The ABC Act provides that nothing in that law prohibits a winegrower from giving or selling wine, or a beer manufacturer from giving or selling beer, to certain nonprofit organizations, at prices other than those contained in schedules filed with ABC. This bill provides that distilled spirits manufacturers and distilled spirits manufacturers' agents are not prohibited from giving or selling distilled spirits to those nonprofit organizations. The bill also provides that licensed importers are not prohibited from giving or selling beer, wine, or distilled spirits to those nonprofit organizations.

Under existing law, the holder of no more than six on-sale licenses may hold not more than 10% of the stock of one corporate licensed beer manufacturer located in the County of Los Angeles. This bill deletes that provision.

Existing provisions of the ABC Act known as "tied-house" restrictions generally prohibit an on-sale alcoholic beverage licensee from having an ownership interest in an alcoholic beverage manufacturer. Existing law allows as an exception to those provisions a holder of no more than six on-sale licenses to own a microbrewery, and provides that the on-sale licensee shall purchase no alcoholic beverages for sale in this state other than from a wholesale or winegrower licensee. This bill creates an exception to the requirement regarding purchase from a wholesale or winegrower licensee for alcoholic beverages manufactured by the licensed beer manufacturer at a single location contiguous or adjacent to the premises of the on-sale licensee. This bill also allows, until January 1, 1998, a holder of no more than one on-sale license and one off-sale general license in Siskiyou County only to own a licensed beer manufacturer, as specified. This bill was signed by the Governor on September 28 (Chapter 1028, Statutes of 1994).

AB 611 (Cortese). Existing law provides that any unlicensed adult person may apply to ABC for a permit to receive, under specified conditions, a shipment of wine, not in excess of 2.4 gallons in any calendar month, from another state. As amended June 22, this bill instead provides that any unlicensed adult resident of California may apply for a permit to receive, under specified conditions, a shipment of wine, not in excess of nine liters in any calendar month, from another state that allows adult residents of that state to receive shipments of wine, as specified, from California.

Existing law generally prohibits a manufacturer, winegrower, manufacturer's agent, California winegrower's agent, rectifier, distiller, bottler, importer, or wholesaler, or any officer, director, or agent of that person from, among other things, providing a licensee alcoholic beverages as free goods as a part of any sale or transaction involving alcoholic beverages, or furnishing anything of value to a licensee for specified purposes. However, existing law authorizes any winegrower, California winegrower's agent, importer, or any director, partner, officer, agent, or representative of that person, to conduct or participate in an instructional event for consumers held at a retailer's premises featuring wines produced by or for the winegrower or imported by the importer, subject to certain specified conditions. One condition provides that no alcoholic beverages shall be given away in connection with the instructional event; however, wine taken from barrels or from tanks, that is used in blending the wines being featured, may be sampled at the instructional event. This bill specifies that the term "importer" as used in that provision means a wine importer, and modifies the above condition to delete the requirement that the wine to be sampled at the instructional event be wine that is used in blending the wines being featured. This bill was signed by the Governor on August 31 (Chapter 394, Statutes of 1994).

The following bills died in committee: **AB 2698 (Tucker)**, which would have—among other things—expanded ABC's authority to impose conditions upon any retail licensee where ABC finds that the licensee has failed to correct objectionable conditions within a reasonable time after receipt of a notice from ABC, a district attorney, city attorney, or county counsel to correct a public nuisance; **AB 2785 (Tucker)**, which would have added manufacturers of distilled spirits to those who may purchase advertising space and time from, or on behalf of, an on-sale retail licensee; **SB 1400 (Greene)**, which would have authorized the holder of an on-sale license in Sacramento County to own a winegrower's license if the winegrower produces 40,000 gallons or less of wine per year; **SB 182 (Hughes)**, which would have prohibited ABC from issuing a license to any club that restricts membership or the use of services or otherwise discriminates on specified grounds, and provided for the suspension or revocation of licensure for those clubs; **SB 283 (Dills)**, which would have required beer wholesalers to own or lease licensed warehouse space for each location where the wholesaler stores or sells beer; and **AB 1974 (Horcher)**, which would have provided, for any license issued to any grocery, market, or convenience store that was completely destroyed or rendered unusable as a result of the civil disturbance in Los Angeles in April 1992, that the City or County may not impose or enforce, as a specific condition of allowing reconstruction or reopening, any of specified types of restrictions on the reconstruction or continued operation of those premises, and that any off-sale general license issued prior to April 29, 1992, for that location may be transferred from that County to another county without regard to certain limitations on transfer.

LITIGATION

On July 14, the California Supreme Court denied review in ***Korean American Legal Advocacy Foundation v. City of Los Angeles***, 23 Cal. App. 4th 376 (Mar. 17, 1994) (as modified Apr. 15, 1994), leaving intact the Second District Court of Appeal's opinion that the City of Los Angeles is not preempted by the ABC Act from exercising land use authority over liquor stores as they rebuild after the 1992 Los Angeles riots. *[14:2&3 CRLR 119]*

At this writing, ***California Beverage Retailer Coalition v. City of Oakland*** is still pending in the First District Court of Appeal. Last December, Alameda County Superior Court Judge James Lambden issued an order temporarily enjoining enforcement of an Oakland ordinance under which vandalism, drug sales, assault, prostitution, public drinking, graffiti, gambling, and public urination are grounds for revoking any nearby retailer's local permit to sell alcohol. Under the ordinance, Oakland retailers must pay a $600 annual fee to support the Oakland alcohol beverage control operation, and a $200 reinspection fee each time violations are found. Judge Lambden agreed with the industry-backed Coalition that the ordinance is preempted by the ABC Act, and issued a preliminary injunction voiding the ordinance. *[14:2&3 CRLR 119; 14:1 CRLR 89–90, 92]* The city has appealed Judge Lambden's injunction; a decision is expected by late September.

BANKING DEPARTMENT

Superintendent:
James E. Gilleran
(415) 557-3232
Toll-Free Complaint Number:
1-800-622-0620

Pursuant to Financial Code section 99 *et seq.*, the State Banking Department (SBD) administers all laws applicable to corporations engaging in the commercial banking or trust business, including the establishment of state banks and trust

companies; the establishment, operation, relocation, and discontinuance of various types of offices of these entities; and the establishment, operation, relocation, and discontinuance of various types of offices of foreign banks. The Department is authorized to adopt regulations, which are codified in Chapter 1, Title 10 of the California Code of Regulations (CCR).

The superintendent, the chief officer of the Department, is appointed by and holds office at the pleasure of the Governor. The superintendent approves applications for authority to organize and establish a corporation to engage in the commercial banking or trust business. In acting upon the application, the superintendent must consider:

(1) the character, reputation, and financial standing of the organizers or incorporators and their motives in seeking to organize the proposed bank or trust company;

(2) the need for banking or trust facilities in the proposed community;

(3) the ability of the community to support the proposed bank or trust company, considering the competition offered by existing banks or trust companies; the previous banking history of the community; opportunities for profitable use of bank funds as indicated by the average demand for credit; the number of potential depositors; the volume of bank transactions; and the stability, diversity, and size of the businesses and industries of the community. For trust companies, the opportunities for profitable employment of fiduciary services are also considered;

(4) the character, financial responsibility, banking or trust experience, and business qualifications of the proposed officers; and

(5) the character, financial responsibility, business experience and standing of the proposed stockholders and directors.

The superintendent may not approve any application unless he/she determines that the public convenience and advantage will be promoted by the establishment of the proposed bank or trust company; conditions in the locality of the proposed bank or trust company afford reasonable promise of successful operation; the bank is being formed for legitimate purposes; the capital is adequate; the proposed name does not so closely resemble as to cause confusion with the name of any other bank or trust company transacting or which has previously transacted business in the state; and the applicant has complied with all applicable laws.

If the superintendent finds that the proposed bank or trust company has fulfilled all conditions precedent to commencing business, a certificate of authorization to transact business as a bank or trust company will be issued.

The superintendent must also approve all changes in the location of a head office; the establishment, relocation, or discontinuance of branch offices and ATM facilities; and the establishment, discontinuance, or relocation of other places of business. A foreign corporation must obtain a license from the superintendent to engage in the banking or trust business in this state. No one may receive money for transmission to foreign countries or issue money orders or travelers checks unless licensed.

The superintendent examines the condition of all licensees when necessary, but at least once every two years. The Department is coordinating its examinations with the Federal Deposit Insurance Corporation (FDIC) so that every year each agency examines certain licensees. New and problem banks and trust companies are examined each year by both agencies.

The superintendent licenses Business and Industrial Development Corporations which provide financial and management assistance to business firms in California.

Acting as Administrator of Local Agency Security, the superintendent oversees security pools that cover the deposits of money belonging to a local governmental agency in any state or national bank or savings and loan association. All such deposits must be secured by the depository.

MAJOR PROJECTS

SBD Releases Annual Report. On May 31, SBD released its 84th Annual Report, for the calendar year ending on December 31, 1993. Among other things, the report included the following findings:

• The California economy appeared to move in a positive direction in 1993; the state's unemployment rate fell to 8.8% from 10% earlier in the year, while the national average dropped to 6.3% from 7% during the same time period. Job losses continued to occur in the defense, aerospace, and construction industries, while employment in areas such as international trade increased.

• Other economic indicators began to show improvement; for example, retail sales in key urban areas of the state increased by 6%–8%. In 1993, sales of single family homes increased by 3.2% over 1992 figures, and office vacancy rates decreased.

• California's state-chartered banks increased their assets from $103.28 billion to $110.58 billion from December 31, 1990 to December 31, 1993. During the same time period, the average capital-to-asset ratio increased from 7.41% to 8.31%; increased capital is a positive sign for California's consumers.

The report also commented on SBD's involvement with the Conference of State Bank Supervisors (CSBS); CSBS is a professional association of the state officials who charter, examine, regulate, and supervise state-chartered commercial and savings banks and who exercise responsibility over bank holding companies' operations in fifty states and Guam, Puerto Rico, and the Virgin Islands. Superintendent James Gilleran, as Chair of CSBS, traveled to the Far East to meet with bankers and regulators in Taiwan, Japan, Korea, Hong Kong, and China; during the trip, he discussed the opportunities and benefits of establishing a banking entity within California, and distributed the Department's *Guide to Foreign Banking in California*, which includes vital statistics and a section on how to start a banking business in California.

The report also explained that the Department is a self-sustaining agency and is not supported by general tax revenues; SBD programs receive financing from the state's Banking Fund, which collects assessments from state-chartered banks, foreign banking corporations, trust companies, issuers of money orders and travelers' checks, and fees generated by specific services. The assessment rate is adjusted to reflect the actual expenses incurred by SBD and the maintenance of a prudent reserve; the assessment rate for fiscal year 1992–93 was $1.34 per $1,000 of assets.

The report also noted that in 1993, seven state-chartered banks failed in California; the banks were American Bank & Trust Company, The Bank of San Diego, Capital Bank of California, First California Bank, Maritime Bank of California, Premier Bank, and Westside Bank of Southern California. Also, nine federally-chartered banks operating in California failed; they were American Commerce National Bank, Columbia National Bank, First American Capital Bank, N.A., First Western Bank, Mid City Bank, N.A., Olympic National Bank, Palos Verdes National Bank, Western United National Bank, and Wilshire Center Bank, N.A.

According to the report, the performance of California state-chartered banks improved in 1993 as compared to 1992; earnings were up 36% from the previous year and the aggregate return on assets and equity increased 0.44% and 5.3%, respectively; over 70% of state-chartered banks were profitable; state-chartered banks strengthened their capital positions and increased their loan loss reserves; state-chartered banks cut back on construction lending; and total loans and leases were up

a fraction in the last quarter to $66.6 billion.

Conversion to State Charter. On June 17, SBD effected the application of University National Bank & Trust Company to convert to a state-chartered bank under the name of University Bank & Trust Company.

Mergers. On June 24, SBD effected the application approved June 10 to merge Western Industrial National Bank with and into Chino Valley Bank. On June 30, SBD effected an application to merge Pacific Western Bank with and into Comerica Bank-California; on July 6, SBD effected the application filed on June 7, and approved the merger of Pacific Trust Company with and into Comerica Bank-California. On July 18, SBD filed an application to merge United American Bank with and into Guaranty Bank of California. On July 21, SBD effected the application to merge Country National Bank with and into Tri Counties Bank. On July 29, SBD effected an application to merge Bank of Hayward with and into Metro Commerce Bank, N.A. On August 1, SBD effected the application to merge Merced Bank of Commerce with and into Bank of Fresno, and to change the name to Valli-Wide Bank. On August 12, SBD approved the application to merge WestCal National Bank with and into Mid-Peninsula Bank. Also on August 12, SBD approved the application to merge Bank of Anaheim, N.A. with and into California State Bank.

Bank Closings. At the close of business on July 8, the Superintendent of Banks closed and took possession of Pioneer Bank in Fullerton, ordered that it be liquidated, and appointed the FDIC as receiver of the bank. Also on July 8, the FDIC transferred certain assets and deposits of Pioneer to Chino Valley Bank pursuant to a purchase and assumption agreement. On July 11, the FDIC commenced paying in full the insured deposits of Pioneer not acquired by Chino Valley Bank and paid a 50% liquidating dividend on uninsured deposits.

At the close of business on July 15, the Superintendent of Banks closed and took possession of the Bank of San Pedro, ordered that it be liquidated, and appointed the FDIC as receiver of the bank; the FDIC entered into a purchase and assumption agreement with Home Bank, which then assumed all the insured deposits of Bank of San Pedro, except deposits generated by the money-desk operations. Home Bank also purchased certain other assets of the Bank of San Pedro. On July 18, the FDIC commenced payment in full on the insured deposits of Bank of San Pedro not acquired by Home Bank and paid a 50% liquidating dividend on uninsured deposits.

At the close of business on July 29, the Superintendent of Banks closed and took possession of CommerceBank in Newport Beach, ordered that it be liquidated, and appointed the FDIC as receiver of the bank. FDIC entered into a purchase and assumption agreement with California State Bank, which assumed all the insured deposits of CommerceBank, except deposits generated by the money-desk operations; California State Bank also purchased certain other assets of ComerceBank. On August 1, the FDIC commenced payment in full on the insured deposits of Commerce-Bank not acquired by California State Bank, and paid a 67% liquidating dividend on uninsured deposits.

At the close of business on July 29, the Superintendent of Banks closed and took possession of Western Community Bank in Corona, ordered that it be liquidated, and appointed the FDIC as receiver of the bank. FDIC entered into a purchase and assumption agreement with Bank of San Bernardino, which assumed all the insured deposits of Western Community Bank, except deposits generated by the money-desk operations; Bank of San Bernardino also purchased certain other assets of Western Community Bank. On August 1, the FDIC commenced payment in full on the insured deposits of Western Community Bank not acquired by California State Bank, and paid a 50% liquidating dividend on uninsured deposits.

At the close of business on August 12, the Superintendent of Banks closed and took possession of Bank of Newport in Newport Beach, ordered that it be liquidated, and appointed the FDIC as receiver of the bank. FDIC entered into a purchase and assumption agreement with Union Bank, which assumed all the insured deposits of Bank of Newport, and also purchased certain other assets of Bank of Newport. On August 15, the FDIC paid a 50% liquidating dividend on uninsured deposits.

At the close of business on August 26, the Superintendent of Banks closed and took possession of Capital Bank in Downey, ordered that it be liquidated, and appointed the FDIC as receiver of the bank. The FDIC entered into a purchase and assumption agreement with Landmark Bank and, through a separate agreement with Landmark Bank, Commerce National Bank assumed all the insured deposits and purchased certain other assets of Capital Bank. On August 29, the FDIC paid a 70% liquidating dividend on uninsured deposits.

Providence Trust Company Seized. On September 1, the Los Angeles County Superior Court issued a temporary restraining order (TRO) against Providence Trust Company, a Texas corporation operating in Mission Hills, and two affiliated companies—Providence Administration, Inc., a California corporation, and Commonwealth Administration, a California limited partnership. SBD Superintendent Gilleran and the Texas Commissioner of Banking filed the TRO petition after Providence Trust Company was seized and placed in liquidation on August 31 by the Texas Commissioner; the petition charged that Providence Trust Company was conducting business in violation of California law. The court order established the Texas judicial record, including orders of administration, as a judgment in California, enabling the Texas liquidator to preserve corporate and fiduciary assets of the trust company located in California.

Cease and Desist Warnings Issued. On June 3, SBD announced its issuance of a warning to cease and desist from doing business in California without a license to Henry Nunez of Fresno, doing business as Native American Bank of California. On June 10, SBD announced its issuance of a warning to cease and desist from doing business in California without a license Igor Ermilov and Rusab Bank International Association of San Francisco. On June 17, SBD announced its issuance of a warning to cease and desist from doing business in California without a license to Bankers Appraisal & Trust Company. On July 1, SBD announced its issuance of a warning to cease and desist from doing business in California without a license to Elvira G. Gamboa, Janet Pederson, and Ms. Pearlasia, doing business as BANKASIA, A.G., in Big Bend, San Francisco, Indianapolis, and Washington, D.C., and to Asia Pacific Bank, Ltd., doing business in Indianapolis. On July 29, SBD announced its issuance of a warning to cease and desist from doing unauthorized trust business in California without a license to Neil R. Brown, doing business as Citizens Trust Co. in Red Bluff.

LEGISLATION

SB 1333 (Lockyer). Existing law requires banks and other financial institutions to maintain certain information concerning charges and interest on accounts, and to make that information available to the public; existing law also requires banks and other financial institutions to furnish depositors with statements concerning charges and interest on accounts. As amended August 18, this bill authorizes a supervised financial organization,

defined to include banks, savings associations, savings banks, and credit unions, or charge card issuer, as defined, to charge and collect fees pursuant to a consumer credit agreement. This bill also limits the fees that a supervised financial organization may charge its credit cardholder customers under a consumer credit agreement as follows: $7 per monthly billing cycle as a late payment charge on the minimum payment due on a consumer credit agreement that is not paid within five days after the date the payment is due; $10 per monthly billing cycle as a late payment charge on the minimum payment due on a consumer credit agreement that is not paid within ten days after the date the payment is due; $15 per monthly billing cycle as a late payment charge on the minimum payment due that is not paid within fifteen days after the date the payment is due; and $10 on any overlimit charge that exceeds the credit limit by $500 or 120% of the credit limit as set forth in the consumer credit agreement, whichever is less.

The bill also provides that, in lieu of the $7 fee described above, if the consumer has already incurred two such late payment fees during the preceding twelve-month period, a supervised financial institution may charge no more than $10 per billing cycle as a late payment charge on the minimum payment due that is not paid within five days after the date the payment is due. Also, the bill requires that there must be at least 23 days between the monthly billing statement date and the date upon which the minimum payment is due, exclusive of the applicable late payment grace period, if the issuer is charging the $7 fee described above; if the issuer is charging the $10 or $15 late payment described above, there must be at least twenty days between the monthly billing statement date and the date upon which the minimum payment is due, exclusive of the applicable late payment grace period. The late payment grace period must be disclosed in the consumer credit or charge card agreement but need not be disclosed in any monthly or other billing statement. Finally, this bill authorizes supervised financial institutions to assess a finance charge at the rates set forth in the consumer credit agreement on the outstanding balance, which may include any late payment or overlimit fee charged on a prior billing statement.

According to an August 26 analysis by the Senate Rules Committee, SB 1333 represents major concessions by interested consumer credit providers and consumer groups to resolve an issue which has been the subject of intense debate involving three different bills over the course of two years (*see* description of AB 2830 below). SB 1333 is seen as offering credit providers with certainty regarding the validity of the fees they may impose on customers who pay late or exceed their credit limits, while providing California consumers with mandatory late payment grace periods and a reduction in the incidence of future overlimit fees. This bill was signed by the Governor on September 28 (Chapter 1079, Statutes of 1994).

H.R. 3841 (Neal), the Interstate Banking and Branching Efficiency Act of 1994, is federal legislation which allows for interstate banking transactions, mergers, and acquisitions. Among other things, the bill allows for the continuation of certain state powers, and allows state governments to opt out of allowing branching before June 1, 1997. This bill was signed by President Clinton on September 29 (Public Law No. 103-328).

H.R. 3474 (Gonzalez), the Community Development and Regulatory Act of 1994, is federal legislation which is aimed at reducing administrative requirements for insured depository institutions, including S&Ls, consistent with safe banking practices. Among other things, the bill sets stringent disclosure requirements for high-cost mortgages, requires that banks grant loans only if they first determine that a potential borrower can afford to repay the debt, and effectively makes flood insurance mandatory in high-risk areas. This bill was signed by President Clinton on September 23 (Public Law No. 103-325).

The following is a status update on bills reported in detail in CRLR Vol. 14, Nos. 2 & 3 (Spring/Summer 1994) at pages 121–22:

AB 2830 (Brulte), as amended May 9, would have superseded California case-law and permitted supervised financial institutions to charge and collect any fee for late payments, over-the-limit usage, and bounced checks which is stated in their customer credit agreement and is "commercially reasonable," defined as "less than or equal to a comparable fee used by at least one of the ten largest lenders headquartered outside of California providing a similar type of open-end credit." This bill contained the provisions formerly in SB 1145 (Boatwright), which was rejected on a 5–4 vote by the Senate Judiciary Committee in January; AB 2830 died in committee, in favor of SB 1333 (Lockyer), which took a compromise position between the interests of consumers and credit providers (*see above*).

AB 2894 (Caldera), as amended June 7, provides that benefits accruing from the placement in a non-interest bearing account of a commercial bank of those funds shall inure to the broker. This bill was signed by the Governor on July 20 (Chapter 289, Statutes of 1994).

AB 2233 (McDonald), as amended May 12, directs the California Research Bureau of the California State Library to conduct a study of factors affecting credit for small businesses, report to the legislature on or before July 1, 1995, and to include within this report, among other things, the effect of state and federal financial institution laws and regulations on small business loans. This bill was signed by the Governor on September 29 (Chapter 1130, Statutes of 1994).

SB 1542 (Kopp), as amended August 26, would have transferred the Business, Transportation and Housing Agency to the existing Trade and Commerce Agency, established the Office of Business and Housing in the Trade and Commerce Agency to consist of the Department of Alcoholic Beverage Control, the Department of Corporations, the Department of Housing and Community Development, the Department of Real Estate, the Department of Savings and Loan, the State Banking Department, the Stephen P. Teale Data Center, and the California Housing Finance Agency. On September 27, Governor Wilson vetoed this bill, contending that "the reorganization of state government is the prerogative of the executive branch, not the legislative branch of government." Moreover, Wilson claimed that the Secretary of Business, Transportation and Housing is already addressing many of the concerns which prompted the introduction of this legislation.

AB 1756 (Tucker), as amended June 9, 1993, would have prohibited state, city, and county governments from contracting for services with financial institutions with $100 million dollars or more in assets unless those companies file Community Reinvestment Act reports annually with the Treasurer. The Treasurer would have been required to annually submit a report to the legislature and to make summaries available to the public. These reports would have included specified information regarding the nature of the governance of the companies, and their lending and investment practices, with regard to race, ethnicity, gender, and income of the governing boards and of the recipients of loans and contracts from the institutions. This bill died in committee.

The following measures died in committee: **AJR 17 (Costa)**, which would have requested the federal government and the state to conduct a thorough review of banking regulations and revise those that are unnecessarily burdensome and barriers to effective community lending; and **HR 20 (Burton)**, which would have—

among other things—stated the Assembly's request that the State Treasurer consider withdrawing all deposits from Bank of America and investing them in other banks within California.

LITIGATION

On August 18, Judge Thomas Mellon, Jr. dismissed plaintiffs' claims in ***Badie v. Bank of America***, No. 944916 (San Francisco Superior Court). The test case challenges BofA's policy which requires that customer disputes over deposit and credit card accounts be sent to binding arbitration. *[14:2&3 CRLR 123; 13:2&3 CRLR 124]* Among other things, plaintiffs' attorney Patricia Sturdevant argued that BofA failed to clearly inform customers of the policy change and therefore failed to establish a binding contract. Judge Mellon disagreed, stating that "the notice was adequate even though there is no evidence that in general the bank's customers did, in fact, read or understand or appreciate the significance of the [alternative dispute resolution] clause or that they didn't." BofA hailed the ruling, stating that the decision will ensure that customers have access to a speedy, inexpensive, and fair process for resolving complaints. Consumer groups disagree with the opinion, arguing that the bank's true motivation is to eliminate the possibility of class action litigation to enforce consumer protection laws, such as the recent *Wells Fargo* case which disgorged $5 million in unlawful late and overlimit fees. *[12:1 CRLR 111]* Consumers also argue that BofA's policy forces them to use an unfamiliar forum that may deprive them of a fair hearing; typical complaints regarding arbitration concern the limited discovery options and the fact that no written opinion is issued. Although plaintiffs are expected to appeal, they have not announced that decision at this writing.

On June 8, the California Supreme Court denied review in ***California Grocers Association, Inc., v. Bank of America***, 22 Cal. App. 4th 205 (Feb. 4, 1994), leaving intact the First District Court of Appeal's holding that the $3 deposited item return (DIR) fee charged by BofA to the California Grocers Association (CGA) is not unconscionable and does not violate the implied covenant of good faith and fair dealing, and that the injunction issued by the trial court which required BofA to lower its DIR fee to not more than $1.73 for a ten-year period was an improper use of the unconscionability doctrine and an inappropriate exercise of judicial authority. *[14:2&3 CRLR 123; 14:1 CRLR 96]*

DEPARTMENT OF CORPORATIONS

Commissioner: Gary S. Mendoza
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(213) 736-2741

The Department of Corporations (DOC) is a part of the cabinet-level Business, Transportation and Housing Agency and is empowered under section 25600 of the California Code of Corporations. The Commissioner of Corporations, appointed by the Governor, oversees and administers the duties and responsibilities of the Department. The rules promulgated by the Department are set forth in Division 3, Title 10 of the California Code of Regulations (CCR).

The Department administers several major statutes. The most important is the Corporate Securities Act of 1968, which requires the "qualification" of all securities sold in California. "Securities" are defined quite broadly, and may include business opportunities in addition to the traditional stocks and bonds. Many securities may be "qualified" through compliance with the Federal Securities Acts of 1933, 1934, and 1940. If the securities are not under federal qualification, the commissioner must issue a "permit" for their sale in California.

The commissioner may issue a "stop order" regarding sales or revoke or suspend permits if in the "public interest" or if the plan of business underlying the securities is not "fair, just or equitable."

The commissioner may refuse to grant a permit unless the securities are properly and publicly offered under the federal securities statutes. A suspension or stop order gives rise to Administrative Procedure Act notice and hearing rights. The commissioner may require that records be kept by all securities issuers, may inspect those records, and may require that a prospectus or proxy statement be given to each potential buyer unless the seller is proceeding under federal law.

The commissioner also licenses agents, broker-dealers, and investment advisors. Those brokers and advisors without a place of business in the state and operating under federal law are exempt. Deception, fraud, or violation of any regulation of the commissioner is cause for license suspension of up to one year or revocation.

The commissioner also has the authority to suspend trading in any securities by summary proceeding and to require securities distributors or underwriters to file all advertising for sale of securities with the Department before publication. The commissioner has particularly broad civil investigative discovery powers; he/she can compel the deposition of witnesses and require production of documents. Witnesses so compelled may be granted automatic immunity from criminal prosecution.

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

The commissioner also enforces a group of more specific statutes involving similar kinds of powers: the Personal Property Brokers Law (Financial Code section 22000 *et seq.*), Franchise Investment Law (Corporations Code section 31000 *et seq.*), Security Owners Protection Law (Corporations Code section 27000 *et seq.*), California Commodity Law of 1990 (Corporations Code section 29500 *et seq.*), California Credit Union Law (Financial Code section 14000 *et seq.*), Industrial Loan Law (Financial Code section 18000 *et seq.*), Escrow Law (Financial Code section 17000 *et seq.*), Check Sellers, Bill Payers and Proraters Law (Financial Code section 12000 *et seq.*), Securities Depository Law (Financial Code section 30000 *et seq.*), Consumer Finance Lenders Law (Financial Code section 24000 *et seq.*), Commercial Finance Lenders Law (Financial Code section 26000 *et seq.*), Knox-Keene Health Care Service Plan Act of 1975 (Health and Safety Code section 1340 *et seq.*), and the Workers' Compensation Health Care Provider Organization Act of 1993 (Labor Code section 5150 *et seq.*).

MAJOR PROJECTS

Public Interest Coalition Requests Rulemaking to Guide DOC Valuations in Nonprofit Conversions. On September 12, Consumers Union (CU) filed an administrative petition with DOC; the petition—filed on behalf of CU, the Children's Advocacy Institute, the Congress of California Seniors, Heath Access, Latino Issues Forum, the California Black Health Network, and nineteen other concerned nonprofit organizations—requests that DOC adopt and implement regulations governing the conversion or restructuring of a nonprofit entity to a for-profit entity, and challenges the actions taken by DOC regarding the recent conversion of Blue Cross of California, a nonprofit health maintenance organization (HMO), into a for-profit organization.

In an August report entitled *Blue Cross' $2.5 Billion Dollar Grab*, CU explained that, in order to encourage positive charitable services, California law provides that nonprofit organizations whose