DEPARTMENT OF REAL ESTATE

Commissioner: Clark E. Wallace
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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 (as of September 1992, 260,133 salespersons and 115,613 brokers, including corporate officers) and subdivisions.

License examinations require a fee of $25 per salesperson applicant and $50 per broker applicant. Exam passage rates averaged 56% for salespersons and 48% for brokers (including retakes) during the 1991–92 fiscal year. License fees for salespersons and brokers are $120 and $165, 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 publishes three regular bulletins. The *Real Estate Bulletin* is circulated quarterly as an educational service to all current licensees. The *Bulletin* 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. The *Mortgage Loan Bulletin* is published twice yearly as an educational service to licensees engaged in mortgage lending activities. Finally, the *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 projects a 1992 total membership of 126,000. 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.

MAJOR PROJECTS

Residential Property Disclosure Requirements: How Much is Enough? California is one of only ten states in the nation to statutorily require sellers of residential property to inform prospective buyers of any defects in the property; as many as twenty other states are expected to consider adopting similar disclosure requirements during upcoming legislative sessions. Specifically, California Civil Code section 1102 *et seq.* requires the transferor of specified real property to deliver to the prospective transferee a written statement disclosing specified defects, either as soon as practicable before transfer of title in the case of a sale, or as soon as practicable before execution of the contract in the case of a transfer by a real property sales contract, a lease together with an option to purchase, or a ground lease coupled with improvements.

The required format of the Real Estate Transfer Disclosure Statement is set forth in Civil Code section 1102.6. Among other things, the form requires the transferor to indicate whether specified items—such as an oven, dishwasher, garage, and fire alarm—are included on the subject property; whether, to the best of the seller's knowledge, any of those items are not in operating condition; whether the seller is aware of any significant defects or malfunctions in specified items, such as the ceiling, roof, windows, the foundation, and plumbing; whether substances, materials, or products which may be an environmental hazard—such as asbestos, formaldehyde, radon gas, lead-based paint, fuel or chemical storage tanks, and contaminated soil or water—are on the subject property; whether there are any encroachments, easements, or similar matters that may affect the transferor's interest in the subject property; whether any room additions, structural modifications, or other alterations or repairs were made without necessary permits or not in compliance with building codes; and whether the transferor is aware of any flooding, draining, or grading problems, neighborhood noise problems, or other nuisances.

If the seller is represented by an agent in the transaction, section 1102.6 requires the agent to sign a statement indicating his/her comments regarding the disclosure statement, based on his/her inquiry of the seller as to the condition of the property and based on a reasonably competent and diligent visual inspection of the accessible areas of the property in conjunction with that inquiry. The form also states that buyers and sellers may wish to obtain professional advice and/or inspections of the property and to provide for appropriate provisions in a contract between buyer and seller with respect to any advice, inspections, or defects.

In a November 16 *Los Angeles Times* article, Chip Kunde of the National Association of Realtors opined that California's disclosure law is perhaps the most stringent in existence. However, many critics contend that sellers are able to cover up potentially serious defects by either indicating that they are not aware of them or that they did not consider them to be "significant" defects or malfunctions. The *Times* article provided the following examples of "gray areas" which some realtors believe they are obligated to disclose and others do not: the presence of a mental health facility or drug rehabilitation clinic in the neighborhood; high traffic volume at certain times of the day, such

as the morning or evening rush hour; nearby schools, especially ones for "problem" students; proposed street or transit programs that could affect traffic; a rising local crime rate; proposals that could increase noise levels in the neighborhood; proposed legislation or bond measures that, if passed, could increase property taxes; and a leaky roof or other defect that has caused problems in the past but has been remedied.

The legislature has provided some assistance in determining whether a specific fact must be disclosed. For example, Civil Code section 1710.2 provides that no cause of action arises against an owner of real property or his/her agent, or any agent of a transferee of real property, for the failure to disclose to the transferee the occurrence of an occupant's death upon the real property or the manner of death where the death has occurred more than three years prior to the date the transferee offers to purchase, lease, or rent the real property, or that an occupant of that property was afflicted with or died from Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus, which causes acquired immunodeficiency syndrome (AIDS); however, nothing in section 1710.2 immunizes an owner or his/her agent from making an intentional misrepresentation in response to a direct inquiry from a transferee or a prospective transferee of real property, concerning deaths on the real property.

Top Consumer Advocate Takes on Real Estate Industry. In order to ensure that home buyers are treated fairly by real estate agents, consumer advocate Ralph Nader has turned his attention to correcting problems within the real estate industry. While the recent trend toward "buyer brokerage" (which involves broker representation of the purchaser in a residential real estate transaction, rather than the traditional, exclusive representation of sellers) has helped protect some home purchasers, Nader objects to the inherent conflict of interest present when the buyer's broker and the selling agent split the commission paid by the seller—the higher the selling price, the higher that commission. Also, Nader is concerned about dual agency, occurring when a single agent represents both buyer and seller in a transaction, or when both the buyer's and seller's agents work for the same firm; he doubts whether either buyers or sellers can expect complete confidentiality and undiluted loyalty in such situations.

Nader will be encouraging the Clinton administration to actively enforce federal anti-kickback rules governing real estate agents, title insurance companies, and settlement agents. Also, Nader noted that state agencies like DRE must aggressively enforce state disclosure laws regarding home defects and representations by real estate agents; state consumer agencies should help organize independent home buyers' and owners' advocacy and service groups to enable consumers to obtain discounts on insurance, home repairs, and other services.

DRE Rulemaking. At this writing, DRE is still reviewing comments made on its proposal to adopt new sections 2814, 2815, 2817, 2835, and 2847.3, and amend sections 2715, 2742, 2770.1, 2792.16, 2792.17, 2792.20, 2792.22, 2792.23, 2800, 2806, and 2970, Chapter 6, Title 10 of the CCR. Among other things, the proposals would specify the current standards, including disclosure requirements, applicable to qualified resort vacation club projects; describe certain short-term deposits which do not constitute commingling within the meaning of Business and Professions Code section 10176(e); require any corporation which is licensed under the authority of Business and Professions Code section 10211 to remain at all times in good legal standing with the Office of the Secretary of State; and specify acceptable terms for use by real estate brokers in advertising in California for a loan secured by real property. *[12:2&3 CRLR 155]* At this writing, DRE anticipates forwarding the rulemaking file to the Office of Administrative Law for review and approval sometime in January.

LITIGATION

In ***Huijers v. DeMarrais***, 11 Cal. App. 4th 676 (Dec. 9, 1992), the Second District Court of Appeal reviewed Civil Code section 2373 *et seq.*, which provides that a real estate agent representing both a buyer and seller in a residential real property transaction must provide a disclosure statement to both buyer and seller which lists the duties of the seller's agent, the buyer's agent, and advises that a real estate agent may represent both seller and buyer in a transaction; specifically, section 2374(a) requires a real estate agent seeking to list residential property for sale to provide the seller with the agency relationship disclosure form prior to entering into a listing agreement. The dispute in issue arose after Leendert Huijers retained Justine Larson, a real estate broker, to locate property suitable for use as a nursery. Larson in turn contacted Gordon and George Ann DeMarrais, who owned a parcel of property in Lompoc; part of the parcel contained a residence, and the remainder was used as a nursery. The DeMarraises told Larson they were willing to talk about selling their land, and met with her in August 1988. At that meeting, Larson told the DeMarraises that she had a client who was interested in buying their property; as a result, the DeMarraises signed an exclusive right to sell listing agreement, with the listing price at $325,000. Larson told them that under the agreement they would owe her a 6% commission if she found a buyer who would pay the listing price. However, Larson did not provide the DeMarraises with an agency disclosure statement prior to or at the time the listing agreement was signed.

Before they had received any offer from Huijers, the DeMarraises told Larson they wanted to increase the asking price from $325,000 to $375,000; Larson did not agree to do so. Huijers had been planning to offer $275,000; after learning of the DeMarraises' desire to raise the asking price, however, he instructed Larson to prepare an offer that met the $325,000 listing price and terms. Shortly thereafter, Huijers, Larson, and the DeMarraises met at the DeMarrais home, at which time the DeMarraises agreed to listen to Huijers' offer at $325,000. At one point early in the negotiations, one of the DeMarraises asked why they could not raise the price; Huijers responded it was his understanding of California law that once a broker has found a ready, willing, and able buyer, she has done her job, and the DeMarraises would have to pay her commission. Following an eight-hour negotiation, the DeMarraises accepted Huijers' offer, seemingly under the belief that they were liable for Larson's commission whether or not they accepted the offer. When the DeMarraises were signing the purchase contract, Larson provided them with the agency disclosure statement which was required to be given to them prior to their signing the listing agreement.

The morning after the contract was signed, the DeMarraises' attorney called Huijers and Larson and told them the DeMarraises had rescinded. Huijers filed a complaint against the DeMarraises for specific performance and damages; the DeMarraises cross-complained against Huijers and Larson for fraud, negligent misrepresentation, breach of fiduciary duty, rescission, and declaratory relief. After a nonjury trial, the court found Huijers' statement concerning Larson's right to a commission was a correct statement of law; at no time did Huijers or Larson make any misrepresentation in order to induce the DeMarraises to sign the purchase agreement; and the contract is valid and specific performance was the proper remedy. The trial court also

awarded Huijers $76,300 in damages and $134,996.72 in attorneys' fees and costs.

On appeal, the DeMarraises contended that Larson's failure to provide them with an agency relationship disclosure statement prior to entering into the listing agreement made the listing agreement voidable; they also argued that their signatures on the sales contract were obtained through the misrepresentation that they were liable for Larson's commission even if they did not sign the contract. The court noted that for residential real estate sales, Civil Code section 2373 *et seq.* requires real estate agents to make certain disclosures about the agent's duties to the parties and about which party or parties to the transaction the agent is representing, and found that there "is no dispute that Larson failed to provide the DeMarraises with the disclosure form required by section 2375 prior to entering into the listing agreement."

However, Huijers contended that Larson was in substantial compliance with the law by providing the disclosure form at the time the purchase contract was signed. The Second District noted that substantial compliance with a statute is sufficient unless the intent of the statute may be served only by demanding strict compliance. According to the court, the objective of the statute requiring disclosure prior to signing the listing agreement is to allow the seller to make a more intelligent decision about whether to sign, and concluded that the full measure of protection that the legislature intended to provide to the seller is not achieved if the listing agent fails to provide the disclosure form prior to entering into the listing agreement.

Finding that Larson failed to substantially comply with the disclosure statute, the court reviewed the remedies available to the DeMarraises. The court noted that although there is no mention of any specific remedies in the relevant Civil Code provisions, section 2382 provides that "[n]othing in this article shall be construed to either diminish the duty of disclosure owed buyers and sellers by agents and their associate licensees, subagents, and employees or to relieve agents and their associate licensees, subagents, and employees from liability for their conduct in connection with acts governed by this article or for any breach of a fiduciary duty or a duty of disclosure." Thus, the court found that the legislative scheme added statutory duties to the common law duties of disclosure, while leaving common law remedies for failure to disclose intact; and noted that the remedy for a real estate agent's breach of a duty to disclose a dual representation of both buyer and seller is that the principal is not liable to pay the agent's commission, and the principal may avoid the transaction.

In support of its holding, the Second District expressed doubt that the legislature intended the remedy for violation of the statute to be confined to discipline by the Real Estate Commissioner, noting that such a statute providing exclusively for discipline against a licensee would ordinarily be found in the Business and Professions Code and not the Civil Code. Thus, the court found that Larson's failure to disclose prior to entering into the listing agreement relieved the DeMarraises from the obligation to pay her commission, thus rendering Huijers' statement regarding the DeMarraises' obligation to pay Larson's commission incorrect. However, the court also found that the failure to disclose does not in itself relieve the DeMarraises from their obligation under the purchase contract, and remanded this issue to the trial court to determine whether Huijers' misstatement regarding the DeMarraises' obligation to pay the commission constituted grounds for rescission.

In conclusion, the Second District cautioned that the failure to provide a disclosure form will not always result in a voidable listing agreement, noting that a seller who has sufficient knowledge concerning the information contained in the disclosure form may still be held to the listing agreement even though he/she did not receive the disclosure form.

DEPARTMENT OF SAVINGS AND LOAN

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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 holds no regularly scheduled meetings, except when required by the Administrative Procedure Act. 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).

MAJOR PROJECTS

OTS Director Resigns. In December, T. Timothy Ryan, who presided over the seizure of more than 700 failed thrifts, resigned as director of the federal Office of Thrift Supervision (OTS) and a director of the Resolution Trust Corporation (RTC). Prior to his 1990 appointment by President Bush, Ryan was a partner in the law firm Reed Smith Shaw and McClay; he also served as a solicitor for the U.S. Department of Labor from 1981 to 1983. Ryan is expected to pursue employment in the private sector. OTS deputy director Jonathan Fiechter was named to replace Ryan until President-elect Bill Clinton names his successor; Fiechter has been at OTS since 1987.

OTS Raises Assessment Fees. In December, OTS announced that S&Ls will pay an additional 4% in assessment fees beginning in January, due to a significant decline in both the number and holdings of thrifts from which OTS derives much of its revenue.

Although OTS has continued to reduce its operating expenses since 1990, it contends that additional funds are still needed to meet its projected 1993 budget of $195 million; despite the fact that OTS is proposing to spend 34% less during 1993 than it did in 1990, critics of the fee hike argue that the agency should be cutting its costs and streamlining rather than raising fees. OTS responded to such comments by noting that it will continue its efforts to streamline and downsize operations, but not at the expense of effective regulation of the thrift industry.

Thrifts Switch Charters to Avoid Regulation Costs. Across the nation, many thrifts are switching to savings bank charters to avoid the fees associated with regulation by OTS. In the last eighteen months, 91 state and federal thrifts—about 5% of all private thrifts—have switched to savings bank charters. Most of the conversions have occurred in the six states that recently passed laws allowing such conversions. The fees paid to switch to bank charters are quickly recouped because an S&L with $100 million in assets saves about $25,000 in annual supervisory and examination fees. Former OTS Director Timothy Ryan questioned the ability of state regulators to monitor S&Ls as closely as federal regulators. According to Ryan, "We were told by Congress in 1989 to examine annually. That's not going to happen" under state regulation. A state or federal S&L must petition both the OTS and the state regulator to convert to a savings bank charter; typically, only the most stable S&Ls are permitted to convert.

Federal Officials Release S&L Prosecution Figures. On November 23, the U.S. Department of Justice (DOJ) released