



Health and St. Joseph's Omni Health Plan to his clients. Schmidt intended to reduce the cost of the plans to his clients by arranging a rebate drawn from his own commission. Two of Schmidt's clients participated in this arrangement until they were informed by Foundation and Omni that the rebate policy was illegal; both clients then terminated their relationships with Schmidt. Schmidt then sued Foundation and Omni for conspiracy to restrain trade, breach of the covenant of good faith and fair dealing, tortious interference with contract and with prospective economic relationships, conspiracy to interfere with economic relationships, intentional misrepresentation, and slander. The trial court sustained the defendants' demurrer on the ground that section 1300.46, Title 10 of the CCR, bars a HCSP broker from rebating commissions to his/her clients.

In *PacifiCare of California v. Gary Mendoza*, No. 751160 (Orange County Superior Court), filed on August 9, PacifiCare challenged DOC's right to inspect its members' complaints and records on members who have left the plan, as well as its grievance procedures, contracts with health care providers, peer review procedures, and financial statements. Among other things, PacifiCare contended that the inspection demands are unreasonable and that compliance would be too costly; according to DOC, it needs to review the complaints to determine whether it needs to increase its supervision of PacifiCare.

On November 30, Superior Court Judge John Watson ordered PacifiCare to turn the documents over to DOC; however, Judge Watson temporarily limited DOC's investigation to 300 cases. In his ruling, Judge Watson also indicated that DOC is entitled to copy and/or take possession of the records during its investigation, as long as it takes adequate steps to prevent the disclosure of confidential information.

DEPARTMENT OF REAL ESTATE

Commissioner: Jim Antt, Jr.
(916) 739-3684

The Real Estate Commissioner is appointed by the Governor and is the chief officer of the Department of Real Estate (DRE). DRE was established pursuant to Business and Professions Code section 10000 *et seq.*; its regulations appear in Chapter 6, Title 10 of the California Code of Regulations (CCR). The commissioner's principal duties include

determining administrative policy and enforcing the Real Estate Law in a manner which achieves maximum protection for purchasers of real property and those persons dealing with a real estate licensee. The commissioner is assisted by the Real Estate Advisory Commission, which is comprised of six brokers and four public members who serve at the commissioner's pleasure. The Real Estate Advisory Commission must conduct at least four public meetings each year. The commissioner receives additional advice from specialized committees in areas of education and research, mortgage lending, subdivisions and commercial and business brokerage. Various subcommittees also provide advisory input.

DRE primarily regulates two aspects of the real estate industry: licensees (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 listings of residential real properties for tenancy under an arrangement where the prospective tenants are required to pay a fee in advance of, or contemporaneously with, the supplying of listings. 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. Pursuant to SB 1978 (Johnston) (Chapter 994, Statutes of 1994), the authority for licensing mortgage bankers that make or service loans will be transferred from DRE to the Department of Corporations as of January 1, 1996.

License examinations require a fee of \$30 per salesperson applicant and \$60 per broker applicant. Exam passage rates average 56% for salespersons and 48% for brokers (including retakes). License fees for salespersons and brokers are \$170 and \$215, respectively. Original licensees are fingerprinted and license renewal is required every four years.

In sales, or leases exceeding one year in length, of any new residential subdivisions consisting of five or more lots or units, DRE protects the public by requiring that a prospective purchaser or tenant be given a copy of the "public report." The public report serves two functions aimed at protecting purchasers (or tenants with leases exceeding one year) of subdivision interests: (1) the report discloses material facts relating to title, encumbrances, and related information; and (2) it ensures adherence to applicable standards for creating, operating, financing, and documenting the project. The commissioner will not issue the public report if the subdivider

fails to comply with any provision of the Subdivided Lands Act.

The Department regularly publishes three bulletins. *Real Estate Bulletin*, which is circulated quarterly as an educational service to all current licensees, contains information on legislative and regulatory changes, commentaries, and advice; in addition, it lists names of licensees who have been disciplined for violating regulations or laws. *Mortgage Loan Bulletin* is published twice yearly as an educational service to licensees engaged in mortgage lending activities. Finally, *Subdivision Industry Bulletin* is published annually as an educational service to title companies and persons involved in the building industry.

DRE publishes numerous books, brochures, and videos relating to licensee activities, duties and responsibilities, market information, taxes, financing, and investment information. In July 1992, DRE began offering one-day seminars entitled "How to Operate a Licensed Real Estate Business in Compliance with the Law." This seminar, which costs \$10 per attendee and is offered on various dates in a number of locations throughout the state, covers mortgage loan brokering, trust fund handling, and real estate sales.

The California Association of Realtors (CAR), the trade association joined primarily by agents and brokers working with residential real estate, is the largest such organization in the state. CAR is often the sponsor of legislation affecting DRE. The four public meetings required to be held by the Real Estate Advisory Commission are usually scheduled on the same day and in the same location as CAR meetings.

On May 9, Governor Wilson appointed Jim Antt, Jr., to serve as Real Estate Commissioner; a long-time real estate licensee, Antt has served as a member of DRE's Real Estate Advisory Commission, President of the California Association of Realtors, and Regional Vice-President for the National Association of Realtors. Antt was sworn into office on June 1.

MAJOR PROJECTS

Commissioner Names New REAC Members. DRE Commissioner Antt recently appointed eight members to the Real Estate Advisory Commission (REAC); these members will assist the Commissioner in carrying out the responsibilities of DRE and act as liaisons between DRE and the real estate industry. The new members are Michael Cortney, president of a residential development company; Melinda Masson, owner of a homeowners' association management firm; and real estate brokers George Francis, Vern Hansen,



REGULATORY AGENCY ACTION

Betty Johnson, Walt McDonald, Mack Powell, and John Wong.

DRE Revenue Continues to Drop. Although DRE has recently taken several steps to reduce expenditures—such as the elimination of 63.5 staff positions and the closure of its Santa Ana district office, the continued decline of the California real estate market has decreased the Department's revenue, which comes from exam, license, and subdivision fees. [15:2&3 CRLR 122-23] In addition to the market downswing, DRE also suffered from a unilateral transfer of \$14 million from its reserve fund to the general fund. According to staff, if the Department's revenue situation does not improve—whether by an upswing in the real estate market, the return of the funds previously transferred from DRE's reserves to the general fund, or a fee increase, DRE will exhaust its reserves in less than two years, requiring the closure of all but two offices and necessitating severe staff reductions. DRE has acknowledged that such actions would greatly hamper its enforcement and licensing functions, and would seriously impair its ability to react to the needs of the consumer.

New Continuing Education Requirements. Starting January 1, all DRE licensees renewing their licenses must have completed a three-hour course on the subject of fair housing and a three-hour course on the subject of trust fund handling, in addition to courses in agency relationships and ethics. As most of the disciplinary actions DRE takes involve trust fund transgressions, staff hopes that the new requirements will help licensees stay informed as to statutory and regulatory requirements, as well as their ethical responsibilities to their customers.

LEGISLATION

SB 537 (Hughes). Existing law requires the county recorder, upon payment of proper fees and taxes, to accept for recordation any instrument, paper, or notice that is authorized or required by law to be recorded. As amended September 8, this bill provides that in addition to other recording fees, upon the adoption of a resolution by the county board of supervisors, a fee of up to \$2 shall be paid at the time of recording of every real estate instrument. The bill requires that the fees collected be placed in the Real Estate Fraud Prosecution Trust Fund to be distributed by the county chief administrative officer, as determined by a Real Estate Fraud Prosecution Trust Fund Committee, to district attorneys and local law enforcement agencies for the purpose of determining, investigating, and prosecuting

real estate fraud crimes. This bill was signed by the Governor on October 14 (Chapter 942, Statutes of 1995).

SB 467 (Leonard). Existing law requires persons acting as listing and selling agents, as defined, to provide sellers and buyers with a disclosure form containing general information on agency relationships in specified residential real property transactions. Existing law requires contracts in these transactions to specify (1) whether the listing agent represents the seller exclusively or both the buyer and seller, and (2) whether the listing or selling agent represents the buyer exclusively, the seller exclusively, or both the buyer and seller. Existing law specifies, with respect to these transactions, that neither the payment of compensation nor the obligation of a buyer or seller to pay compensation to a real estate agent is necessarily determinative of a particular agency relationship. Existing law specifies that associate real estate licensees are agents of the real estate agent, and when an associate real estate licensee owes a duty to any principal or to any buyer or seller who is not a principal, that duty is equivalent to the duty owed to that party by the broker for whom the associate licensee functions. Existing law expressly precludes dual agents, as defined, from disclosing specified price information to the other party without consent. Existing law specifies that a listing agent is not a dual agent solely by reason of being the selling agent, and expressly precludes a listing agent from acting as an agent for the buyer only. Existing law, with respect to these transactions, specifically authorizes contracts between principal and agent to be modified to change the agency relationship, before performance of the act that is the object of the agency, by the written consent of the parties to the agency relationship. Existing law also provides that these provisions specifying the duties of an agent, as defined, to the buyer and seller in a residential real property transaction shall not be construed to diminish the duty of disclosure owed buyers and sellers by agents, as specified, or to relieve them from liability for breach of a fiduciary duty or duty of disclosure.

As amended June 30, this bill repeals and reenacts those provisions as part of existing general provisions relating to duties owed to prospective purchasers of residential property. This bill was signed by the Governor on August 10 (Chapter 428, Statutes of 1995).

SB 946 (Johnston). Existing law which permits real estate brokers to deposit funds received in trust with an out-of-state depository institution in certain

instances will be repealed on January 1, 1996. As amended August 29, this bill deletes the repeal of these provisions, and makes related changes.

Under existing law, a real estate broker who meets specified criteria, including making loans or sales in excess of certain amounts, is required to file annual reports and periodic trust fund status reports with the Real Estate Commissioner. This bill provides that in determining the applicability of loans or sales negotiated by a broker, or for which a broker collects payments or provides other servicing for the owner of the note or contract, if the broker is a licensed residential mortgage lender acting under the authority of that license and meets specified criteria, certain loans and sales are not counted.

Under the California Finance Lenders Law, a person who engages in the business of negotiating or performing an act as a broker in connection with loans made by a finance lender is subject to regulation. This bill provides that this regulation does not apply to a loan made or arranged by a licensed residential mortgage lender or servicer when acting under the authority of that license.

The California Residential Mortgage Lender Act, which will become operative January 1, 1996, if certain conditions are met, requires persons making or servicing residential loans to be licensed, unless exempt. The bill requires an applicant for a license to submit a copy of the fidelity bond currently in effect.

This bill also permits a licensee to place funds in an interest-bearing account at the request of the owner; revises licensee bond requirements; increases from \$500 to \$5,000 the amount payable by a licensee to the Commissioner of Corporations for support of regulatory functions in lieu of a pro rata assessment amount; and limits the total amount of any assessment imposed to pay for costs of regulation.

Existing law regulates the solicitation of sales by telephonic sellers, and specifies those representations by a telephonic seller to a prospective purchaser that constitute a telephonic solicitation for purposes of this law. Existing law exempts various persons from the definition of a telephonic seller. This bill additionally exempts from that definition a person licensed as a residential mortgage lender or servicer when acting under the authority of that license.

Existing law provides for the regulation of mortgage foreclosure consultants. For those purposes, various persons are exempt from the definition of foreclosure consultant. This bill additionally exempts from the definition of foreclosure consul-



tant a person licensed as a residential mortgage lender or servicer when acting under the authority of that license. This bill was signed by the Governor on October 4 (Chapter 564, Statutes of 1995).

AB 530 (Weggeland). Existing law requires specified written disclosures to be made to prospective transferees of real property, the waiver of which is declared void as against public policy. As amended July 3, this bill declares the intent of the legislature with regard to these real estate transfer disclosure statements. This bill was signed by the Governor on August 3 (Chapter 335, Statutes of 1995).

AB 1644 (Granlund). Under existing law, a person acting as a principal or agent in this state may not sell or lease or offer for sale or lease lots or parcels in a subdivision situated outside of this state but within the United States, except as specified; this limitation does not apply to a time-share project, as defined. As amended August 21, this bill repeals this provision and instead provides that a person acting as a principal or agent who intends, in this state, to sell or lease or offer for sale or lease lots, parcels, or interests in a subdivision located outside of this state but within the United States is required, prior to any sales, leasing, or offering, to register the subdivision with the Commissioner of Real Estate. This bill provides that the application for registration is required to be made on a form acceptable to the Commissioner, which contains specified information. The bill establishes the fees that accompany various applications in connection with that registration.

Existing law defines the terms "improved out-of-state residential subdivision" and "improved out-of-state time-share project." This bill repeals these definitions.

Under existing law, the sale or lease or the offering for sale or lease of lots or parcels in a subdivision situated outside of the state are governed by provisions of law relative to real property securities dealers and subdivided land, as specified. This bill repeals that provision.

Under existing law, when an inspection is to be made of subdivided lands situated outside of the State of California which are to be offered for sale or lease in this state, the applicant is required to provide a questionnaire and a filing fee, together with an amount, estimated by the Commissioner, for travel from the DRE office where the filing is made to the location of the project, and an amount estimated to be necessary to cover the actual and necessary subsistence expenses incurred in the inspection. This bill repeals this provision.

Under existing law, the Commissioner of Real Estate may issue a preliminary or a conditional permit, as specified, for an improved out-of-state residential subdivision upon receipt of a substantially complete application for the subdivision. This bill repeals this provision.

This bill provides that it is unlawful for a person, in this state, to sell or lease or offer for sale or lease specified lots, parcels, or interest in a subdivision located entirely outside of this state but within the United States, unless any printed material, literature, advertising, or invitation in this state relating to that sale, lease, or offer clearly and conspicuously contains a disclaimer, in 10-point type, as specified. The bill provides for a separate disclaimer for agreements or contracts to lease or purchase that property where the offer is made to a California resident in California.

This bill also enacts provisions that regulate the sale, lease, and offer for sale or lease of multistate time-share interests in California.

This bill provides that on and after the date upon which the total number of owners of interests in a qualified resort vacation club first exceeds 200, the Commissioner of Real Estate may not impose an absolute presale requirement by regulation.

Under existing law, DRE is required to submit a final report to the legislature on or before January 1, 1996, regarding the effectiveness of the regulation of qualified resort vacation clubs. This bill extends that date to January 1, 1999.

Under existing law, those provisions that regulate qualified resort vacation clubs would remain in effect only until January 1, 1997. This bill extends that date to January 1, 2000.

Under existing law, the terms "subdivided lands" and "subdivision" refer to improved or unimproved land or lands, wherever situated in the United States. This bill instead provides that these terms refer to improved or unimproved land or lands wherever situated within California.

Under existing law, the limitation of specified provisions relative to subdivided land to subdivisions within the United States do not apply to a time-share project, as defined, which consists of, or will consist of, two or more distinct geographic locations. This bill instead exempts subdivisions located entirely outside California from the operation of the subdivided land provisions. This bill was signed by the Governor on October 9 (Chapter 723, Statutes of 1995).

SB 310 (Craven). Existing law regulates mobilehome parks in various capac-

ities, and—among other things—requires a subdivider, at the time of filing a tentative or parcel map for a subdivision to be created using financing or funds from a specified source, to avoid the economic displacement of nonpurchasing residents and to file a report regarding the impact of the conversion upon the displaced residents of the mobilehome park to be converted. Existing law also requires a subdivider to offer each existing tenant the option to purchase his/her condominium unit, which is to be created by conversion of a mobilehome park into condominium units. As amended June 22, this bill replaces the reference to subdivisions from the specified funding source with a reference to subdivisions created from the conversion of a rental mobilehome park to resident ownership, and adds further requirements for avoiding economic displacement of nonpurchasing residents, including requiring that the subdivider be subject to a hearing on the matter. This bill also reorganizes certain existing provisions relating to the option to purchase condominium units and interests. This bill specifies that the provisions relating to avoiding economic displacement and the report on the impact of the conversion do not apply to the conversion of a rental park to resident ownership.

Existing law regulates the membership of nonprofit mutual benefit corporations, and generally prohibits the holding of multiple or fractional memberships in these corporations, with certain exceptions. This bill adds to the specified exceptions by providing that a bona fide secured party who, pursuant to a security interest in a membership in a mobilehome park acquisition corporation, as defined, has taken title to the membership, and who is actively attempting to resell the membership, according to specified conditions, may own more than one membership.

Existing law requires any person who intends to offer subdivided lands for sale or lease to file with DRE an application for a public report consisting of, among other things, a notice of intention, as specified. Existing law provides that the notice of intention is not applicable to the purchase of a mobilehome park by a nonprofit corporation, under specified circumstances, including the requirement that a permit to issue securities is obtained from the Department of Corporations. This bill changes all references to "tenants" of mobilehome parks to "homeowners," and defines that term for purposes of these provisions. The bill offers alternative requirements for the exemption from filing a notice of intention, in the case of a nonissuer transaction, pursuant to specified provisions of law,



and provides that a permit to issue securities is not required under certain of these conditions.

This bill provides that, notwithstanding any other provision of law, the subdivider of a mobilehome park that is proposed to be converted to resident ownership shall make a specified written disclosure to homeowners and residents of the park, with regard to the tentative price of the subdivided interest proposed to be sold or leased. The bill provides that the written disclosure shall not be construed to authorize the subdivider to engage in specified prohibited activities, with regard to subdividing the park into ownership interests, prior to the issuance of a public report. This bill was signed by the Governor on August 1 (Chapter 256, Statutes of 1995).

AB 46 (Hauser). Existing law defines and regulates common interest developments, providing, among other things, that these developments shall be managed by an association. Existing law regulates the conduct of meetings of the association's boards of directors, including the attendance of association members at these meetings, and the availability to association members of minutes of any board meeting. As amended September 1, this bill reorganizes and expands the scope of the law relating to association board of directors meetings, by creating the "Common Interest Development Open Meeting Act." The bill also sets forth the rights and responsibilities of board members as well as association members, with respect to meetings, including notice procedures; permits the association president or two other members of the governing body to call an emergency meeting; and allows the board to meet in executive session, upon the request of a board member subject to discipline. This bill was signed by the Governor on October 8 (Chapter 661, Statutes of 1995).

SB 1029 (Calderon), as amended September 14, prescribes conditions which a common interest development association must satisfy before it commences an action for damages against a builder of the development for a defect in the design or construction of the development. Among other things, the bill also requires a court to determine if, in the interest of justice, the action should be dismissed or if another remedy should be fashioned if the association does not substantially comply with these requirements. This bill was signed by the Governor on October 12 (Chapter 864, Statutes of 1995).

SB 1326 (Petris), as amended September 5, requires any lender who originates a loan secured by the borrower's separate interest in a condominium project which

requires earthquake insurance or imposes a fee or any other condition in lieu thereof, pursuant to an underwriting requirement imposed by an institutional third party purchaser, to disclose to the potential borrower that earthquake insurance or that fee or other condition will be required by the lender or by the institutional third party to whom the note is sold; that not all lenders or institutional third parties to whom the note may be sold require earthquake insurance or that fee or other condition in lieu thereof; that earthquake insurance may be required on the entire condominium project; and that lenders or institutional third parties may also require that a condominium project maintain, or demonstrate an ability to maintain, financial reserves in the amount of the earthquake insurance deductible. This bill was signed by the Governor on October 14 (Chapter 925, Statutes of 1995).

SB 1201 (Hughes), as introduced February 24, would add a \$5 surcharge to county fees for the recording of instruments, papers, or notices affecting the title to or possession of real property, and require the fees collected to be paid to the Controller, deposited in the Real Estate Fraud Special Fund, and continuously appropriated to DRE and to local law enforcement and prosecutorial agencies for the purpose of investigating and prosecuting real estate fraud crimes. [S. Jud]

AB 1117 (Hawkins). Existing law provides that a person may testify as an expert if he/she has special knowledge, skill, experience, training, or education sufficient to qualify him/her as an expert on the subject to which his/her testimony relates. As introduced February 23, this bill would provide that notwithstanding this provision, an officer or employee of DRE or the Office of Real Estate Appraisers may not testify as an expert in a private civil action to determine whether a real estate licensee has fulfilled his/her professional obligations with due care. [A. Jud]

AB 1309 (Boland). Under existing law, a person who takes an examination to obtain a real estate salesperson license is required, prior to the issuance of the license or within 18 months after issuance, to submit evidence, satisfactory to the Real Estate Commissioner, of successful completion at an accredited institution of two specified courses; a salesperson who then qualifies for a license is exempted from the requirement that he/she take specified continuing education courses for the first license renewal. As introduced February 23, this CAR-sponsored bill would delete this exemption. [S. B&P]

AB 1646 (Conroy). The Escrow Law exempts from its provisions, among oth-

ers, any person licensed to practice law in California who is not actively engaged in conducting an escrow agency, any licensed real estate broker while performing acts in the course of or incidental to a real estate transaction in which the broker is an agent or a party to the transaction and in which the broker is performing an act for which a real estate license is required, and persons whose principal business is that of preparing abstracts or making title searches, as specified. As amended April 17, this bill would delete the exemption of licensed real estate brokers, and require that every person licensed to practice law in this state, and, to the extent of any exemption under the escrow law, title insurers, underwritten title companies, and controlled escrow companies, that perform escrow activities shall have all escrow trust accounts covered by a fidelity bond in an amount equal to the amount on deposit with the respective entity. [A. B&F]

AB 1831 (Morrow). Existing law sets forth the duties owed by real estate agents and their associate licensees, subagents, and employees to buyers and sellers of real property. As amended April 26, this CAR-sponsored bill would clarify the holding in *Salahudin v. Valley of California*, 24 Cal. App. 4th (1994), to provide that a person licensed under the Real Estate Law and acting with regard to his/her principal within the course or scope of that license generally acts in a fiduciary capacity, but that acts of ordinary negligence do not constitute a breach of that fiduciary duty. The bill would make real estate agents liable only for out-of-pocket damages when they make a negligent misrepresentation, rather than "benefit-of-the bargain" damages for constructive fraud. The Consumer Attorneys of California (formerly the California Trial Lawyers Association) opposes this bill. [A. Jud]

SBX 8 (Campbell), Existing law requires that specified information be revealed to a purchaser of real property prior to sale. As amended May 15, this bill would also require that a disclosure statement containing specified information regarding certain natural conditions or hazards be delivered to a prospective purchaser of real property.

Existing law requires dam owners, who the Office of Emergency Services determines own facilities whose failure would result in death or injury, to prepare inundation maps showing the areas of potential flooding. This bill would require an agent for a seller of real property, or the seller if the seller is not represented by an agent, to disclose to any prospective purchaser the fact that the property is located within



an area of potential flooding if the inundation maps or the information contained in those maps is reasonably available. The bill would also require a city or county that includes areas covered by inundation maps to post a notice at the office of the county recorder, county assessor, and the planning department. The bill would impose similar disclosure, notice, and posting requirements in the case of property located in a very high fire hazard severity zone.

Existing law sets forth various disclosure requirements for an agent of a seller, or the seller if the seller is not represented by an agent, of real property located in earthquake fault and seismic hazard zones, and in state fire prevention and suppression responsibility areas, and specifies certain conditions for the posting of information by a county that includes an area covered by a zone or responsibility area at the offices of the county recorder, county assessor, and county planning commission. Existing law authorizes the posting of notice regarding seismic hazard maps at any other location determined by the county to be necessary to achieve adequate distribution. This bill would also provide for posting of notices relating to earthquake fault and seismic hazard zone maps by cities, and specify that information regarding zone maps be posted at the offices of the county recorder, county assessor, and county or city planning departments, and that information regarding responsibility areas be posted at the offices of the county recorder, county assessor, and county planning department. It would authorize the posting of notice regarding earthquake fault zones and fire responsibility areas at any other location determined by the county, or county or city, to be necessary to achieve adequate distribution. [S. Jud]

SB 258 (O'Connell), as amended June 20, would define terms related to paid home inspections, establish a standard of care for home inspectors, and prohibit certain inspections in which the inspector or the inspector's employer, as specified, has a financial interest. The bill would also provide that contractual provisions seeking to waive the statutory duty of care or limit the liability of a home inspector to the cost of the home inspection report are contrary to public policy and invalid. [A. CPGE&ED]

LITIGATION

In *Bernasconi Commercial Real Estate v. Omni Health Plan, Inc.*, 35 Cal. App. 4th 1644 (May 23, 1995), the Third District Court of Appeal considered whether a real estate broker may bring an action for breach of contract, prior to his

performance of a contract, when he was unlicensed when the contract was executed but licensed at the time the alleged breach occurred. The trial court accepted the argument of defendant Omni Health Plan, Inc., that the contract was void and unenforceable and granted its motion for summary judgment. The broker, plaintiff Bernasconi Commercial Real Estate, appealed from the subsequent judgment in favor of Omni.

On appeal, the Third District noted that Business and Professions Code section 10130 provides that it is unlawful for any person to engage in the business of, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesperson within this state without first obtaining a real estate license from DRE; pursuant to Business and Professions Code section 10139, anyone who acts as a real estate broker without a license may be punished by a fine of up to \$1,000 and/or six months in jail, or a fine of up to \$10,000 if the offender is a corporation. As it was undisputed that at the time plaintiff entered into the agreement, it did not have a real estate broker's license, the court found that plaintiff acted unlawfully in entering into the contract for real estate broker services at that time.

The court acknowledged that, as a general rule, contracts made in violation of regulatory statutes are void; however, the court cautioned that there are exceptions to this rule. For example, the rule will not be enforced when the penalties imposed by the legislature for violation of the statute exclude by implication the additional penalty of holding the contract void. Accordingly, the Third District stated that the issue turns on whether the statutory scheme for licensing real estate brokers excludes, expressly or by implication, the additional penalty of finding plaintiff's contract void.

Among other things, the court explained that the exception to the rule that an illegal contract is void when another penalty is provided is predicated on the maxim "expressio unius exclusio alterius est"—to express one thing is to exclude another. The court noted that there are both criminal and administrative penalties for violation of the real estate broker licensing requirements, and found that although the presence of these penalties does not mandate the conclusion that the contract cannot ever be void, there is statutory evidence that the legislature did not intend a contract entered into by an unlicensed broker to be necessarily void. Specifically, the Third District was referring to Business and Professions Code section 10136, which provides that no person engaged in the business or acting in the

capacity of a real estate broker or a real estate salesperson within this state shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of specified acts without alleging and proving that he/she was a duly licensed real estate broker or real estate salesperson at the time the alleged cause of action arose. According to the Third District, this statute permits recovery when a broker had no license when he/she entered into a contract but became licensed by the time his cause of action (i.e., his/her commission was earned) arose. According to the Third District, the statutory scheme for licensing real estate brokers thus indicates that a contract entered into by an unlicensed broker is not necessarily void and unenforceable, but it is void if the broker never obtains a license.

Accordingly, the Third District reversed the trial court's ruling, concluding that plaintiff's failure to hold a broker's license upon execution of the contract did not render it necessarily void, and stating that because plaintiff asserted that the defendant breached the contract after the license was obtained, there is a factual issue whether the contract was then void.

On August 31, the California Supreme Court denied defendant's petition for review; however, the court ordered that the Third District's decision be depublished.

In *Sweat, et al., v. Hollister, et al.*, 37 Cal. App. 4th 603 (July 28, 1995), the Fourth District Court of Appeal considered whether real estate brokers and sellers are liable to buyers for nondisclosure based on a failure to disclose that local building ordinances prevented the home from being remodeled or expanded. When the Sweats purchased their new home in Poway, it was disclosed to them that the home was located in a designated flood plain; however, they did not know that the Poway Municipal Code bars homes in designated flood plains from being enlarged or otherwise altered. When they were informed of this fact, they sued the sellers and the sellers' real estate broker for failure to disclose, deceit, negligent misrepresentation, and suppression of fact; the trial court granted summary judgment to all of the defendants.

On appeal, the Fourth District explained that a real estate broker is required by law to reveal all factual matters related to the quality of the property being sold that might adversely affect its value; however, only facts which are not discoverable by the buyers would support an action for nondisclosure. Stating that city ordinances that regulate property in flood plains are just as available to the buyers as they are



to sellers, the Fourth District concluded that property sellers have no obligation to research local land use ordinances and to advise buyers as to the effect of those ordinances on the property.

On October 26, the California Supreme Court denied the Sweats' petition for review.

RECENT MEETINGS

At the September 22 REAC meeting, DRE staff announced that the 1996 compendium of real estate law will be available in both paperback and computer disk format; a revised version of the Real Estate Reference Book, which has not been updated since 1989, is expected to be completed by mid-1996.

DEPARTMENT OF SAVINGS AND LOAN

*Interim Commissioner:
Keith Paul Bishop
(213) 897-8202*

The Department of Savings and Loan (DSL) is headed by a commissioner who has "general supervision over all associations, savings and loan holding companies, service corporations, and other persons" (Financial Code section 8050). DSL is part of the larger Business, Transportation, and Housing Agency. The Savings and Loan Association Law is in sections 5000 through 10050 of the California Financial Code. Departmental regulations are in Chapter 2, Title 10 of the California Code of Regulations (CCR). The Department, which has been recently downsized by the Wilson administration [13:4 CRLR 128], now consists of four employees regulating only eight state-chartered savings and loan institutions, one of which is currently seeking conversion to a federal charter. The DSL staff includes the Interim Commissioner, an examiner, a staff analyst, and a part-time assistant.

Although recent state budgets refer to DSL as the "Office of Savings and Loan," DSL is still officially a department. Its responsibilities technically include licensing, examination, and enforcement, but the trend is away from state chartering of S&L institutions. DSL no longer performs field audits of state-chartered S&Ls, and its enforcement powers have been reduced to reviewing analyses performed by the federal Office of Thrift Supervision.

MAJOR PROJECTS

DSL Pursues Changes to Affirmative Action Regulations. On August 18,

the Department published notice of its intent to amend section 103.121 and repeal section 104.400, Title 10 of the CCR, to effect amendments mandated by Executive Order W-124-95, relating to affirmative action.

Financial Code section 6556 provides that in determining an application for approval to establish a branch office, the Commissioner must assess, among other things, whether the applicant's policies, financial condition, and operations afford a basis for supervisory objection. Section 103.121(a)(2) requires an association which is required to file affirmative action reports under federal law to include in any branch application a description of the progress that it has made in attaining the goals and timetables established in its affirmative action in employment program. Section 103.121(b) provides that in reaching a decision on the branch application, the Commissioner may consider whether that association has an effective affirmative action in employment program, and the association's progress in attaining goals adopted in those programs, based on information contained in examination reports and on information in the association's affirmative action in employment reports filed in accordance with section 104.400. Section 103.121(b) also requires that consideration of the affirmative action in employment reports be given special emphasis when there are competing applicants for a branch facility.

Financial Code section 8151 requires state-licensed S&Ls to make any report that the Commissioner may from time to time require. Section 104.400 provides that each S&L which is required by federal law to file or prepare reports relating to its affirmative action in employment is required to file copies of such reports with the Commissioner.

Executive Order W-124-95, issued by Governor Wilson on June 1, provides that in the interest of promoting equal opportunity and a truly "color-blind" society and eliminating excessive state regulations and requirements, state agencies are required to take action to eliminate state preferential treatment requirements that exceed federal statutory or regulatory, or state statutory requirements (affirmative action measures), to the extent that the elimination would not violate a court order or result in a loss of federal funding.

Accordingly, DSL's proposed amendment would delete the requirement that a branch application describe the progress that an S&L has made in attaining the goals and timetables established in its affirmative action in employment program; delete the provision that states that the

Commissioner may consider whether that S&L has an effective affirmative action in employment program, and the S&L's progress in attaining its affirmative action goals when determining an application for approval to establish a branch; delete the provision which states that consideration of affirmative action in employment reports will be given special emphasis when there are competing applicants for a branch facility; and delete the requirement relating to the filing of affirmative action reports with the Commissioner.

The Department received public comments on these proposed changes until October 3; no public hearing was scheduled. At this writing, the changes await review and approval by the Office of Administrative Law (OAL).

DSL Amends Its Conflict of Interest Code. On June 16, DSL published notice of its intent to amend its conflict of interest code, which is set forth at section 102.300 *et seq.*, Title 10 of the CCR, and requires certain DSL employees in decisionmaking positions to file statements of financial and business interests. The changes remove several job classifications from the code, as those positions no longer exist within DSL. Also, the changes add "Administrator" as a designated position, and assigns a disclosure category of I to that position. Also, because of the changes, there would be no positions in disclosure category III; accordingly, DSL proposed to eliminate that disclosure category and renumber disclosure category IV as disclosure category III.

The Department did not hold a public hearing on these proposed changes; following the 45-day public comment period, DSL adopted the changes, which were approved by OAL on December 15.

LEGISLATION

AB 1482 (Weggeland). The federal Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 permits bank subsidiaries of a bank holding company to act as agents for each other for specified purposes, expands the authorization for interstate banking, and allows interstate bank branching. [15:1 CRLR 103-04; 14:4 CRLR 114] As amended September 5, this bill makes changes to state law regulating the operation of banks to eliminate conflicts with the Act, implement the provisions of the Act, and make related changes. The bill provides that certain of the changes also apply to industrial loan companies, as specified. The bill also enacts provisions to assist in the transition between the existing and revised banking laws. This bill was signed by the Governor on September 28 (Chapter 480, Statutes of 1995).