally take a prime contract or subcontract that involves (1) framing or carpentry, or (2) at least two unrelated trades or crafts other than framing or carpentry (framing or carpentry may not be counted as one of the two unrelated trades or crafts). Further, a B-general building contractor may take a contract for a single specialty trade, provided the work of the contract is subcontracted to a properly licensed specialty contractor, or the general building contractor holds the relevant specialty license. The Board has also amended section 834(b) to conform to amended section 7057 (see below).

◆ **Consolidation of Specialty Licenses.** In its 1996-97 review of the Board, the JLSRC expressed its doubt about the need for all 42 specialty licenses existing at that time. After surveying various trade associations, the Board engaged in rulemaking to modify seven of its 42 specialty licenses by merging them into other specialty categories. As a result of this rulemaking, no specialty classifications have been eliminated; their total number has simply decreased due to the consolidation actions described above. In its 1999 sunset report, CSLB states that "it is not in the best interests of consumers to eliminate any Specialty license classifications, consider-

ing the results of the health and safety survey, public testimony, and potential risks to consumers." [16:1 CRLR 105]

◆ **Home Improvement Contractor Certification Program.** After the Board's 1996-97 sunset review, CSLB staff compiled data indicating that the majority of financial injury and consumer complaints filed with the Board are attributable to problems with home improvement contractors. To remedy this problem, CSLB initially proposed a Home Improvement Certification Program that would require all prime contractors and subcontractors who perform home improvement work to pass an open-book exam on the home improvement business and fulfill a continuing education requirement, or post a blanket payment and performance bond of \$250,000.

The Board's plan was opposed in the legislature. The modified plan, AB 1213 (Miller) (Chapter 888, Statutes of 1997), amended section 7150.2 of the Business and Professions Code to require CSLB to establish a mandatory certification program for home improvement contractors by January 1, 1999. After July 1, 2000, a contractor may not engage in the home improvement business un-

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less he/she has been certified under section 7150.3; certification requires completion of an application, a current contractor's license, and passage of a one-time, twenty-question (multiple choice), open-book, take-home (via the Internet) exam, which may be retaken until successful. All the information an examinee needs to pass the test is in the *Home Improvement Certification Reference*, which is also available on the Internet. Accordingly, CSLB is currently notifying contractors who perform home improvement work that passage of this exam becomes mandatory by July 1, 2000.

◆ **Elimination of Home Improvement Salesperson Registration.** CSLB administers a registration (not licensing) program for individuals who operate as "home improvement salespersons" for licensed contractors. At its 1996-97 sunset hearing, the JLSRC noted that CSLB takes very few disciplinary actions against salespersons, and inquired whether the registration requirement should be abolished. In its 1999 report, CSLB explained that, although it is authorized to discipline salespersons, it holds the contractor responsible for any unlawful actions of the salesperson. CSLB recommended against the elimination of salesperson registration, noting that consumer groups have objected to that proposal. According to these groups, some home improvement salespersons victimize elderly consumers and convince them to sign a contract which not only obligates them to pay for unnecessary home improvements but also places a lien or security interest on their home. CSLB also suggested that the legislature review additional restrictions on the kinds of home improvement contracts which may be marketed by registered salespersons (see LEGISLATION).

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◆ **Certification Programs for Asbestos Contractors and Hazardous Materials Removal.** In its initial sunset review of CSLB, the JLSRC questioned whether CSLB should continue to administer existing certification programs for asbestos contractors and those who remove hazardous materials.

Under Business and Professions Code section 7058.5, no contractor may engage in asbestos-related work which involves 100 square feet or more of surface area of asbestos-containing materials unless the contractor has passed an asbestos certification examination administered by CSLB. The Board reports that, although it is authorized to discipline a contractor who violates laws pertaining to asbestos, its staff lacks the expertise to determine whether such a violation has occurred. CSLB currently relies on the investigations and testimony of experts from Cal-OSHA's Division of Occupational Safety and Health (DOSH) or of officials from local health agencies. CSLB and DOSH agree that the asbestos certification program should be transferred to DOSH, and are developing legislation to that effect.

In 1986, the legislature added section 7058.7 to the Business and Professions Code, delegating to CSLB the responsibility for certifying contractors who work with or remove specified hazardous materials. Additionally, CSLB is authorized to discipline contractors who undertake such work without obtaining the appropriate certification. The JLSRC asked whether CSLB remains the best agency to oversee this program. Initially, the Board considered transfer of the program to the Department of Toxic Substances Control (DTSC) because of its expertise in handling hazardous materials. However, DTSC opposed the transfer because it lacks the investigative staff and disciplinary machinery to properly administer such a program. Thus, the Board believes it to be in the public interest for CSLB to continue to administer the hazardous materials program.

◆ **Examination Analysis.** CSLB schedules and administers over 40,000 licensing examinations annually at eight CSLB testing centers across the state; all Board exams are computer-administered. In 1993, the Assembly Consumer Protection Committee held public hearings which revealed, among other things, that the pass rates on CSLB's licensing exams are very high, raising the possibility that incompetent people are passing the exam and becoming licensed. [14:1 CRLR 39; 13:4 CRLR 41] In 1997, the JLSRC recommended that CSLB hire an independent examination consultant to (1) conduct an occupational analysis of various contractor classifications and evaluate the Board's current licensing exams based upon that analysis; and (2) determine whether the Board's exam waiver policies ensure that applicants who are licensed without being required to take an exam are compe-

tent. In its October 1999 report, CSLB noted that it contracted with an exam consultant who completed its analysis of the Board's examinations in April 1999, but is still analyzing the Board's exam waiver policies.

As to the exams, the consultant found that "CSLB's examinations consistently meet or exceed professional standards for test development." However, the auditor noted that the Board has not been able to update the occupational analysis for many of its exams in a timely fashion, nor has it been able

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to replace overexposed test questions in the more frequently administered licensing exams. To address these problems, the consultant has identified which exams are in the greatest need of reevaluation, and the Board has set up a schedule for conducting occupational analyses and updating its exams for each classification over the next five years. Under the Board's schedule, a new occupa-

tional analysis will be conducted every five years on each exam. The Board will also hire additional testing personnel to conduct periodic test question development workshops with subject matter experts; this will enable the Board to increase the size of its question pools and minimize overexposure of test questions.

◆ **Length of Complaint Processing Time.** In 1996-97, the JLSRC identified the need for CSLB to shorten the time it takes to process complaints and complete investigations. According to the Committee, this need became particularly apparent after the natural disasters that struck California between 1994 and 1996. Although the mean closure time between receipt of the complaint and case disposition was 55 days at the time of CSLB's first sunset review, JLSRC staff found that it takes CSLB two years to process some cases from initial complaint to disposition (either dismissal or referral for legal action). Accordingly, the JLSRC requested that CSLB study and submit recommendations on ways to reduce the time lag.

In response, CSLB commenced a pilot project in the Los Angeles area in March 1999 to revamp the way it receives, routes, investigates, and mediates complaints against contractors, in order to reduce cycle times, increase consumer satisfaction, and reduce its cost per complaint. The new process has involved the closure of some CSLB district offices and the transfer of personnel at those offices to other centralized CSLB offices. In the Los Angeles area, CSLB has centralized its intake/mediation functions in its Buena Park office, which is staffed by consumer service representatives (CSRs) from the Board's Azusa, Van Nuys, and Inglewood district offices. Simultaneously, the first centralized Investigation Center was created in Azusa, consisting of a consolidation of CSLB's Van Nuys and Azusa investigators. All complaints in the area are now received through the Buena Park office,

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where they are reviewed, prioritized, and assigned to mediation or forwarded to the Investigative Center for appropriate action. [16:2 CRLR 83-84]

According to Board staff, CSLB investigators use computer technology to retrieve investigative files and information faster than they could before, and are able to spend more time with consumers at their homes inspecting complaint sites. Board staff believes that the pilot program, which is reviewed at each CSLB meeting (see below for details), is working well, and hopes to expand it statewide in 2000.

◆ **Cooperation with Local Building Officials.** In 1995-96, of 30,000 complaints filed with CSLB, only 127 were filed by state or local agencies. Local building officials are considered to be in the best position to discover and report incompetent or unlicensed contractors. The Board thinks that this lack of referred complaints is due in part to a lack of awareness on the part of the local agencies of laws pertaining to contractors. The JLSRC recommended that CSLB develop an outreach program to ensure awareness and cooperation from local agencies. CSLB agreed, and held a roundtable meeting with representatives of the California Building Officials (CALBO) in November 1998 to discuss better communications and how the Board can better serve building officials. As a result of the meeting, CSLB prepared a pamphlet of frequently-asked questions for building officials that is now on the Board's website. CSLB has also added increased cooperation with building officials as an objective in its 1999-2000 strategic plan; in furtherance of this objective, the Board has held other roundtable discussions with building officials in various locations throughout the state, and is researching ways to make it easier for building officials to contact CSLB with enforcement cases.

◆ **Consumer "Safety Net" Options.** During CSLB's 1996-97 sunset review, the JLSRC expressed concern that consumers are frequently unable to recover financially when a contractor bankrupts or absconds with their money without completing the contracted project. The current bonding requirement is only \$7,500, which is typically gone before the consumer attempts recovery; according to the JLSRC, "surety bonds do not provide protection to consumers," and "frequently, the homeowner's only recourse is to sue in small claims court or file a civil action against the contractor." Approximately fifteen states maintain some type of recovery fund which may reimburse (in whole or in part) consumers who have been victimized by dishonest, incompetent, or bankrupt contractors. The JLSRC instructed the Board, and CSLB instructed its Registrar, to investigate possible methods for providing consumers with a "safety net."

In September 1998, staff recommended several ways to implement a consumer safety net: (1) a "step-bonding" program based on the amount of the prime contract—the higher

the amount of the contract, the higher the required bond; this would bring the existing bonding requirement in closer alignment with the potential loss; (2) a mandatory payment or performance bond—again tied to the value of the contract; and (3) the establishment of a recovery or restitution fund, funded by contractors as a requirement of licensure and maintained by the Board. However, the Board rejected all of them. [16:1 CRLR 107] Since then, staff has specifically honed in on the problems presented by home improvement contractors and has developed a "Home Improvement Protection Plan" (HIPP) consisting of several related proposals intended to protect consumers who engage contractors in home improvement projects. [16:2 CRLR 84-85] According to the Board's October 1999 report, the HIPP components being researched by staff include the following: (1) a new bond that would supplement the existing \$7,500 bond and be available only to homeowners; (2) a new civil remedy to allow unpaid materials suppliers to seek the same 2% per month penalty from contractors as is presently available to subcontractors under Business and Professions Code section 7108.5; (3) a new requirement that contractors disclose to consumers whether they carry general liability insurance; (4) new and more consumer-friendly notices that contractors must provide to homeowners about mechanic's liens and other pitfalls; and (5) revision of CSLB's criminal conviction review process (see below for details).

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◆ **Cost of Industry Expert Witnesses.** In its 1997 sunset report, the JLSRC noted that—although the number of complaints annually received by the Board has not increased—the number and cost of industry expert witnesses used by CSLB in disciplinary proceedings has almost tripled since 1992-93 (from \$551,000 in 1992-93 to \$1.3 million in 1995-96). CSLB explained that the increase is largely attributable to the number and complexity of cases resulting from natural disasters. In its October 1999 report, CSLB further reiterated that it has implemented stricter cost controls on its industry expert program, including written justifications for charges exceeding \$300 (which must be approved by a district supervisor). The Board is also in the process of adopting quality control regulations for its industry expert program (see below).

◆ **The Use of FTB to Collect Overdue Fines.** In its 1996-97 sunset report, the JLSRC noted that CSLB has collected only 10% of the penalties it has assessed for violations of its license laws; approximately \$8,000,000 in assessed fines is uncollected. CSLB currently uses two collection agencies selected under the requirements of the Public Contract Code. The JLSRC suggested that CSLB consider using the Franchise Tax Board (FTB) to collect the unpaid fines. Utilization of the FTB requires authorization by the legislature.

At its October 1998 meeting, CSLB directed staff to study the feasibility of such a plan. To conduct the study, staff

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forwarded the records of approximately 10,000 nonlicensee penalty assessments totaling \$11 million to FTB to ascertain how many of them could be collected under the FTB system. These assessments represent all of the uncollected nonlicensee citations, including those that were referred to private collection agencies but for which there has been no collection activity. For assessments occurring during calendar year 1999, FTB estimated it could collect \$1 million (1,951 penalty assessments) at a cost of \$225,000. For ongoing assessments over the next three years, FTB estimated it could collect approximately 16% of the money owed to CSLB, but it would cost CSLB 50% of the amount collected. CSLB concluded that, "considering the FTB estimated rate of collection at 16%, there is only a 3% difference between FTB and private collection agency rates. Given the comparative analysis, including the FTB projected costs, there does not appear to be a compelling financial incentive to pursue legislation at this time."

At this writing, CSLB's sunset review hearing before the JLSRC is scheduled for November 30.

Update on Southern California Complaint Handling Reengineering Project

Starting March 1, 1999, CSLB commenced a pilot project to reengineer the way it receives, manages, and resolves complaints from consumers. The pilot project has been implemented in phases in the Los Angeles area, and will be reviewed, monitored, and evaluated before expansion to other areas of the state. Phase I of the project began on March 1 with the opening of CSLB's first centralized Intake/Mediation Center in Buena Park, staffed by consumer services representatives (CSRs) from the Board's Azusa, Van Nuys, and Inglewood district offices. Simultaneously, the first centralized Investigation Center was created in Azusa, consisting of a consolidation of investigators from CSLB's Van Nuys and Azusa offices. All complaints in the area are now received through the Buena Park office, where they are reviewed, prioritized, and assigned to mediation or forwarded to the Investigative Center for appropriate action. The Board's investigative staff is equipped with mobile offices, including a laptop computer, modem, cellular phone, and fax machine, to enable them to work more in the field but still be reachable immediately for new assignments and information. [16:2 CRLR 83-84]

Phase II began on July 1. The Board's San Bernardino office became an Investigative Center for investigators from its Moreno Valley and San Bernardino offices; and its Long Beach office became an Investigative Center for investigators from its Santa Ana and Long Beach offices. Intake/mediation staff from those offices were transferred to Buena Park (which was expanded to accommodate the additional staff). The Board's Moreno Valley, Santa Ana, and Van Nuys regional offices have closed, and its Inglewood office is open to the public three mornings per week.

At the Board's July meeting, staff reported on the intake/investigative statistics of Phase I of the pilot project. Accord-

ing to staff, the average production of the Los Angeles area offices has not deteriorated compared to figures prior to the consolidation of those offices. In fact, the average age of a complaint closed at intake in January 1999 (49 days) decreased to 41 days by June 1999. For cases referred to investigation, the decrease in age was less dramatic—from an average age at closing of 116 days in January to 115 days in June. The number of cases pending per investigator dropped from 49 to 46—still an extremely high caseload. At the Board's October meeting, staff reported that the pilot project continues to achieve improved case processing quality, including a higher percentage of cases referred for the filing of legal action; at this writing, the Board will review the statistics on the pilot project in December before deciding whether to expand it statewide.

"Home Improvement Protection Plan" Update

On October 6 and 12, CSLB held informational hearings on several components of its new initiative entitled the "Home Improvement Protection Plan" (HIPP), which consists of several related proposals intended to protect consumers who engage contractors in home improvement projects. In attendance were representatives of the construction and insurance industries, as well as legislative aides, Board members and staff, and consumer advocates. The proposals discussed include the following:

◆ **2% Penalty for Unpaid Materials Suppliers.** CSLB proposes to create a 2% civil penalty, recoverable in a civil court action, against a contractor who fails to pay a materials supplier where the contractor has been paid by the homeowner and the payment to the supplier is past due; this proposal would give materials suppliers the same protection currently enjoyed by subcontractors under Business and Professions Code section 7108.5, and will hopefully encourage unpaid materials suppliers to seek recovery against the contractor in court instead of filing a mechanic's lien on the homeowner's property. The group generally favored this proposal, but was skeptical about whether the 2% penalty alternative would be widely used. When a contractor fails to pay a materials supplier, it is usually because the contractor has no money; in that case, a court judgment against a contractor is a hollow victory. However, where the contractor has assets, the group agreed this proposal may have merit.

◆ **Revision of Mechanic's Lien Notices.** Staff also proposes to revise the language of several notices about mechanic's liens that are required to be provided to homeowners and to create some new notices that better explain to consumers the dangers of a mechanic's lien, and enable consumers to protect themselves against the filing of a mechanic's lien if at all possible. In particular, staff proposes to amend the contents and timing of service of the so-called "20-day preliminary notice" that must be given to a homeowner by a contractor, subcontractor, or materials supplier intending to file a mechanic's lien. Most construction industry representatives opposed any changes in the timing of ser-

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vice of a preliminary notice, but were not opposed to providing adequate information to consumers about mechanic's liens.

◆ **Enhanced Criminal Conviction Review.** To enable CSLB to better track the criminal histories of its applicants and licensees, staff proposes to seek legislation to permit it to collect the fingerprints of all first-time applicants for contractor licensure (and home improvement salesperson registration) and from applicants for renewal who have been licensed less than five years, as well as any licensee convicted of a crime after the date the legislation becomes effective. The legislative proposal would further require contractor licensees and home improvement salesperson registrants to report criminal convictions to the Board within 30 days of the conviction, and authorize the Board to use the license/registration renewal process as a means of collecting information about criminal convictions.

Comments at the public hearing were varied. Some criticized the fingerprinting proposal because unlicensed employees of contractors (who may have more contact with homeowners on a home improvement job than does the licensed contractor) will not be fingerprinted; others said that fingerprinting only contractors who have been licensed five years or less would exclude thousands of contractors who may merit review. Still others stated that a person who has been convicted, served time, and "paid the price" should not be further harassed by government; therefore, CSLB should not inquire into criminal convictions at all.

◆ **Mandatory General Liability Insurance for Home Improvement Contractors.** This proposal is embodied in AB 1288 (Davis), which would require contractors to demonstrate to CSLB that they carry general liability insurance (GLI) in a minimum amount of \$1 million as a condition of license renewal (see LEGISLATION). GLI would protect both the contractor and the

homeowner if the contractor commits a negligent act which causes consequential damage to the homeowner's property. If a contractor with adequate GLI coverage negligently damages a consumer's property, the insurance will presumably cover the damages up to the limits of the policy. If a contractor without GLI negligently damages a homeowner's property, the consumer has three "remedies"—the consumer may (1) sue the contractor (who likely has few assets and is judgment-proof; if the contractor had substantial assets, he/she would carry GLI to protect them), (2) file a claim against his/her own homeowners' insurance policy (thus risking premium increases), or (3) pay out-of-pocket to repair the damage.

Although prior public hearings have revealed that GLI is quite affordable to the vast majority of contractors [16:2 CRLR 84-85], the construction industry opposes the mandatory GLI concept because it would have to fund a "pool" to subsidize the cost of mandatory GLI for contractors who cannot afford it but must have it in order to do business. The insurance indus-

try opposes mandatory GLI for several reasons: (1) it contends that CSLB has not studied the problem to be solved with mandatory GLI, and thus has no idea how pervasive it is and/or whether such a remedy is even necessary (and the industry refuses to provide CSLB with any underwriting data, claiming that such information is "proprietary"); and (2) in order for CSLB to require GLI as a condition of licensure, insurance companies would have to electronically transmit information to CSLB about its licensees who purchase, cancel, or let lapse a GLI policy. According to an insurance industry representative at CSLB's October 12 hearing, the computerized system that forwards information from workers' compensation insurance companies to CSLB about the existence of workers' compensation policies (which is required for licensure) is not reliable, and the industry would resist being forced to expand that system to include GLI policies. According to the insurance representative, "each insurance company would have to restructure its computer system to accommodate CSLB, and they are not about to do that voluntarily."

Due to opposition from both the construction and insurance industries, CSLB has decided to abandon its proposal to require GLI as a condition of licensure, but is pursuing an alternative proposal to require contractors to disclose to consumers whether or not they carry GLI. That alternative would require CSLB to determine the adequate amount of required insurance for home improvement contractors (which may vary widely from contractor to contractor), and figure out some way to enable consumers to verify whether the contractor's disclosure is true. CSLB would like to post information about

whether a contractor carries GLI on its Website, but—again—that would require the cooperation of the insurance industry and electronic transmission from insurance companies to CSLB about GLI policies purchased, canceled, or lapsed. In the alterna-

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tive, CSLB could require contractors to provide consumers with a copy of their GLI certificate.

At its October 20 meeting, the Board discussed the results of the public hearings, and generally approved of all staff's HIPP proposals except its criminal conviction review proposal. The Board agreed that CSLB should seek legislation authorizing it to fingerprint all licensees, not just those licensed less than five years. With that modification, the Board approved staff's proposal to seek legislative authors for all of the above proposals in 2000.

CSLB Rulemaking

Following is a report on recent rulemaking proceedings undertaken by CSLB, some of which are described in more detail in Volume 16, No. 2 (Summer 1999) of the *California Regulatory Law Reporter*:

◆ **Industry Expert Program.** At its July 14 and October 20 meetings, CSLB held public hearings on its proposal to

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adopt sections 895–895.9, Title 16 of the CCR. These regulations would implement Business and Professions Code section 7019.1, which was added by SB 857 (Polanco) (Chapter 812, Statutes of 1997). Section 7019.1 authorizes CSLB to contract with licensed professionals (“industry experts”) to assist the Board in its investigation of consumer complaints, and directs the Board to adopt regulations concerning the use of the industry expert’s report. The statute requires the Board, on and after July 1, 1998, to furnish a copy of the industry expert’s report to the complainant and the licensee against whom the complaint has been made. The opinion must include all of the following: (1) an identification of the nature of the condition that produced the complaint and the cause, basis, or contributing cause of that condition; (2) whether the cause or basis of the condition complained of constitutes a departure from plans, codes, or accepted trade standards; (3) an identification of the code provisions or trade standards specified in paragraph (2); (4) the cost to correct each item identified under paragraph (2) as being the result of a departure from plans, specifications, codes, or accepted trade standards; and (5) the basis of the cost computed in paragraph (4). Section 7019.1 sunsets on July 1, 2000.

The proposed regulations would directly implement section 7019.1. Additionally, because the Board’s review of its industry expert program has revealed that the program varies across the state in the way that experts are used, the amount and quality of the experts’ training, and the quality of both the experts’ opinions and the experts’ reports, CSLB also seeks to establish quality control standards and formalize the administration of its industry expert program.

Section 895 would define several terms used in the statute and regulations, while section 895.1 would set forth the purpose of the industry expert program: “to provide the Registrar with technical expertise necessary to assist in the investigation of possible violations of the CSLL.” The industry expert’s opinion may be used by the Registrar to (1) assist in a determination of whether the CSLL was violated; (2) qualify a case for arbitration; (3) support disciplinary action being brought against a licensee; (4) support a criminal action against a licensed or unlicensed contractor referred to a local prosecutor; or (5) assist an arbitrator to resolve a dispute between a complainant and a licensee.

Section 895.2 would authorize the Registrar to conduct recruitment for industry experts as necessary. Section 895.3 would set forth the required qualifications of all industry experts. Each expert must be eligible to be qualified as an expert witness pursuant to Evidence Code section 720. Further, each licensed contractor acting as an industry expert “should” meet the following requirements: (1) the licensing requirements in Business and Professions Code section 7019; (2) must have at least four years of experience in the construction industry act-

ing in the capacity of a licensed contractor; (3) must have successfully completed the Board’s training course on the role of the industry expert in the Board’s investigatory process; (4) must possess current knowledge of accepted trade standards in his/her area of expertise; (5) must be able to communicate effectively, orally and in writing, as needed to prepare an expert’s report and present evidence at a hearing; (6) shall not have been the subject of legal action by the Registrar in the past five years; and (7) if necessary, attend Board training to update or refresh the expert’s understanding of his/her role in the industry expert program. Section 895.3 would also permit the Registrar to waive the experience and training qualifications in order to procure the one-time-only services of a licensed contractor who has already performed, or begun to perform, corrective services for the complainant or the licensee. Further, the Registrar may also temporarily waive the Board training requirement for any expert; if the training requirement is waived and the expert continues in the program, the expert must be assigned to attend such training as soon as possible.

Section 895.4 would set forth grounds for disqualification of an expert; section 895.5 would authorize the Registrar to intermittently conduct regional training sessions to ensure the availability of a pool of qualified industry experts. Section 895.6, entitled “Decision to Hire an Expert,” would authorize the Registrar to determine, in light of an investigation, whether the services of an expert are warranted under the circumstances; it further provides that upon request by either party involved in an arbitration proceeding, the Registrar may appoint one industry expert pursuant to Business and Professions Code section 7085.

Section 895.7 would define the contents of the expert’s report. At minimum, the report must include information about the expert; a statement of any specific qualifications or expertise the expert relied upon in preparing the report; the date of the report; the date(s) of any inspection of the site; a list of the complaint items identified by the CSLB investigating deputy; and the expert’s opinion as to whether each complaint item conforms to plans and/or specifications, meets accepted trade standards, or reflects work abandoned or not performed. The section also lists additional items which must be included if a complaint item is “identified as a problem,” and authorizes the Registrar to waive any of the report requirements “in light of the investigation.”

Section 895.8 would state that the industry expert report may not be released until the Registrar determines it is complete and accurate, and (1) has been used to make a determination that there was no violation of the CSLL; (2) has been used to qualify a case for arbitration; (3) is being used to assist the mediation/resolution process; (4) is ready to be included in a citation package; (5) has been approved for re-

Because the Board’s review of its industry expert program has revealed that the program varies across the state in the way that experts are used, the amount and quality of the experts’ training, and the quality of both the experts’ opinions and the experts’ reports, CSLB seeks to establish quality control standards and formalize the administration of its industry expert program.

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lease by a Deputy Attorney General assigned to prosecute an accusation; or (6) has been approved for release by a local prosecutor assigned to a criminal proceeding. The section also provides that, prior to making a determination that the report is complete, the Registrar may disclose relevant contents of the report to the licensee in order to allow the licensee to rebut the basis of the expert's opinion and/or the expert's reasoning. Once the Registrar has determined that the conditions of release are met, the Registrar must, upon request, furnish a copy of the report to the complainant and to the licensee. Section 895.9 would state that the Registrar may not charge the complainant or the licensee for the first copy of the report; for all other requested copies, the Registrar may impose a reasonable charge for furnishing a copy of the report.

At the Board's October 20 public hearing, staff counsel Ellen Gallagher noted that CSLB had received several written comments on the proposed regulations, mostly requesting clarifying language to certain parts of the regulations. Attorney Sam Abdulaziz also suggested the addition of clarifying language to ensure that the expert knows his/her role is as a neutral judge of whether a violation has occurred; on behalf of the California Spa and Pool Industry Education Council, he also recommended that licensed contractors acting as industry experts should have five years of contracting experience (not four), and deletion of the language in section 895.3 that would permit the Registrar to use a contractor who has already started to perform corrective work on the subject property as an "impartial expert." Following discussion, the Board directed staff to work with the interested parties to finalize the language, and to publish the modified language for an additional 15-day comment period.

♦ **Minimum Qualifications for Arbitrators.** CSLB investigates approximately 30,000 complaints related to building construction each year. Approximately 1,500 of these cases involve financial injury and are referred to the Board's Arbitration Program, established in section 7085 of the Business and Professions Code. Hearings are conducted and disputes are handled by an arbitrator appointed by the Board. On May 28, the Board published notice of its intent to adopt section 890, Title 16 of the CCR, to implement a provision of section 7085.5 of the Business and Professions Code. Subsection 7085.5(b)(3) requires CSLB to adopt regulations setting minimum qualification standards for listed arbitrators based upon relevant training, experience, and performance.

Under proposed section 890, arbitrators used in CSLB proceedings must satisfy the following qualifications: (a) four years of experience in the construction industry acting in the capacity of a building contractor, or four years of experience handling legal litigation as an attorney, judge, or arbitrator on construction-related cases; (b) must have taken and passed an arbitrator's course on construction arbitration within the last five years or be licensed to practice law in California; (c) current knowledge of construction technology and laws relating to arbitration; (d) must have had training on an arbitrator's code of ethics and arbitration administrative pro-

cedures and techniques; (e) successful completion of a training program related specifically to CSLB arbitration procedures, laws, and policies; and (f) must be approved by the Registrar of Contractors. The section would specify that an arbitrator may be disapproved by the Registrar for the following reasons: (a) more than two pending or closed complaints on file with CSLB or another government agency within the past three years; (b) felony criminal conviction of any type or misdemeanor within the past ten years; (c) past or pending disciplinary action on file with any state, local, or federal agency; (d) pending criminal action; or (e) any other past or pending activity that, in the judgment of the Registrar, would discredit the CSLB arbitration program.

Although it was scheduled to hold a public hearing on proposed section 890 at its July 14 meeting, CSLB postponed the hearing at the request of DCA Director Kathleen Hamilton, who stated that DCA would like to submit input on the regulatory language before CSLB goes further in the rulemaking process.

♦ **New Guidelines for B-General Building Contractors.** On August 20, OAL approved the Board's April 1999 amendments to section 834(b), Title 16 of the CCR, to conform it with recent amendments to Business and Professions Code section 7057. Section 7057 now specifies that a B-general building contractor may legally take a prime contract or subcontract that involves (1) framing or carpentry, or (2) at least two unrelated trades or crafts other than framing or carpentry (framing or carpentry may not be counted as one of the two unrelated trades or crafts). In other words, a general building contractor may not take a prime contract or subcontract involving fewer than two unrelated trades (other than framing or carpentry) unless the general building contractor holds the required specialty license. As amended, section 834(b) now reads: "A licensee classified as a general building contractor, as defined in section 7057 of the Code, shall take a prime contract or subcontract only as authorized by section 7057." [16:2 CRLR 85-86]

LEGISLATION

SB 1306 (Committee on Business and Professions), as amended August 31, extends the Board's sunset date to July 1, 2001, to enable legislative review of CSLB's performance during the fall of 1999 and to allow for the passage of legislation extending the sunset date during 2000 (see MAJOR PROJECTS). Governor Davis signed this bill on October 6 (Chapter 656, Statutes of 1999).

AB 1678 (Consumer Protection Committee), as amended August 30, is a technical clean-up bill which makes the following changes to the CSLB: (1) it deletes the \$25 limit on delinquent renewal of a contractor's license; (2) it restores the four-year statute of limitations for the filing of a misdemeanor complaint for violation of the home improvement contract provisions by an unlicensed contractor (this statute of limitations was inadvertently dropped in 1995 legislation); (3) it allows consumers who go to small claims court

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to collect from contractors who have a cash deposit in lieu of a bond to collect up to \$4,000 rather than just \$2,500 (this amount was inadvertently reduced by 1998 legislation); and (4) it makes technical changes to specified reporting requirements of the Board pertaining to the sending of semi-annual workers' compensation reports to city and/or county building departments. This bill was signed by the Governor on October 10 (Chapter 982, Statutes of 1999).

AB 952 (Wiggins), as amended August 24, would have—until January 1, 2006—created a major fraud investigation unit within CSLB. The unit, funded with \$750,000 during 1999–2000 from the Contractors' License Fund, would have conducted both criminal and administrative investigations into alleged violations of law, including but not limited to violations of the CSLB and relevant labor law, in cooperation with other local, state, and federal agencies. Governor Davis vetoed AB 952 on September 28, stating that “while this bill has merit, it involves major budgetary expenditure and should be considered in the normal budget process.”

AB 1206 (Wesson), as amended August 18, expands the definition of “contractor” to include (and thus require CSLB to license) persons who engage in the preparation and removal of roadway construction zones, lane closures, flagging, or traffic diversions. The bill creates a new specialty contractor license category for these individuals, and requires persons performing that work, on or after January 1, 2001, to hold the appropriate specialty contracting license. Finally, the bill exempts from the license exam process and “grandparents” into licensure an applicant who certifies under penalty of perjury that he/she: (1) has been continuously engaged in the business of traffic control for at least the prior ten years; (2) has not been party to a construction litigation judgment totaling more than \$500,000 or 5% of the annual value of work performed, whichever is less; (3) has not been convicted of a serious or willful violation of the California Occupational Safety and Health Act of 1973; (4) has not been convicted of violation of federal or state law; and (5) has not been convicted of submitting a false or fraudulent claim to a public agency during the last five years. This bill was signed by the Governor on October 6 (Chapter 708, Statutes of 1999).

SB 187 (Hughes) and SB 99 (Hughes) were companion bills intended to reduce the incidence of home equity lending fraud—especially in cases where the victim is a senior citizen on a fixed income—by establishing procedures a seller must follow in certain retail installment sales contracts involving home improvements.

As amended in March 1999, SB 187 prohibits the seller of a home improvement contract from taking a security interest (other than a mechanic's lien) on the principal residence of a buyer who is 65 years of age or older. The bill also im-

poses civil remedies and penalties for violation of current Business and Professions Code provisions prohibiting a lender in a home improvement contract from making direct payments solely to the home improvement contractor. Governor Davis signed SB 187 on September 27 (Chapter 512, Statutes of 1999).

As amended in April 1999, SB 99 would have established detailed procedures that a seller must follow in certain retail installment contracts involving home improvements. Specifically, this bill—as it regards a retail installment sales contract for home improvements that creates a security interest in excess of \$5,000 in the buyer's real property—would have required the seller to examine the buyer's credit report and other financial information to determine whether the buyer is an “at-risk buyer” (as defined in the bill); give written notice to all at-risk buyers advising the buyer that the seller is relying on the buyer's income and expenses statement as being true and correct, and that the buyer could lose his/her home in a foreclosure sale if the person fails to make the contract payments; and also determine if the retail installment sales contract would be an at-risk loan, which exists where the sum of the monthly payment on the retail installment sales contract and the buyer's total fixed monthly expenses exceeds 60% of the buyer's effective gross income. If the transaction involves an at-risk buyer and an at-risk loan, the bill would have required the seller to require the buyer to seek and obtain independent advice and counseling from a HUD-authorized counseling agency, a nonprofit neighborhood or community housing or community counseling service, or an attorney, before completing the sales loan.

Governor Davis vetoed SB 99 on October 8. According to the Governor, “while the intent of this bill has merit, it is burdensome for consumers and contractors who utilize these

loans. This bill is unclear as it does not specify who would provide the required credit counseling to at-risk buyers. This requirement could create a situation whereby counselors who are unqualified or untrained, or affiliated with lenders who have financial interests in the sale of the home improvement contract, are providing counseling to vulnerable buyers.”

AB 931 (Calderon), as amended August 16, requires the Division of Apprenticeship Standards in the Department of Industrial Relations, on or before January 1, 2001, to establish and validate minimum standards for the competency and training of electricians through a system of testing and certification; establish fees necessary to implement those requirements; and establish and adopt regulations for enforcement purposes. As used in this bill, the term “electricians” includes all employees who engage in the connection of electrical devices for electrical contractors licensed pursuant to Business and Professions Code section 7058 (specifically, contractors classified as electricians under CSLB's regulations). This sec-

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tion does not apply to low-voltage electrical connections under 100 volt-amperes or to electrical work ordinarily and customarily performed by stationary engineers.

The bill also requires the Division—on or before March 1, 2000—to establish an advisory committee and panels as necessary to carry out the functions under this section. Under the bill, there must be contractor representation from both joint apprenticeship programs and unilateral nonunion programs in the electrical contracting industry. Discrimination for or against any person based upon union or nonunion membership is prohibited. Governor Davis signed AB 931 on October 7 (Chapter 781, Statutes of 1999).

SB 989 (Sher), as amended September 7, prohibits anyone, on and after January 1, 2002, from installing, repairing, maintaining, or calibrating monitoring equipment for an underground storage tank unless that person (1) has fulfilled training standards identified by CSLB, and (2) possesses a Class "A" General Engineering Contractor License, C-10 Electrical Contractor License, C-34 Pipeline Contractor License, C-36 Plumbing Contractor License, or C-61 (D40) Limited Specialty Service Station Equipment and Maintenance Contractor License issued by CSLB. The bill further requires CSLB, on or before July 1, 2001, and in consultation with the Water Resources Control Board, the petroleum industry, air pollution control districts, air quality management districts, and local government, to review its requirements for petroleum underground storage tank system installation and removal contractors and make changes, where appropriate, to ensure these contractors are qualified. This bill was signed by the Governor on October 8 (Chapter 812, Statutes of 1999).

SB 865 (Hughes). Business and Professions Code section 7163 specifies certain requirements as to the enforceability of home improvement contracts. As amended in May 1999, SB 865 would provide that a violation of section 7163 by a licensed home improvement contractor or person subject to licensure, or by his/her agent or salesperson, shall subject the licensee to mandatory suspension or revocation of CSLB licensure. [A. CPGE&ED]

AB 229 (Baldwin). The Beverly-Killea Limited Liability Company Act, Corporations Code section 17000 *et seq.*, allows certain business interests to operate a limited liability company (LLC), whereby the members of the LLC may not be held personally liable for the debts of the LLC except in those circumstances where a shareholder of a corporation could be held liable for the debts of the corporation. Under the Act, most providers of professional services are prohibited from operating as LLCs. As amended in March 1999, AB 229 would permit providers of approximately 50 types of professional services—including general contractors and sub-contractors—to form LLCs. AB 229 failed passage in the Assembly Judiciary Committee on April 27, 1999, but was granted reconsideration. Supporters argue that the bill would be a boon to business by providing the liability shield to more types of businesses. Opponents argue that allowing profes-

sionals to escape personal liability for the harm they cause could place the public at risk. [A. Jud]

AB 1221 (Dutra), as amended in April 1999, would express the legislature's findings relating to a lack of construction of multifamily housing (including condominiums and townhouses) due to construction defect litigation, and declare that there is a substantial need for a highly effective, state-sanctioned, ten-year new home warranty program to provide both a process for resolving claims and a mechanism to ensure quality design and construction. AB 1221 would establish the California Homebuyer Protection and Quality Construction Act of 1999. The bill would permit a licensed contractor to apply to CSLB to be certified as a participating home builder, which would mean that the contractor could issue a California Home Construction Warranty. The bill would require CSLB to promulgate regulations governing the program and to annually review the certification.

The bill would require a California Home Construction Warranty to meet specified minimum standards and procedures; permit a participating home builder to issue a California Home Construction Warranty on new residential housing, including a home that is part of a common interest development, where the purchaser secures title on or after January 1, 1999; and provide that a California Home Construction Warranty applies for a minimum of ten years and is binding on subsequent purchasers during the term of the warranty. AB 1221 would also define the term "construction defects," provide for binding arbitration of construction defect claims covered by the Warranty, and provide that if a homeowner elects by contract to purchase a home subject to a California Home Construction Warranty, the contractual provisions of that warranty shall be deemed to be the exclusive election of recourse by the homeowner and the participating homebuilder for the claims covered by the warranty. In other words, the parties to a California Home Construction Warranty would be deemed to waive tort remedies, including negligence, strict liability, implied warranties, fraud and intentional misrepresentation, and any other common law remedy other than for breach of warranty contract and the provisions therein. The waiver does not preclude or limit any right of action for bodily injury or wrongful death. [A. H&CD]

AB 1288 (Davis), as introduced in February 1999, would require CSLB, on and after January 1, 2000, to require—as a condition precedent to the issuance, renewal, reinstatement, reactivation, or continued maintenance of a license—that an applicant or licensee file or have on file with the Board a certificate of liability insurance in the amount of \$1,000,000 per occurrence (see MAJOR PROJECTS). [A. CPGE&ED]

SB 1216 (Hughes), as introduced in February 1999, would create a registration program for home inspectors within DCA. [S. B&P]

ACA 5 (Honda) and **AB 742 (Honda)** are two of several pending bills concerning mechanic's liens, the current legal mechanism available to protect the interests of those who provide labor or materials toward the improvement of

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the property of others. Section 3 of Article 14 of the California Constitution currently authorizes a contractor, subcontractor, materials supplier, artisan, and/or laborer to file a lien against the real property on which the claimant has furnished labor or material, for the value of the labor done or material furnished. Problems occur for a homeowner when the homeowner pays the prime contractor in full, yet the prime contractor fails to pay the laborers, subcontractors, and material suppliers—who are now victims of the prime contractor's breach of contract. Under current law, once the laborers, subcontractors, and materials suppliers have failed to be paid by the prime contractor, they have the right to collect from the homeowner via a mechanic's lien—and the homeowner may have to pay twice.

ACA 5 would amend the California Constitution to create an exception to the mechanic's lien provision where the property is a single-family, owner-occupied dwelling that is the primary residence of the owner of the property if the owner has paid the prime contractor in full. ACA 5's companion measure, AB 742, would prohibit non-prime contractors from recording a mechanic's lien on such a dwelling where the owner has paid the prime contractor in full, but would enable non-prime contractors who have not been paid to seek compensation through the Contractor's Default Recovery Fund (CDRF), a new industry-supported fund to pay laborers, subcontractors, and materials suppliers. [16:2 CRLR 86-87] Both ACA 5 and AB 742 are two-year bills.

Because of the complexity of the mechanic's lien issue, the Assembly Judiciary Committee has asked the California Law Revision Commission to comprehensively review California's mechanic's lien laws and suggest areas of reform. The Commission has retained Gordon Hunt of Pasadena to prepare a background study. The Commission intends to give this matter its highest priority during 2000, and it is unlikely that ACA 5, AB 742, or any other pending mechanic's lien bill will be enacted until the Commission has completed its study.

AB 1642 (Floyd), as introduced in March 1999, would provide that the failure of a contractor to pay moneys when due for materials purchased or services rendered in connection with his/her operations as a contractor for residential home improvement work, when he/she has the capacity to pay or has received funds for that particular project that were sufficient to pay for the services or materials, and if the failure to pay results in a mechanic's lien being filed against residential property for that work, would result in the automatic suspension of the

contractor's license. AB 1642 would also create a rebuttable presumption that the failure of a contractor to pay for any goods supplied or serviced rendered in connection with a contract, when he/she has received sufficient funds for that particular work, is a willful and deliberate violation. [A. CPGE&ED]

AB 171 (Margett), as amended in April 1999, would amend section 3258.5 of the Civil Code, which requires the owner of a work of public or private improvement to sign and verify any notice of completion or notice of cessation of work, and also requires that the notice be recorded in the office of the county recorder of the county in which the site is

located. This bill would require the owner of a public or private work of improvement to notify, by registered or certified mail, the original contractor and any claimant who has provided a preliminary 20-day notice that a notice of completion or notice of cessation has been recorded, within ten

days of recordation of that notice of completion or notice of cessation. Failure to give notice would extend the period of time in which the contractor or claimant may file a mechanic's lien or stop notice to 90 days (which would be the sole liability incurred for failure to give notice). The bill would also define an "owner" for these purposes as a person who has an interest in real property, or his/her successor in interest, but would exclude a person who occupies the real property as his/her personal residence. [A. Jud]

SB 1151 (Polanco), as amended in May 1999, would amend Business and Professions Code section 7081.5, which requires a licensed contractor—prior to entering into a contract with an owner for home improvement or swimming pool construction work—to provide a notice regarding the state's

mechanic's lien laws to the owner, owner's agent, or the payer. Failure to provide the notice would be grounds for disciplinary action. This bill would additionally require the contractor to obtain a written receipt indicating that the person has received and read the notice; require the receipt to be maintained for inspection; and make failure to provide

the notice and obtain the receipt grounds for disciplinary action. It would also specify certain additional information with respect to a contractor's license bond to be contained in the notice. [A. CPGE&ED]

LITIGATION

In *Cates Construction, Inc. v. Talbot Partners*, 21 Cal. 4th 28 (July 29, 1999), the California Supreme Court handed the surety industry a huge victory when it ruled that a surety

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Talbot Partners hired Cates Construction to build a condominium project. The contract required Cates to furnish a performance bond, which it secured from Transamerica Insurance Company in favor of Talbot and the bank financing the project. Throughout construction, Cates billed Talbot, and Talbot paid regularly until Talbot refused to pay a progress payment because Talbot had already paid several hundred thousand dollars more than the cost of the work. Cates eventually abandoned the project, and Talbot demanded that Transamerica perform under the bond. Transamerica refused, claiming that Talbot (not Cates) had breached the contract by failing to make payments. Litigation ensued under various contract and tort theories, and the trial court eventually found in Talbot's favor on its contract claims and on its tort claim of breach of the implied covenant of good faith and fair dealing against Transamerica. A jury awarded Talbot \$3.1 million in compensatory damages and a record \$28 million in punitive damages. The Second District Court of Appeal affirmed the judgment but reduced the punitive damages award to \$15 million.

In a 4-3 decision, the California Supreme Court reversed the punitive damages award entirely, finding that California law permits tort damages for breach of the implied covenant of good faith and fair dealing only in cases involving insurance policies. The majority distinguished Transamerica's surety bond from an insurance policy. "As our decisions explain, tort recovery is considered in the insurance policy setting because such contracts are characterized by elements of adhesion and unequal bargaining power, public interest and fiduciary responsibility....[T]he typical performance bond bears no indicia of adhesion or disparate bargaining power that might support tort recovery by an obligee....Obligees have ample power to protect their interests through negotiation, and sureties, for the most part, are deterred from acting unreasonably by the threat of stiff statutory and administrative sanctions and penalties, including license suspension and revocation." The majority acknowledged that "our unwillingness to recognize a new tort action may mean that isolated instances of surety misconduct may yet occur. Nonetheless, in the absence of compelling policy reasons supporting tort recovery, we leave it up to the Legislature, which is better equipped to gather

data and study the effects of a significant shift in the balance of power between owner/obligees, contractors/principals and sureties, to determine whether statutorily authorized tort remedies would benefit the real estate development industry."

In a similar decision in favor of the construction industry a month later, the California Supreme Court reversed the Second District Court of Appeal and held that while a contractor's negligent construction of a home may support damages for breach of contract, it does not support tort damages for emotional distress. In *Erlich v. Menezes*, 21 Cal. 4th 543 (Aug. 23, 1999), the court ruled that tort liability may be established only if a duty that is independent of the contract has been breached.

Barry and Sandra Erlich contracted with licensed general contractor John Menezes to build

their "dream home" on an oceanview lot in San Luis Obispo. The home was completed in late 1990; in February 1991, the rains came. Despite Menezes' attempts to repair the house, experts agreed that "the house leaked from almost every conceivable location" and had been improperly constructed in almost every respect. After a trial, a jury awarded the homeowners over \$400,000 for the cost of repairing the home and \$165,000 for lost wages, emotional distress, and pain and suffering. Although the Second District upheld the emotional distress award, the Supreme Court reversed on that issue. Despite the fact that the homeowners claimed physical injury due to the stress they suffered, the court held that "the breach—the negligent construction of the Erlichs' house— did not cause physical injury. No one was

hit by a falling beam....The only physical injury alleged is Barry Erlich's heart disease, which flowed from the emotional distress and not directly from the negligent construction." The Supreme Court noted that "adding an emotional distress component to recovery for construction defects could increase the already prohibitively high cost of housing

in California, affect the availability of insurance for builders, and greatly diminish the supply of affordable housing."

The Second District Court of Appeal recently decided a case interpreting Business and Professions Code section 7031, which generally precludes an individual from recovering in law or in equity for the performance of work performed as a contractor unless he/she was a duly licensed contractor "at all times during the performance of the contract" under which he/she claims compensation. In *ICF Kaiser Engineers, Inc. v. Superior Court (Sepulveda Hatteras Ltd., et al., Real Parties in Interest)*, 75 Cal. App. 4th 226 (Sept. 27, 1999),

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Kaiser performed earthquake remediation work for Sepulveda in October 1995. At the end of the project, Kaiser had billed Sepulveda about \$1.9 million, but Sepulveda had paid only \$700,000, leaving \$1.2 million still owed to Kaiser. As they had agreed they would do in the event of a dispute, the parties submitted the matter to a three-member arbitration panel; the panel awarded \$800,000 to Kaiser, and Kaiser filed a petition to confirm the arbitration award.

In opposition to Kaiser's petition, Sepulveda—for the first time—contended that Kaiser's claim was barred because its contractor's license had been suspended at the time the contract was entered into and during the construction period. Kaiser took its petition off calendar and investigated CSLB's records, which revealed that Kaiser's license had in fact been suspended because, due to clerical oversight, the corporation failed to submit a "qualifying individual" bond to CSLB when it substituted a new "responsible managing officer" (RMO) for a previous RMO who had left the company. Kaiser had secured the bond and it remained in full force and effect during the time Kaiser worked for Sepulveda; it had simply failed to transfer possession of the bond to CSLB. CSLB never notified Kaiser that its license had been suspended; in fact, because of a computer glitch, an inquiry to the Board during the time of Kaiser's suspension would have elicited a response that Kaiser's license was in good standing.

In the meantime, Sepulveda filed a motion to vacate the arbitration award, citing Business and Professions Code section 7031. Kaiser argued that had "substantially complied" with the licensure requirement and was entitled to the award under subsection 7031(d), which states in pertinent part: "The judicial doctrine of substantial compliance shall not apply under this section where the person who engaged in the business or acted in the capacity of a contractor has never been a duly licensed contractor in this state. However, the court may determine that there has been substantial compliance with licensure requirements under this section if it is shown at an evidentiary hearing that the person who engaged in the business or acted in the capacity of a contractor (1) had been duly licensed as a contractor in this state prior to the performance of the act or contract, (2) acted reasonably and in good faith to maintain proper licensure, and (3) did not know or reasonably should have known that he or she was not duly licensed...." However, the trial court rejected Kaiser's substantial compliance argument and granted Sepulveda's motion to vacate.

On appeal, the Second District noted that only one of the three elements required for "substantial compliance" was at issue—whether Kaiser "did not know or reasonably should not have known that [it] was not duly licensed." After a detailed examination of the evidence presented on this point (which revealed an extraordinary amount of back-and-forth communication between Kaiser and CSLB throughout the process of replacing an outgoing RMO with a new RMO), the court concluded that (1) no one at Kaiser ever had a clue that its license had been suspended, (2) the documents sent by CSLB to Kaiser suggested, if anything, that there was nothing

further to be done by Kaiser, (3) the required bond was at all times in full force and effect so that, had a claim been made, the required coverage would have been available, (4) "the Board itself was (for all practical purposes) unaware of the suspension at the time of its occurrence," and (5) had anyone inquired of the Board about the status of Kaiser's license during the time of the suspension, the answer would have been that Kaiser was licensed as required by law. According to the Second District, "[i]n the face of these facts and in the absence of any evidence to the contrary, we cannot say that the trial court's findings are supported by the evidence....If the doctrine of substantial compliance included in section 7031 is to have any effect at all, it must applied in this case." Sepulveda has filed a petition for review with the California Supreme Court.

In *In Re Dunbar*, 235 B.R. 465 (June 16, 1999), the Bankruptcy Appellate Panel for the U.S. Ninth Circuit Court of Appeals vacated a CSLB disciplinary action, including an order to pay restitution and cost recovery, against a contractor who had filed Chapter 13 bankruptcy.

Contractor Dunbar installed a concrete driveway for the Martins in September 1993. In May 1995, Dunbar filed for bankruptcy, and did not list the Martins as creditors. In early 1996, the Martins noticed that the concrete was beginning to crumble. After unsuccessful efforts to get Dunbar to resolve the problem, the Martins filed a complaint with CSLB. Dunbar failed to appear at his evidentiary hearing before an administrative law judge (ALJ), instead sending a letter seeking to stop the administrative hearing on the basis that it was subject to the automatic bankruptcy stay. The ALJ treated Dunbar's letter as a motion to terminate the proceedings, and ruled that the bankruptcy filing did not preclude commencement of CSLB's disciplinary action against Dunbar's license under the exception to the automatic stay in 11 U.S.C. § 362(b)(4), which states that the filing of a bankruptcy petition does not operate as a stay "of the commencement or continuation of an action or proceeding by a governmental unit...to enforce such governmental unit's...police and regulatory power...." The ALJ found Dunbar guilty of poor workmanship and ordered him to make restitution to the Martins in the amount of \$27,000. The CSLB Registrar adopted the ALJ's decision, and also ordered Dunbar to pay over \$2,900 to reimburse the agency for its investigative and enforcement costs.

After the Board issued its order, Dunbar sought relief in the bankruptcy court, seeking injunctive relief to prevent the Board from enforcing its order. The court concluded that the ALJ's decision that the automatic stay was not being violated was binding on it under principles of collateral estoppel, and declined to grant Dunbar's motion. On appeal, the Bankruptcy Appellate Panel reversed, ruling that the bankruptcy court should not have accepted the ALJ's determination but instead should have "independently determine[d] whether the state agency's actions (*i.e.*, (1) ordering restitution, and (2) ordering the payment of costs) violated the automatic stay." The appellate panel acknowledged the exception to the stay in 11 U.S.C. § 362(b)(4) for "consumer protection" governmental

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proceedings, but noted that application of the exception is not automatic. It is permitted if either of two tests are satisfied—both of which must be analyzed by the bankruptcy court. Thus, the appellate panel remanded the matter to the bankruptcy court for further proceedings.

RECENT MEETINGS

At its July meeting, CSLB reelected contractor Joe Tavaglione as its Chair and elected Bob Alvarado, the Board's building trade labor organization representative, as its Vice-Chair.

FUTURE MEETINGS

- November 9–10, 1999 in Riverside.
- January 18, 2000 in Sacramento.
- March 17, 2000 in San Diego.
- April 26, 2000 in Downey.
- July 26–27, 2000 in San Diego.
- October 25–26, 2000 in Oakland
- November 8–9, 2000 in Riverside.

Board for Professional Engineers and Land Surveyors

Executive Officer: Cindi Christenson ♦ (916) 263-2222 ♦ Internet: www.dca.ca.gov/pels

The Board for Professional Engineers and Land Surveyors (PELS) is a consumer protection agency within the state Department of Consumer Affairs (DCA). PELS regulates the practice of engineering and land surveying through its administration of the Professional Engineers Act, sections 6700–6799 of the Business and Professions Code, and the Professional Land Surveyors' Act, sections 8700–8806 of the Business and Professions Code. The Board's regulations are found in Division 5, Title 16 of the California Code of Regulations (CCR). The basic functions of the Board are to conduct examinations, issue licenses, set standards for the practice of engineering and land surveying, investigate complaints against licensees, and take disciplinary action as appropriate.

PELS administers a complicated licensing system under which land surveyors and fifteen categories of engineers are licensed and regulated. Land surveyors are licensed under section 8725 of the Business and Professions Code. Pursuant to section 6730 of the Business and Professions Code, professional engineers may be licensed under the three "practice act" categories of civil, electrical, and mechanical engineering. Structural engineering and geotechnical engineering are "title authorities" linked with the civil engineering practice act; both require licensure as a civil engineer and passage of an additional examination. The "title act" categories of agricultural, chemical, control system, fire protection, industrial, manufacturing, metallurgical, nuclear, petroleum, and traffic engineering are licensed under section 6732 of the Business and Professions Code. PELS' "title acts" only restrict the use of a title; anyone (including an unlicensed person) may perform the work of a title act engineer so long as he/she does not use the restricted title.

The Board consists of thirteen members: seven public members, one land surveyor, four practice act engineers, and one title act engineer. The Governor appoints eleven of the



members for four-year terms that expire on a staggered basis. Additionally, the Assembly Speaker and the Senate Rules Committee each appoint one public member.

The Board has established four standing committees (Administration, Enforcement, Examination/Qualifications, and Legislative), and appoints other special committees as needed. Pursuant to Business and Professions Code section 6726, PELS has also established several technical advisory committees (TACs) to provide advice and recommendations in various technical areas.

On June 1, the Senate Rules Committee announced its reappointment of Millicent Safran as a public member on PELS. On September 13, Assembly Speaker Antonio Villaraigosa reappointed public member Andrew J. Hopwood to another term on the Board.

MAJOR PROJECTS

PELS Preparing for Sunset Review

On October 1, in preparation for its upcoming sunset review hearing, PELS submitted a supplemental report to the Joint Legislative Sunset Review Committee (JLSRC). The Board's October 1999 report updates an October 1, 1998 report that it submitted in anticipation of a fall 1998 sunset review. However, that review was postponed until the fall of 1999, and SB 1306 (Committee on Business and Professions) (Chapter 656, Statutes of 1999) has extended the existence of the Board to accommodate the new schedule (see LEGISLATION).

The 1999 review follows the Board's initial 1996–97 review, at which time the JLSRC instructed PELS to investigate and resolve several critical issues, including the following:

♦ *Continued Need for Title Acts.* After PELS' 1996–97 sunset review, the JLSRC instructed the Board to reevaluate the continued need for its title acts (then numbering 13)