of section 453(d), it did not reach the subsidization issue. The First District refused to "accept counsel's post hoc rationalizations for agency action."

On December 15, 1999, the California Supreme Court agreed to review the First District Court of Appeal's decision in ***Hartwell Corporation v. Superior Court (Santamaria, et al., Real Parties in Interest)***, 74 Cal. App. 4th 837 (Sept. 1, 1999; as modified Sept. 29, 1999). In this matter, three separate plaintiff groups of residents filed 1997 tort actions in two superior courts against various PUC-regulated southern California water companies (including Southern California Water Company, Suburban Water Systems, and Southwest Water Company), other non-PUC-regulated water companies, and general industrial companies for money damages arising from the contamination of well water in the San Gabriel Valley. The trial courts' various and conflicting decisions on demurrers were all appealed to the Second District Court of Appeal, which eventually recused itself and transferred all of the matters to the First District. The First District held that PUC's jurisdiction over water quality standards and regulated water utilities preempts the filing of tort actions for damages in court against those regulated utilities. However, the court refused to extend preemption to claims against utilities not regulated by the Commission even though issues of the same or similar subject matter are involved. Plaintiffs and the non-utility defendants all petitioned for review. *[17:1 CRLR 185–86]* At this writing, oral argument is scheduled for November 2001 and the Supreme Court's decision is expected in early 2002.

FUTURE MEETINGS

The full Commission usually meets every other Thursday in San Francisco.

Department of Real Estate

Commissioner: Paula Reddish Zinnemann ♦ (916) 227-0931 ♦ (510) 622-2552 ♦ (559) 445-5009 ♦ (213) 620-2072 ♦ (619) 525-4192 ♦ Internet: www.dre.ca.gov

The Department of Real Estate (DRE) is established in the Business, Transportation and Housing Agency pursuant to Business and Professions Code section 10000 *et seq.*; DRE's regulations appear in Chapter 6, Title 10 of the California Code of Regulations (CCR). DRE's primary objective is to protect the public interest in regard to the handling of real estate transactions and the offering of subdivided lands and real property securities by DRE licensees. To this end, DRE has established a standard of knowledge—measured by a written examination—for licensing real estate agents, and a minimum criterion of affirmative disclosure for qualifying subdivided lands offerings. DRE also works to increase consumer awareness and collaterally assists the real estate industry in expanding its standards and increasing its level of professional ethics and responsibility.

The Real Estate Commissioner, who serves as the chief executive of the Department, is appointed by the Governor, subject to Senate confirmation. The Commissioner's principal duties include determining administrative policy and enforcing the Real Estate Law in a manner that achieves maximum protection for purchasers of real property and those persons dealing with real estate licensees. The Commissioner is authorized to issue licenses; promulgate regulations that have the force of law; and revoke or suspend licenses for violations of those regulations, the Real Estate Law, or other applicable laws. The Commissioner is assisted by the Real Estate Advisory Commission, which is comprised of six brokers and four public members who serve at the Commissioner's pleasure. The Real Estate Advisory Commission must conduct at least four public meetings per year. The Commissioner receives additional advice from specialized committees in the areas of education and research, mortgage lending, subdivisions, and commercial business brokerage. Various subcommittees also provide advisory input.

DRE primarily regulates two aspects of the real estate industry: licensees (salespersons and brokers) and subdivisions. Pursuant to Business and Professions Code section 10167 *et seq.*, DRE also licenses "prepaid rental listing services." which supply prospective tenants with a list of residential real properties available for tenancy under an arrangement where the prospective tenants are required to pay a fee in order to obtain the list. Certified real estate appraisers are not regulated by DRE, but by the separate Office of Real Estate Appraisers within the Business, Transportation and Housing Agency.

A person must obtain a real estate license in order to engage in the real estate business and act in the capacity of, advertise, or assume to act as a real estate broker or salesperson in California. An applicant for real estate salesperson licensure must fulfill certain real estate education requirements and pass a real estate examination before obtaining the license. In most cases, a broker applicant, in addition to completing the educational prerequisites, must have two years of real estate experience before applying for the exam. Broker and salesperson licenses are issued for a four-year period. In general, both types of licenses may be renewed by submitting the appropriate application and fee, and evidence of completion of 45 hours of DRE-approved continuing education courses. At this writing, there are 311,845 real estate licensees in California, with salespersons (204,250) outnumbering brokers (107,595) at a ratio of just under two to one.

DRE also enforces the Subdivided Lands Act, the purpose of which is to ensure that subdividers of real property deliver to the buyer what was agreed to at the time of sale. The law covers most standard land subdivisions and various types of common interest developments, time-shares, certain undivided interest developments, and out-of-state time-share subdivisions offered for sale in California. Before real property which has been subdivided can be marketed in California, the subdivider must obtain a "public report" from DRE. Prior to the issuance of a public report, the subdivider must file an application along with documents supporting the representations made in the application. In sales (or leases exceeding one year in duration) of any new residential subdivisions consisting of five or more lots or units, DRE requires that a prospective purchaser or tenant be given a copy of the public report. The public report serves two functions aimed at protecting purchasers or tenants of subdivision interests: (1) it discloses material facts about title, encumbrances, and related information; and (2) it ensures adherence to applicable standards for creating, operating, financing, and documenting the project. The Commissioner will not issue the public report if the subdivider fails to comply with any provision of the Subdivided Lands Act.

DRE's Enforcement and Audit sections investigate complaints regarding alleged violations of the Real Estate Law, the Department's regulations, or other applicable laws. If a complaint is supported by evidence, the Commissioner may revoke, suspend, or deny a real estate license. The Commissioner may also issue desist and refrain orders to stop activities that are in violation of these laws. Violations may result in civil injunctions, criminal prosecutions, or substantial fines.

The Department regularly publishes three bulletins to educate its licensees. The *Real Estate Bulletin*, which is circulated quarterly to all current licensees, contains information on legislative and regulatory changes, commentaries, and advice; in addition, it lists the names of licensees who have been disciplined. The *Mortgage Loan Bulletin* is published twice yearly and circulated to licensees engaged in mortgage lending activities. Finally, the *Subdivision Industry Bulletin* is published annually for title companies and persons involved in the building industry. DRE also publishes numerous forms, books, brochures, and videos relating to licensee activities, duties and responsibilities, market information, taxes, financing, and investment information.

The revenue necessary to operate DRE is derived from fees charged for real estate licenses, subdivision public reports, and various other permits issued by DRE. In addition to its operating funds, DRE also maintains the Real Estate Recovery Account (RERA); currently, 12% of all license fees collected by DRE are credited to this account. Under certain conditions, when a consumer obtains a civil judgment against a real estate licensee as a result of fraud, misrepresentation, deceit, or conversion of trust funds by a licensee while acting as an agent in the transaction, that consumer may seek reimbursement from RERA for actual and direct loss (up to a statutory maximum).

DRE is headquartered in Sacramento and maintains branch offices in Oakland, Fresno, Los Angeles, and San Diego. The Commissioner oversees a staff of approximately 300 people.

On November 8, 1999, Governor Davis announced the appointment of real estate broker Paula Reddish Zinnemann to the post of Real Estate Commissioner. Zinnemann, a Los Angeles attorney with more than 30 years of experience in the real estate business, has practiced real estate law, served as vice president and general counsel for a real estate brokerage firm, and was president of Real Estate Mediation and Arbitration, Inc. Zinnemann previously served as a member of the City of Los Angeles' Rent Adjustment Commission and the Los Angeles County Assessment Appeals Board. She was a mediator for the Los Angeles County Superior Court and is a member of the Executive Committee of the Real Property Section of the Los Angeles County Bar Association. She is a past president of the Beverly Hills Board of Realtors and was an active member of the California Association of Realtors.

MAJOR PROJECTS

DRE Increases License and Filing Fees

On December 14, 2000, DRE held a public hearing in accordance with Business and Professions Code sections 10226 and 11011, which require the Department to hold at least one regulatory hearing during each calendar year to consider various DRE fees. According to the hearing notice published on October 27, 2000, the Commissioner did not propose to make any regulatory change, but rather intended to "consider all comments, objections and recommendations regarding such fees."

On January 26, 2001, the Commissioner published notice of her intent to amend sections 2716, 2790.1, and 2805.1, Title 10 of the CCR, to increase various DRE licensing and filing fees. During the past two consecutive years, DRE decreased many of its fees in order to maintain its reserve fund at a lawful level; the reserve fund level had spiked because the state repaid DRE for money taken from its special fund during the early 1990s to help balance the budget. *[12:4 CRLR 1]* However, with reduced fees, the reserve fund has decreased to the point that fees must be raised to keep it at the proper level. *[17:1 CRLR 188; 16:1 CRLR 173–74]* The Department held a public hearing on the proposal on March 14, 2001, and also accepted written comments until that day.

The proposal would increase the following fees in section 2716: (1) the fee for a real estate broker license would increase from $110 to $218; (2) the fee for a real estate salesperson license would increase from $65 to $129; (3) the fee for a salesperson license for an applicant who has not satisfied all of the educational requirements would increase from $90 to $178; (4) the late license renewal fee for a real estate broker would increase from $165 to $327; (5) the late license renewal fee for a real estate salesperson would increase from $97 to $193; (6) the fee for a restricted real estate broker

license would increase from $110 to $218; and (7) the fee for a restricted real estate salesperson license would increase from $65 to $129.

The proposal would increase the following subdivision filing fees in section 2790.1: (1) the fee for an original public report for subdivision interests described in Business and Professions Code section 11004.5 would increase from $1,550 to $1,650; (2) the fee for an original public report for subdivision interests other than those described in section 11004.5 would increase from $450 to $550; (3) the fee for a renewal public report for subdivision interests described in section 11004.5 would increase from $450 to $550; and (4) the fee for an amended public report to offer subdivision interests would increase from $300 to $400.

Finally, the proposal would establish the following filing fees in section 2805.1 related to certain time-share projects: (1) $1,650 (up from $1,550) plus $10 for each subdivision interest to be offered for an original permit application; (2) $550 (up from $450) plus $10 for each subdivision interest to be offered that was not permitted to be offered under the permit to be renewed for a renewal permit application; and (3) $400 (up from $300) plus $10 for each subdivision interest to be offered under the amended permit for which a fee has not previously been paid for an amended permit application.

At this writing, the Commissioner has adopted the proposed increases and DRE has prepared the rulemaking file and submitted it to the Office of Administrative Law (OAL), where it awaits that agency's final approval. If approved, the fee increases become effective on July 1, 2001.

Other DRE Rulemaking

On May 26, 2000, DRE published notice of its intent to make several changes to its regulations. The original proposal included amendments to sections 2718, 2729, 2790.5, 2810.1, 2812.8, 2813, 2813.5, 2813.8, 2846.5, 2846.7, 2849.01, 2930 and 3106; adoption of new sections 2813.14, 2841, and 2846.9; and repeal of sections 2810.3 and 2810.5, Title 10 of the CCR. The Department held a public hearing on the rulemaking package on July 12, 2000. Following the hearing, the Commissioner adopted all but two of the proposed regulatory changes (see below); OAL approved them on November 9, 2000. Several of the regulatory changes made minor, nonsubstantive revisions to correct clerical errors and to update references to other statutory and regulatory sections. The changes that are more substantive in nature are described below.

The former version of section 2718 required legal presence in the United States in order to obtain benefits from the Real Estate Recovery Account (RERA). While the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1995 (Pub. L. No. 104-193, 8 U.S.C. section 1621 *et seq.*) imposes restrictions on the receipt of certain government benefits based on immigration status, no provision in the federal law mandates any particular citizenship status for persons applying for or receiving benefits from the RERA. Thus, DRE amended section 2718(c) to delete that requirement, thereby conforming the regulation to federal law.

The former version of section 2810.1 did not authorize the use of alternative dispute resolution (ADR) provisions in resolving disputes over time-share purchases or operation. The amendment incorporates existing subdivision ADR provisions in resolving such time-share disputes. DRE asserts that those provisions include minimum standards designed to ensure a timely and fair resolution.

Business and Professions Code section 11018.5(e) requires, in part, that reasonable arrangements have been made as to each interest with respect to the management, preservation, and operation of certain subdivision and time-share projects defined in section 11004.5. Regulation section 2810.3 formerly specified one method to assure such arrangements have been made by requiring a minimum number of initial owners to support the financial obligations of the project. However, the goal of assuring viability for time-share projects may also be achieved by alternative arrangements that provide more direct benefits to the owners. DRE noted that in the past 20 years, the presale alternative recognized by section 2810.3 had never been utilized. "Therefore, the presale alternative is not of value and it is proposed that the regulation be repealed."

Prior to statutory amendments in the early 1990s, regulation section 2810.5 resolved the uncertainty as to whether a time-share project located both within and outside the state is to be regulated under the Subdivided Lands Law as an in-state offering or under Article 8.5 of the Business and Professions Code as an out-of-state offering. However, at present there is no statutory distinction between in-state and out-of-state projects as to qualification procedures. Therefore, section 2810.5 no longer served a purpose and thus was repealed.

The prior version of section 2812.8 prohibited a time-share owners association from employing a managing agent for a period longer than three years, with one-year renewals thereafter. DRE's amendment to section 2812.8 increases the time limit on the initial management employment agreement from three to five years, and also extends the subsequent renewal period from one year to three years.

Former section 2813 provided that a quorum for a time-share owners association meeting could be no less than 15% of the association membership. The amended version reduces the quorum requirement to 10%.

Section 2813.5 previously required a time-share owners association to distribute a detailed budget and report to each member annually. As amended, the section now allows an association to distribute a summary of the detailed budget and report along with notification that any member may obtain a copy of the actual detailed budget and report upon request.

Section 2813.8 previously required a majority vote of owners other than the developer to amend the declaration and the articles of incorporation of a time-share owners association. The section also required at least a 25% vote of owners other than the developer to amend the bylaws of the associa-

tion. This change lowers the voting requirements for amending the declaration and the articles of incorporation to 25% of owners other than the developer, and lowers the requirement for amending the bylaws to a 10% vote of owners other than the developer.

DRE's existing regulations did not address conflicts that may occur between time-share project regulations and the laws of other states. Thus, DRE adopted new section 2813.14 to allow the Commissioner to vary the requirements of California regulations in such situations as long as a purchaser receives substantially the same level of consumer protection.

AB 653 (Hertzberg) (Chapter 407, Statutes of 1999) authorizes a nonlicensed employee to assist a real estate broker in meeting the broker's obligations to clients in certain residential mortgage loan transactions, but prohibits nonlicensed employees from participating in any negotiation. *[17:1 CRLR 190]* New section 2841 lists actions that do not constitute "negotiation" within the meaning of the statute.

During 2000–01, DRE sponsored several outreach events for both licensees and consumers.

DRE's existing regulations did not allow for the delayed filing of trust fund reports required from multi-lender brokers under Business and Professions Code section 10229(n). DRE amended section 2846.7 to add multi-lender brokers to the list of persons who may delay filing trust fund reports upon submission of a written request, if approved by the Commissioner. Similarly, the Department proposed new section 2846.9 to allow multi-lender brokers to delay filing servicing reports under Business and Professions Code section 10229(j) upon submission of a written request that is approved by the Commissioner.

Brokers who meet the multi-lender quarterly reporting requirements must file an annual business activity report pursuant to Business and Professions Code section 10229(n). This annual report is essentially the same as the annual report required of threshold brokers pursuant to Business and Professions Code section 10232.2. Regulatory section 2849.01 sets forth the form used by threshold brokers for the annual report. DRE amended section 2849.01 to accommodate the information needed for both the threshold broker and multi-lender annual reports.

Subsection 11 of regulatory section 2930 formerly provided that payment of a monetary penalty was to be "delivered" to the Department prior to the effective date of the decision in the matter. Because there was confusion over the meaning of the term "delivered," the Commissioner amended the regulation to provide that the payment must be "received in hand by the Department prior to the effective date of the Decision in the matter."

As noted above, the Commissioner declined to adopt two of the proposed changes. In response to a written comment, DRE chose not to go forward with the proposed adoption of section 2846.9; the Commissioner agreed with the comment's suggestion that the provisions that section would have contained were either already adequately covered by existing statute or could be more effectively integrated into the other proposed amendments to existing regulations. In addition, the same comment also pointed out that the proposed version of new section 2813.14 contained a reference to section 2810.3, which was slated to be repealed by the same rulemaking action. The text of section 2813.14 was thus revised and re-noticed, causing a delay in its approval by OAL until January 10, 2001. New section 2813.14 became effective February 9, 2001.

DRE Sponsors Informational Seminars

During 2000–01, DRE sponsored several outreach events for both licensees and consumers, including the following:

- In the fall of 2000, DRE hosted a seminar concerning California's housing shortage for members of the real estate industry. Participants discussed possible strategies for relieving the problem and ways in which the real estate industry could contribute to a solution. The Department scheduled a follow-up housing shortage seminar for May 31, 2001.
- In late 2000, DRE organized a seminar on assisted care projects. This meeting was geared to developers and subdividers.
- In October 2000, DRE held a seminar for consumers entitled "How to Protect Yourself When Purchasing a Home and Obtaining a Loan."
- In November 2000, the Department hosted two seminars—one in Oakland and another in Los Angeles—to provide consumers with an overview of the home buying process, services provided by real estate licensees, and the types of financing programs currently available for borrowers.
- In April 2001, DRE sponsored a seminar entitled "What Every Consumer Should Know When Buying a Home and Getting a Loan."
- On May 12, 2001, the Department will conduct a seminar in Fresno for Spanish-speaking real estate consumers. That program will provide an overview of the home buying and loan origination processes as well as information on "things to watch out for" in real estate transactions.

2000 LEGISLATION

AB 935 (Brewer). The Subdivided Lands Act (SLA) requires any person intending to sell or lease subdivided lands within California, including a time-share project, to file an application with DRE. The Department then issues a public report for prospective buyers, which provides information about the subdivided interest and proposed sales offering. The Commissioner may issue a preliminary public report or a conditional public report if certain conditions are met.

Under the provisions of the SLA, a "single-site time-share project" consists of a single geographic site where a purchaser buys the right to reserve the use or occupancy of accommodations and facilities at that site. The project may be associated with other time-share projects through the use of a reser-

vation system. Before an owner or subdivider sells a single-site time-share interest, DRE must issue a public report that discloses information about that site. A "multi-site time-share project" consists of more than one site where a purchaser has the right to use and occupy accommodations or facilities through a reservation system. Before an owner or subdivider sells a multi-site time-share interest, DRE must issue a public report that discloses information about each site.

A relatively new trend in real estate development is for time-share developers to offer single-site time-share projects that include a mandatory reservation system, which has caused confusion over the disclosure requirements. As amended August 7, 2000, this bill provides that for purposes of the SLA, a single-site time-share project that includes a mandatory membership in a reservation system is not to be considered a multi-site time-share project.

The bill also: (1) provides that a mandatory reservation system may be automatically renewed (every five years or less) unless the time-share members vote to terminate the reservation system; (2) allows a time-share project to increase the costs of the mandatory reservation system by up to 10% annually without a vote of the members; (3) mandates that votes to terminate a reservation system or increase reservation costs must attain a 30% participation rate and be approved by the greater of (a) 25% of the membership, or (b) a majority of the members voting; (4) allows the Commissioner to include a disclosure statement in a permit or public report for a single-site time-share project pertaining to the effects of a reservation system on the purchase of interest in those projects; (5) allows the Commissioner to prepare a separate disclosure statement relating to the effects of the reservation system on the purchase of an interest in such a project; (6) requires DRE to develop and utilize a standardized disclosure form; and (7) requires the subdivider or subdivider's agent to provide the disclosure statement to a prospective purchaser as soon as practical before executing a binding contract or agreement.

AB 935 was signed by the Governor on September 18, 2000 (Chapter 522, Statutes of 2000).

SB 1395 (Monteith), as amended June 22, 2000, also deals with subdivided lands transactions. The SLA requires the Commissioner to issue public reports based on subdividers' disclosures about the parcels they want to sell or lease. The SLA defines a subdivision as improved or unimproved land divided for sale, lease, or financing into five or more parcels. The SLA's definition exempts certain special types of subdivisions, including those where the resulting parcels are 160 acres or more. Also exempt are subdivisions of land that are expressly zoned for industrial or commercial uses. A subdivider is prohibited from selling or leasing parcels without obtaining a DRE public report. Before the Commissioner issues such a public report, DRE's staff examines the project to be sure that it meets required standards. Public reports disclose information about the subdivision's location, size, assessments, taxes, soils, utilities, and services. DRE's maximum fee for reviewing public reports is $7,500.

According to an analysis prepared by the Senate Local Government Committee, there was confusion as to whether the SLA applies when subdividers sell subdivided lands to one another. Some experts contended that the legislature meant for the SLA and its elaborate disclosure requirements only to protect individual buyers, not to interfere in wholesale land transactions; others argued that the requirements for public reports applied to all subdivision sales. This bill settles the legal dispute in favor of those who say SLA applies only to retail sales.

The bill exempts certain transactions from SLA's public reporting requirements. The exemption applies to industrial or commercial subdivisions when the land uses are limited by zoning or recorded declarations of covenants, conditions, and restrictions. The exemption also applies when the buyer or lessee is a single individual or entity, and the agreement includes a statement that the buyer or lessee must obtain a public report before reselling or subleasing the property if the secondary sale or lease is not also exempt from the SLA.

Under this bill, subdividers exempted from the SLA are allowed to file an application with the necessary supporting documentation. Approved applications can then be used when subsequently filing for public reports relating to the subdivision identified in the application. DRE has 60 days to inform the applicant about any deficiencies or the application is automatically deemed approved. The Department has 30 days from receipt to respond to the applicant about any deficiencies in a revised declaration or it is automatically deemed approved. This bill limits the filing fee charged by DRE for this review to $200.

According to the Senate Floor analysis, this bill streamlines the procedures for subdividers to sell property to other subdividers while still protecting individual consumers. DRE supported the bill, declaring that it would also clarify existing law, eliminate delays, and reduce the administrative burden on subdividers. Governor Davis signed SB 1395 on August 31, 2000 (Chapter 279, Statutes of 2000).

AB 2234 (Wiggins), as amended August 25, 2000, modifies the definition of "prepaid rental listing service" under the Real Estate Law and provides that a contract for those services may be provided by a DRE-licensed service provider to a prospective tenant and signed in electronic form. The bill increases the amount of the bond required to be provided by a rental listing service licensee to DRE from $2,500 to $10,000.

AB 2234 increases the amount that the licensee may keep as a service charge from $25 to $50 in the event the tenant rents from a source other than the licensee; the bill further requires DRE to periodically adjust the amount allowed for that service charge. AB 2234 requires a licensee, within ten days of receiving written statement signed by the prospective tenant under penalty of perjury and indicating that the prospective tenant did not obtain a rental through the services of the licensee, to refund to the prospective tenant any fee paid over the permitted service charge. The bill also establishes a new administrative claims procedure for refunds and increases

the amount of damages that can be awarded to $1,000. Governor Davis signed AB 2234 on September 16, 2000 (Chapter 473, Statutes of 2000).

AB 2284 (Dutra). The Real Estate Law requires a real estate broker to file certain information with the Commissioner concerning a transaction that involves the sale of or offer to sell a series of notes secured directly by an interest in real property, or the sale of undivided interests in a note secured directly by real property equivalent to a series transaction, otherwise known as a multi-lender transaction. This bill expands the nature of the information that is required to be filed with DRE in this regard.

The Real Estate Law also requires a real estate broker engaging in certain mortgage-related activities to report certain information to DRE, and authorizes the Department to conduct a trust fund examination of a broker who fails to submit the required information. The Commissioner may charge a broker an amount equal to 1.5 times the cost of such an examination and other related activities. This bill authorizes DRE to suspend a broker's license, or deny renewal of a broker's license, if the broker fails to pay the amount charged for this purpose. Governor Davis signed AB 2284 on September 24, 2000 (Chapter 636, Statutes of 2000).

AB 1823 (Dutra), as amended June 29, 2000, sponsored by the California Association of Realtors, amends the Davis-Stirling Common Interest Development Act to require a common interest development association to notify a homeowner-member when the board of directors plans to meet to consider that homeowner's alleged violation of the association's rules. Further, the bill requires the owner of a separate interest in the development to provide any prospective purchaser with notice of any unpaid monetary fines or penalties levied upon the owner's separate interest, and notice of any unresolved violations of the governing documents about which the association previously has sent notice to the owner. The Governor signed this bill on August 25, 2000 (Chapter 257, Statutes of 2000).

AB 860 (Thomson), as amended July 6, 2000, provides that no governing documents of a common interest development entered into, amended, or otherwise modified on or after January 1, 2001 may prohibit the owner of a separate interest in a condominium project from keeping at least one pet within the development, subject to the reasonable rules and regulations of the association. Governor Davis signed AB 860 on September 18, 2000 (Chapter 551, Statutes of 2000).

SB 1889 (Figueroa), as amended August 23, 2000, requires DRE to disclose information regarding the status of its licensees on the Internet. The bill requires DRE to disclose the addresses of record of licensees and to allow licensees to provide a post office box or other alternative address instead of a home address. Governor Davis signed SB 1889 on September 29, 2000 (Chapter 927, Statutes of 2000).

AB 1219 (Kuehl), which would have prohibited a local legislative body from approving tentative maps, parcel maps, or development agreements for subdivision of property of more than 200 residential units unless it finds that a sufficient, reliable water supply is available that will meet the reasonable needs of the project, died in the Senate Committee on Agriculture and Water Resources.

2001 LEGISLATION

AB 795 (Dutra), as amended April 16, 2001, is sponsored by DRE. The bill would affirm DRE as the responsible agency for the investigation, review, and discipline of real estate licensees who arrange multi-lender loans (loans in which more than one private investor has a partial ownership interest in a mortgage note secured by real property). In so doing, the bill would consequently eliminate any administrative oversight by the Department of Corporations (DOC), thereby avoiding both the current confusion and the potential "double jeopardy" resulting from dual oversight by DOC and DRE for violations by real estate licensees who arrange multi-lender loans.

Under the provisions of the bill, brokers who service multi-lender loans would be required to report that fact to DRE. Servicing agents who do not originate multi-lender loans, but just service them, would be required to submit notice and other multi-lender reports just as are required of those originating such loans.

AB 795 would also require purchasers of real estate to provide formal, written acknowledgment of receipt of all documents required under the federal Truth-in-Lending Act. The bill would impose upon a real estate broker responsibility for maintaining a copy of the buyer's signed acknowledgment, "good faith estimate," and all applicable disclosures for a period of three years.

This bill would clarify that compensation from the RERA is only allowable where California state and federal courts—but not the courts of another state—have issued a final judgment. The bill would also expand the venue and service of process requirements for RERA claims. According to DRE, the proposed procedural changes to RERA would generally streamline and simplify the recovery process for claimants. *[A. Appr]*

AB 489 (Migden), as amended April 19, 2001, would require the Secretary of the Business, Transportation and Housing Agency to adopt regulations with respect to the origination of high-cost real estate loans (known as "predatory loans") to define schemes, devices, or contrivances that are manipulative, deceptive, or otherwise fraudulent and to identify means to curb abusive practices related to the advertising, brokering, and making of those loans. The regulations would be developed in consultation with the Commissioner of Corporations, the Real Estate Commissioner, the Commissioner of Financial Institutions, and the Attorney General. The regulations would be enforced by the agencies charged with the regulation of specified persons and entities involved in the making of real estate loans. *[A. B&F]*

AB 392 (Maddox). Existing law subjects the escrow industry to various laws and regulations under the oversight of

the Real Estate Commissioner, the Commissioner of Corporations, or the Insurance Commissioner. As amended April 23, 2001, this bill would require the commissioners to notify each other when taking enforcement or disciplinary action related to certain escrow services. The bill would require DRE, DOC, and the Department of Insurance to each maintain a Web site that displays a database of individuals who have been subject to disciplinary action related to the escrow industry. *[A. Appr]*

SB 221 (Kuehl), as amended April 26, 2001, is Senator Kuehl's attempt to resurrect AB 1219 (Kuehl), which died in 2000 (see above). SB 221 would prohibit approval of a tentative map, or a parcel map for which a tentative map was not required, or a development agreement for a subdivision of property of more than 200 residential units unless the local legislative body to which the map or agreement has been submitted makes a finding that a sufficient, reliable water supply is available that will meet the reasonable needs of the project. *[S. LGov]*

SB 329 (Morrow). The Real Estate Law requires an applicant for the examination for an original real estate broker license to submit evidence of the successful completion of certain courses at an accredited institution, including the successful completion of three courses from a specified list of optional courses. As amended April 17, 2001, this bill would add to that list of options a course in computer applications in real estate. *[A. B&P]*

LITIGATION

In ***Yergan, et al. v. California Department of Real Estate***, 77 Cal. App. 4th 959 (Jan. 25, 2000), the Second District Court of Appeal affirmed a DRE decision denying a claim for payment from the Real Estate Recovery Account (RERA).

In this case, two sisters (Yergan) sold an apartment building they co-owned through Mazmanian, a licensed real estate salesperson. The sisters left the proceeds with Mazmanian to invest in other properties on their behalf; he did so, and earned substantial commissions on the transfers. The sisters subsequently lost the properties and their investments due to foreclosures. Yergan sued Mazmanian, his management company (REM, a licensed real estate corporation), and other defendants for fraud, breach of fiduciary duty, and negligence, alleging that he had misused and converted rental monies from the investment properties. The "defendants," collectively, agreed to pay $400,000 to settle the matter; REM additionally agreed to pay $50,000 to settle appellants' claims for professional negligence and breach of duty. Under the agreement, if REM failed to pay, Yergan was authorized to enter a $50,000 judgment against REM. When REM failed to pay, judgment was entered for Yergan, who then applied to DRE for compensation from the RERA. Yergan's application for compensation relied on the stipulated settlement, in which no defendant admitted any wrongdoing and in which REM agreed to settle only the claims based on professional negligence and fiduciary duty.

DRE denied Yergan's claim, stating: "The judgment is not based upon the judgment debtor's fraud, misrepresentation, or deceit, made with the intent to defraud, or conversion of trust funds which is a mandatory prerequisite to payment from the Recovery Account....The settlement agreement provided that the agreement was a compromise of disputed claims and that payment could not be construed as an admission of liability of the parties to the agreement. Further, pursuant to the agreement, judgment debtor was to pay claimants the sum of $50,000 in settlement of all claims for professional negligence and breach of duty....The underlying judgment is a result of debtor's breach of the settlement agreement, not a result of a final adjudication of the allegations in the complaint. Moreover, the settlement agreement explicitly states that it is a resolution only of claims based on breach of duty and professional negligence. Neither of those causes of action is a basis for payment from the Recovery Account." Yergan then filed suit against DRE, seeking an order requiring it to compensate her from the RERA. The trial court affirmed DRE's decision, and Yergan appealed.

The Second District first analyzed the Real Estate Recovery Program (Business and Professions Code section 10471 *et seq.*). Courts have viewed the program expansively, stating that "it is to be given a liberal construction to promote its purpose and protect persons within its purview. As such, it has been held that relief will be granted under section 10471 unless to do so is clearly forbidden by statute. Section 10471 will be construed when its meaning is doubtful so as to suppress the mischief at which it is directed, to advance or extend the remedy provided, and to bring within the scope of the law every case which comes clearly within its spirit and policy."

On the other hand, the court noted, this view is to be "tempered by the remarks of the Legislature which, in 1987, made the following findings and declarations: 'The economic vitality of the Real Estate Recovery Program must be protected in order for the program to continue to perform valuable consumer protection functions. An independent study completed for the Department of Real Estate has determined that, based upon anticipated future program revenues and claims, the Real Estate Recovery Program is now insolvent. In recent years the Real Estate Recovery Program has been subject to claims which have exceeded the intended purpose of the program, in certain cases brought by claimants who have employed judicial procedures designed solely to assure access to the Recovery Account.'"

Next the court turned to the precise language of the RERA statute, which "speaks in terms of the aggrieved party obtaining a 'final judgment' and does not specifically discuss settlements, stipulated judgments, or consent judgments." Notwithstanding, the court agreed with prior case law permitting recovery based on these other types of litigation conclusions.

The Second District framed the case before it as follows: "The stipulation for judgment and the judgment entered did not state the basis for the $50,000 recovery awarded to appellants. The Department looked behind these documents, but

only as far as the parties' settlement agreement. The Department refused appellants' invitation to go further and base its decision on the underlying facts tending to establish more serious offenses. The trial court agreed with the Department. Under the facts presented, we agree with the Department and the trial court."

According to the Second District, "[a]ppellants argue that stipulated facts set forth in the application [to DRE for RERA reimbursement] establish the fraudulent actions which formed the primary basis for their claims against...defendants. Appellants misunderstand their burden under the statutory scheme. The statute does not ask for proof that the applicant had valid claims for fraud; the applicant must demonstrate that it has a valid judgment for fraud. The determination of the latter issue could very well be resolved by looking at the wording of the judgment itself. Where that fails to resolve the issue, it is appropriate to look behind the judgment at the stipulation or other agreement which led to the judgment. If some ambiguity still remains, the Department (and the court in reviewing the Department's action) might need to look further.... But where these documents expressly preclude the possibility that the judgment was based on fraud, the Department is entitled to conclude that the resolution of the underlying claims occurred as set forth in the agreement entered into by the parties."

As was the legislature in 1987, the Second District appeared quite concerned that the parties to this transaction had structured the settlement agreement and judgment to ensure access to the Recovery Account.

As was the legislature in 1987, the Second District appeared quite concerned that the parties to this transaction had structured the settlement agreement and judgment to ensure access to the Recovery Account. In a footnote, the court noted that Yergan and her sister "permitted the individual who reputedly defrauded them, Mazmanian, to settle for negligence and breach of duty—and continue with his real estate career—and are attempting to attribute the fraud solely to a defunct corporation which he controlled." According to the court, "[n]o one disputes that appellants had strong evidence to support their claims of having been defrauded by their agent...in the purchase and sale of the various properties. However, when it came time to settle, appellants were willing to sacrifice those claims in order to ensure recovery from [the agent's employer's] insurer. That decision was not forced on them—they voluntarily entered into the settlement agreement which limited recovery to the claims for negligence and breach of duty."

In *Villa Milano Homeowners Association v. Il Davorge*, a case of first impression, the Fourth District Court of Appeal held that a binding arbitration clause inserted and recorded by the developer of a condominium complex into the declaration of covenants, conditions, and restrictions (CC&Rs) governing the use and maintenance of the property was unconscionable and thus unenforceable to the extent it applies to construction and design defect claims.

In ***Herrera v. California Department of Real Estate***, 88 Cal. App. 4th 776 (Apr. 26, 2001), the Second District Court of Appeal upheld the superior court's denial of a petition for writ of mandate filed by a dual State Bar/DRE licensee whose DRE license had been revoked because the State Bar suspended his license to practice law.

On April 19, 1996, the California Supreme Court suspended the State Bar license of Terry Herrera pursuant to a stipulation between Herrera and the State Bar stating that Herrera had willfully and in violation of statute as well as the Bar's Rules of Professional Conduct misappropriated a client's funds for his own use. Herrera's act of misappropriation had taken place in 1989.

Business and Professions Code section 10177(f) provides that one of the grounds upon which DRE is permitted to revoke a real estate license is the denial, revocation, or suspension of a license by another state agency for acts that would also constitute grounds for disciplinary action against a real estate licensee. Pursuant to that section, the Commissioner revoked Herrera's real estate license based on the suspension of his license to practice law.

In this appeal, Herrera contended that: "(1) the Department's action was barred by the statute of limitations; (2) the Department's action was barred by laches; (3) section 10177, subdivision (f) requires a trial on the merits in the underlying action; (4) the underlying offense did not involve moral turpitude; and (5) the administrative law judge abused his discretion by recommending revocation of Herrera's real estate license."

Only the appellate court's discussion of the statute of limitations issue was certified for official publication. Concerning the statute of limitations, the court held that "[i]t is the occurrence of the ground for discipline that commences the limitations period. Where the ground is the actual misconduct of the licensee, the misconduct commences the period. Where, however, the ground is a criminal conviction, a civil judgment or the disciplinary action of a regulatory agency, it is the final official action that commences the period. In this case, the ground for disciplinary action against Herrera was the suspension of his law license, not the underlying misappropriation of a client's funds. Herrera's law license was suspended on April 19, 1996, and the accusation to revoke or suspend Herrera's real estate license was filed on February 16, 1999....Thus, it is irrelevant for purposes of the statute of limitations that the misappropriation of client funds took place in 1989. Accordingly, the accusation was timely filed."

In ***Villa Milano Homeowners Association v. Il Davorge***, 84 Cal. App. 4th 819 (Nov. 6, 2000), *reh'g denied* Nov. 27, 2000, *rev. denied* Feb. 21, 2001, a case of first impression,

the Fourth District Court of Appeal held that a binding arbitration clause inserted and recorded by the developer of a condominium complex into the declaration of covenants, conditions, and restrictions (CC&Rs) governing the use and maintenance of the property was unconscionable and thus unenforceable to the extent it applies to construction and design defect claims. In reaching its conclusion, the court considered Code of Civil Procedure (CCP) sections 1298–1298.8, which include requirements for the form, content, and effect of arbitration clauses contained in real property sales documentation. The Fourth District focused especially on CCP section 1298.7, which permits a purchaser to pursue construction and design defect actions against a developer in court even if the purchaser signed an agreement to convey real property containing an arbitration clause.

The court also examined section 2791.8, Title 10 of the CCR, a regulation adopted by DRE in 1998 that permits developers to insert arbitration clauses into sales agreements and CC&Rs so long as the arbitration afforded is conducted pursuant to specified criteria to ensure it is fair. Although section 2791.8 did not exist at the time of the transaction at issue, the court examined it "in order to explore its potential significance as a current expression of public policy." The Fourth District also pointedly noted that prior to 1997, DRE "followed a policy of disapproving mandatory binding arbitration provisions in CC&Rs until a disgruntled developer successfully challenged the policy....Unfortunately, it appears the DRE did not seek review of the unfavorable trial court decision." *[16:1 CRLR 172–73]*

Based on its review of the Code of Civil Procedure and section 2791.8, the court held that "public policy disfavors the binding arbitration clause in the context of the case before us. With respect to construction and design defect claims, the clause is substantively unconscionable as an attempt to evade the statutory protections of Code of Civil Procedure sections 1298 through 1298.8....Public policy will not permit a developer, who is unable to use a purchase agreement to block a home buyer's access to a judicial forum, to cut off that access by circuitous means—the CC&Rs."

In ***Freeman v. San Diego Association of Realtors***, 77 Cal. App. 4th 171 (Dec. 27, 1999), *reh'g denied* Jan. 24, 2000, *rev. denied* Apr. 12, 2000, the Fourth District Court of Appeal upheld the trial court's dismissal of a wide-ranging antitrust challenge to private entities' control of the multiple listing service (MLS), a computerized medium by which real estate agents exchange information on properties that are for sale or have been recently sold. Plaintiff Freeman, a real estate agent, alleged numerous antitrust violations against the defendants, associations of realtors that collectively formed Sandicor, a corporate entity that provides a countywide MLS in San Diego. Under the Cartwright Act, Business and Professions Code section 16700 *et seq.*, plaintiff alleged antitrust violations on a number of theories: illegal tie-ins, price fixing, group boycott, and market exclusion. Freeman also alleged that defendant San Diego Association of Realtors (SDAR) violated the terms of a permanent injunction issued in *People v. National Association of Realtors*, a successful antitrust prosecution by the San Diego District Attorney's Office in the 1980s; in that matter, the trial court found—and the Fourth District affirmed—that SDAR and other defendants had committed numerous antitrust violations in connection with their control of the MLS.

Plaintiff's allegation of a tying arrangement was based on Sandicor's provision of "Enhanced Services" along with the basic MLS. According to the plaintiff's complaint, such "enhanced services" included inputting MLS listings, monitoring listings for compliance with Sandicor rules, providing forms and publications, employing staff to answer subscriber questions, offering meeting facilities, and processing reciprocal listings. According to the court, "Freeman's tying claim alleged that Sandicor conditioned sale of access to its MLS (the tying product) on purchase of the Enhanced Services (the tied product); Sandicor had sufficient economic power to force real estate agents wishing to purchase MLS access to also purchase the Enhanced Services; and a not insubstantial amount of sales in the tied product was effected by the tying arrangement." However, after a review of each individual component service of the "enhanced services," the court concluded that "Freeman's complaint, read in the context of the facts of which we may take judicial notice, and shorn of its conclusory allegations, did not adequately allege an illegal tying arrangement. The alleged facts do not demonstrate that (1) access to Sandicor's MLS data and the Enhanced Services are separate products for which separate markets exist, or that (2) the tie affected a substantial volume of commerce in the market for the tied product."

On the issue of price fixing, Freeman alleged that Sandicor's corporate form was a sham that should be disregarded and treated instead as a combination of the local associations which were separate entities colluding to fix the price of the MLS and Enhanced Services. The court agreed that "whether separate entities are present requires analysis not of the corporate formalities but of the economic realities under which the entities operate." Nevertheless, the court concluded that "because the complaint did not allege facts that suggest the local associations pursued interests diverse from or antithetical to the interests of Sandicor, the complaint does not establish the plurality of separate entities necessary to a price fixing conspiracy claim."

Next, Freeman alleged that after she petitioned Sandicor to appoint her office as a service center for Sandicor, the various local associations combined in an illegal group boycott to force Sandicor to refuse Freeman's application. Freeman theorized that as a result of this rejection, consumers of Sandicor's services were harmed because she would have charged less than other service centers. The court responded that "Freeman's conclusory statement that the local associations caused Sandicor to refuse Freeman's request is insufficient to satisfy the requirement of alleging specific overt acts in furtherance of a conspiracy to boycott Freeman. The com-

plaint contained no allegation of specific acts, threats, coercion, intimidation or other unlawful conduct employed by local associations to force Sandicor to boycott Freeman."

Finally, Freeman contended that because Sandicor's monthly fee for access to the MLS is more than some brokers can afford, Sandicor has violated the antitrust laws by pricing these brokers out of the market and has thereby unreasonably restrained trade by limiting the pool of competing brokers." This "market exclusion" contention was based on language in *Marin County Board of Realtors Inc. v. Palsson*, 16 Cal. 3d 920, (1976), wherein the California Supreme Court had held that an MLS operator was prohibited from excluding nonmembers from its service, and was permitted to charge only "a reasonable fee for use of the service consistent with the per-capita costs of operation." The Fourth District disagreed with Freeman, opining that such dicta from *Palsson* was part of the remedy for that particular case, rather than part of the antitrust analysis. In a footnote, the court also expressed doubts about Freeman's standing to raise the issue of market exclusion: "Freeman admits she is not one of the brokers excluded from the market based on inability to pay. Therefore the antitrust injury alleged—exclusion from the broker market—is not an injury she has suffered....Indeed, because Freeman alleged she has remained active in selling real estate, she has benefitted to the extent that higher prices have reduced the pool of her competitors, thereby undercutting her standing on this claim."

The court found it unnecessary to reach Freeman's allegation that SDAR violated the 1984 injunction in *People v. National Association of Realtors*, because Freeman alleged that Sandicor (not SDAR) violated the injunction, and only SDAR was bound by the injunction. According to the court, "the complaint did not allege the party that set the fees (Sandicor) was bound by the injunction, or that the party that was bound by the injunction (SDAR) had the ability to comply with the injunction by charging fees at levels below those set by Sandicor."

At this writing, Freeman is pursuing a similar action under federal antitrust law in the U.S. District Court for the Southern District of California.