Carleton then brought this professional negligence action, alleging in substance that Tortosa "failed to exercise reasonable care and skill in undertaking her duties as a broker" by neglecting to warn him that his transactions could have adverse tax consequences and by failing to structure the transactions as tax-deferred exchanges. Tortosa filed a motion for summary judgment on the ground "plaintiff cannot establish duty or breach of duty as a matter of law." The trial court granted the motion, holding that the nature of the fiduciary relationship between Carleton and Tortosa did not include a separate responsibility on the part of Tortosa to advise Carleton on tax matters, but rather specifically excluded the provision of tax advice from the scope of Tortosa's duty to Carleton.

On appeal, the Third District affirmed. Among other things, the court rejected Carleton's claim that the use of "boilerplate disclaimers" in the listing agreements, disclosure forms, and purchase contracts stating that a real estate broker is not responsible for giving tax advice did not relieve Tortosa of the duty to warn Carleton that his proposed transactions had substantial tax consequences. The court disagreed, finding that the documents Carleton signed explicitly informed him that he should consult an appropriate professional if he desired legal or tax advice; advised him to carefully read all agreements to assure that they adequately express his understanding of the transaction; and reiterated that a real estate agent is a person qualified to advise about real estate, and that if legal or tax advice is desired, he should consult a competent professional. According to the court, these documents negated Carleton's claim of duty.

In response to Carleton's claim that the "boilerplate" language in his contracts stating that Tortosa was not responsible for giving tax advice was adhesive and thus should be disregarded, the court found that even if a contract is adhesive in nature, it remains fully enforceable unless (1) all or part of the contract falls outside the reasonable expectations of the weaker party, or (2) it is unduly oppressive or unconscionable under applicable principles of equity. Referring to Civil Code section 2375, the court noted that the legislature determined that buyers and sellers of real estate should rely on professionals other than real estate brokers for tax advice; accordingly, the court found that any expectation on the part of Carleton that Tortosa would provide such information or "issue-spot" tax problems was not reasonable. Moreover, the court held that none of the contractual terms were either "unduly oppressive" or "unconscionable."

Carleton alternatively contended that any contractual provision relieving real estate brokers of a duty to recognize and alert a client to the potential tax consequences of a transaction violates public policy. According to Carleton, "current real estate practice" dictates that a real estate professional has a duty to recognize tax consequences of a transaction and to structure tax-deferred exchanges when appropriate. Carleton further claimed that, because brokers hold themselves out to the public as possessing special knowledge in real estate transactions and "given the evolution of the real estate profession into new and emerging fields," public policy requires brokers to have a duty to recognize and advise clients of the tax consequences of their transactions and of the need for tax-deferred exchanges. According to the court, this contention fails because the legislature has determined that public policy expects sellers and buyers to obtain tax advice from professionals other than real estate brokers. Civil Code section 2375 mandates that buyers and sellers be told: "A real estate agent is a person qualified to advise about real estate. If legal or tax advice is desired, consult a competent professional." In light of this provision, the court "decline[d] to conclude that public policy requires real estate brokers to provide tax advice when the Legislature has determined that such advice should be sought from other competent professionals."

DEPARTMENT OF SAVINGS AND LOAN

Commissioner:
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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

LAO Recommends Major Changes to DSL. In its *Analysis of the 1993–94 Budget Bill*, the Legislative Analyst's Office (LAO) noted that the Wilson administration has proposed total expenditures of $691,000 in 1993–94 for DSL; this is $2.3 million, or 77%, less than estimated current-year expenditures. According to LAO, the proposed budget reflects the administration's decision to reduce the regulatory and administrative functions of DSL by downsizing it from a department to office status within the Business, Transportation and Housing Agency, and reducing authorized staff from 38 positions in 1992–93 to three positions in 1993–94. LAO explained that the Administration's decision is based in part on the 1989 enactment of the federal Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), which had the impact of significantly reducing the number of state-chartered savings and loans; the number of state-chartered associations has declined from 130 in 1989–90 to 27 at the end of 1992. LAO also noted that the decline in assessment revenues (which are determined on the basis of an association's asset size) which support DSL's activities has been even more significant, as a proportionally greater number of the large associations have ceased to be state-chartered; the current assessment roll consists primarily of small associations that pay only the minimum assessment of $20,000 per year.

LAO also noted that a state charter no longer confers a significant benefit because FIRREA removed most economic advantages of being licensed by the state. According to LAO, there is no need and no benefit for the state to continue a regulatory program that has been, for all practical purposes, supplanted by the federal government; under FIRREA, federal regulators examine all S&Ls—including those that are state-chartered—for compliance with all applicable federal laws and regulations. These examinations make the state's examination virtually duplicative of, and secondary in importance to, federal examinations.

In light of these facts, LAO recommended that legislation be enacted by July 1, to become effective January 1, 1994, terminating the state-chartered savings and loan association program; existing state-chartered S&Ls could convert to another charter authorized to operate in California—such as federally-chartered S&Ls, state-chartered thrifts, or state- or federally-chartered banks.

However, if the legislature decides to continue the state-charter program, LAO recommended that DSL inform the legislature on how the proposed budgetary reductions will be implemented, and how its proposal will affect the state's ability to protect consumers' savings and investments and regulate state-chartered associations. According to LAO, the Wilson administration has not provided any information to assure the legislature that DSL will be able to meet its obligations if the proposed reductions are made. For example, the budget does not identify what changes in DSL's regulatory functions would be needed as a result of the reduced staffing level, or how the reduced effort may affect both the level of risk for consumers and the potential liability of the state.

Also in its *Analysis of the 1993–94 Budget Bill*, LAO noted that California's regulation of financial services programs (including investments, checking, savings, lending, accounting, and other similar financial operations) for individuals and institutions in the business of lending money and providing related financial services is scattered among DSL, the State Banking Department (SBD), the Department of Corporations (DOC), and the Department of Real Estate (DRE). LAO explained that prior to 1982, state-chartered lenders were restricted by law to providing specific lending activities and related financial services; thus, the state's regulatory framework reflected the segmented nature of the lenders and the services they provided. However, in 1982 and 1983, the federal and state governments deregulated the lending and related financial services industry, virtually eliminating the functional differences which previously existed among lenders. *[10:4 CRLR 1]* Despite the changes brought about by deregulation, the state's regulatory programs have not been reorganized, and remain scattered among the four departments.

According to LAO, the fragmented regulation limits the effectiveness of the departments by hindering timely and effective coordination of regulatory activities; LAO believes that consolidation of the financial regulatory programs into one department would improve regulatory coordination and result in the more effective and efficient administration of the programs. For example, LAO states that consolidation would promote close coordination and sharing of regulatory information on a timely basis; result in a more uniform application and enforcement of regulatory laws; provide consistency in program management as well as policy development and interpretation; allow for effective and efficient use of staff as regulatory workload fluctuates among the programs under the department; reduce management and administrative services staff; and provide businesses and consumers with a "one-stop" department to deal with.

Accordingly, LAO recommended that legislation be enacted to consolidate DSL, SBD, DOC's lending and fiduciary-related programs (except escrow agents), and DRE's mortgage broker-salesperson program into a new Department of Financial Services. LAO contended that this consolidation would result in combined annual administrative savings of about $500,000 to various special funds in the proposed 1993–94 budget, thus resulting in lower costs to licensees and consumers of financial services.

At this writing, neither of LAO's recommendations have been incorporated into legislation.

S&L Clean-up Update. On May 13, the U.S. Senate approved a final funding bill to complete the S&L clean-up and appropriated $18.3 billion to the Resolution Trust Corporation (RTC) and $8.5 billion to the Savings Association Insurance Fund (SAIF); the bill would also keep available an authorization of an additional $7.5 billion for further appropriations to the SAIF, if necessary. Legislation currently pending on the House floor would make available the same amount of money—$34.3 billion—to the RTC and SAIF.

Other recent events regarding the S&L crisis include the following:

• On May 18, the Congressional Budget Office (CBO) estimated that the cost of the S&L bailout will total $180 billion on a present-value basis, paid almost entirely by taxpayers; CBO also noted that this total cost could vary by as much as $15 billion in either direction. According to the CBO, a substantial portion of the total cost was the fault of inefficient government policies and a major regulatory failure.

• Adding insult to the taxpayers' financial injury resulting from the S&L crisis is a finding that over 100 S&L executives who agreed to pay fines in lieu of serving long prison terms have repaid less than a half-penny per dollar owed. In February, the Associated Press (AP) obtained a Justice Department document indicating that the former executives had paid only $577,540 of the $133.8 million they agreed to pay. For example, the S&L offenders who agreed to the five largest fines imposed are E. Frank Neisch ($19.9 million), E. Michael Sheheen ($11.8 million), Gerald Cernero ($10.7 million), Larry Frankenhous ($9.9 million), and James Cruce ($8 million); the AP reported that all of these offenders have yet to pay a single penny. According to the AP, federal prosecutors agree to plea bargains with fines to avoid costly trials; the end result is that the average prison term for an S&L convict is 21 months, seven months less than the time served by the average car thief convicted in federal court.

• In February, RTC chief executive officer Albert Casey announced his retirement. In March, the Clinton administration announced that while a permanent replacement is being selected, Treasury Department Deputy Secretary Roger Altman will serve as temporary CEO.

LEGISLATION

SB 202 (Deddeh). Existing law provides that no savings association or subsidiary thereof, without the prior written consent of the Savings and Loan Commissioner, shall enter into certain specified transactions. As introduced February 4, this bill would instead provide that no savings association or subsidiary thereof, without the prior written consent of the Commissioner, and except as otherwise permitted by law, shall enter into those specified transactions. *[S. BC&IT]*

SB 161 (Deddeh). Existing law requires financial institutions to furnish depositors, if not physically present at the time of the initial deposit into an account, with a statement concerning charges and interest not later than 10 days after the date of the initial deposit. As introduced February 1, this bill would instead require the statement to be furnished not later than seven business days after the date of the initial deposit. With respect to an increase in the rate of account charges or a variance in the interest rate, the bill would reduce the notice time from fifteen days prior to date of change or variance to seven business days.

The bill would also make technical, clarifying changes in provisions specifying the maximum percentage of assets that an association chartered by this state under the Savings Association Law, including a savings bank, may invest in specified loans made for agricultural, business, commercial, or corporate purposes. *[S. BC&IT]*

AB 320 (Burton). Existing law does not prescribe interest rates for bank credit card accounts, but prohibits defined usurious interest rates for any loan or forbearance made by a nonexempt lender. As introduced February 4, this bill would prescribe a maximum interest rate or finance charge which could be charged on credit card accounts issued by a bank, savings association, or credit union. Except as otherwise provided, the interest rate or finance charge assessed with respect to any account for which charges may be added by the use of a bank credit card shall not exceed an annual rate equal to 10% plus the savings account interest rate paid by the financial institution issuing the card. *[A. F&I]*

AB 1995 (Archie-Hudson), as introduced March 5, would authorize state-chartered banks, savings associations, and credit unions to restructure a loan or extend credit terms and obligations to minority or women business enterprises in accordance with safe and sound financial operations. Any loan so restructured or extended shall not be classified as delinquent, and the financial institution shall not be required to increase its reserves, or be subject to adverse regulatory action because of that loan. *[A. F&I]*

AB 1756 (Tucker). Existing law does not prohibit governmental agencies from contracting with financial institutions that do not report on specified topics relating generally to community reinvestment. As amended May 17, this bill would prohibit state, city, and county governments from contracting for services with financial institutions with $100 million dollars or more in assets unless those companies file reports annually with the Treasurer; the Treasurer would be required to annually submit a report to the legislature and to make summaries available to the public. These reports would include 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. *[A. CPGE&ED]*

LITIGATION

In **People, et al. v. Highland Federal Savings and Loan, et al.**, No. B058411 (Jan. 26, 1993), plaintiffs—the People of the State of California and numerous individuals in their individual capacity and as guardians ad litem and on behalf of a class who resided in one or more of the subject slum Los Angeles City buildings—appealed from the judgment of dismissal stemming from the trial court's finding that their complaint failed to state a cause of action for Racketeer Influenced and Corrupt Organizations Act (RICO) violations and fraud, among other things; the trial court also found that the entire complaint, except the RICO cause of action, was barred by the doctrine of federal preemption. On January 26, the Second District Court of Appeal reversed, finding that the trial court erred both in finding that no cause of action was stated and that the doctrine of federal preemption barred the state claims.

Highland, a federally chartered savings and loan institution, specializes in making loans to owners of residential properties, including slum buildings, in the greater Los Angeles area. Plaintiffs are seeking to hold the Highland defendants responsible for the continuing slum conditions of certain buildings; in addition to monetary damages and penalties, the complaint seeks injunctive relief. The thrust of the complaint charges Highland with engaging in unfair business practices and fraud for the purpose of maximizing its profits. This goal was allegedly achieved by creating a situation where rents, which were collectable only if the units complied with the habitability laws, were generated without the expenditure of sums necessary to ensure such compliance; thus, the slum nature of the buildings was perpetuated and the tenant plaintiffs were defrauded of their right to a habitable dwelling.

The main issues addressed by the Second District on appeal were whether state claims against Highland, a federal savings and loan association, are either expressly or impliedly preempted by the Federal Home Owners' Loan Act of 1933 (HOLA) and its implementing regulations, and whether the complaint states a cause of action against the Highland defendants for RICO violations or fraud. On the preemption issue, the court found that plaintiffs' action is neither expressly or impliedly barred by federal law. Among other things, the court found that no provision of HOLA expressly preempts the statutory action by the People for unfair business practices and the causes of action by the tenant plaintiffs for fraud, RICO violations, or other such claims. However, the court did find that two of plaintiffs' specific allegations are preempted, as they concern matters which are expressly preempted by HOLA and/or regulations implementing that Act. Accordingly, the court directed that on remand, the trial court strike such allegations and corresponding prayer requests.

The Second District also rejected defendants' argument that the subject action is barred by the doctrine of implied preemption; defendants contended that federal law has impliedly "occupied the field" of federal savings and loan associations with regard to their operations and functions. The Second District stated that it must determine whether the state causes of action are impliedly barred by federal preemption by scrutinizing them to see if they are directly "purporting to address the subject of the operations" of Highland, a federal savings association. The state causes of action at issue are grounded in Highland's wrongful course of conduct which enables slum conditions in the subject buildings to be perpetuated to the detriment of the health, safety, and welfare of the people of California and, in particular, the tenant plaintiffs. The essence of those causes of action concerns the right of the state to prohibit, and punish Highland for its part in, the conspiracy to maintain dwellings in an uninhabitable condition. The court stated that HOLA and its concomitant regulations contain no statutory provision or regulation which even purports to address the subject of minimum housing standards; any impact or intrusion on the "operations" of Highland is minimal and indirect. Therefore, the court held that plaintiffs' action is not impliedly barred by federal preemption pursuant to HOLA.

As to whether plaintiffs stated a cause of action for RICO violations and fraud, the court noted that a RICO violation is comprised of "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Defendants claimed plaintiffs' allegations failed to satisfy the "enterprise" and "racketeering activity" components. On the "enterprise" issue, the court noted that plaintiffs identified several individual and institutional defendants and alleged their participation in "an informal ongoing organization consisting of a group of entities associated together for a common purpose of engaging in a course of conduct and functioning as a continuing unit....The complaint essentially alleges that the...defendants engaged in a continuing scheme to defraud the tenant plaintiffs by secretly manipulating the record owner defendants and by actively assisting such owners to perpetuate the buildings in an uninhabitable condition in violation of the law." With regard to "racketeering activity," the court found that plaintiffs adequately pleaded facts to support the predicate racketeering act of mail fraud. Thus, the court ruled that plaintiffs stated a RICO cause of action. Upon further review of the complaint, the court found that plaintiffs also stated a cause of action for fraud; the Second District reversed and remanded to the trial court for further proceedings.

On April 22, the California Supreme Court denied Highland's petition for review, and ordered that the Second District's opinion be published in the official reports.

On January 6, former savings and loan boss Charles Keating and his son, Charles Keating III, were convicted by a federal jury on charges of racketeering, bank and securities fraud, conspiracy, and the interstate transportation of stolen goods. *[13:1 CRLR 90]* The elder Keating, who is already serving a ten-year state sentence for defrauding 25,000 investors out of $268 million by persuading them to buy worthless junk bonds instead of government-insured certificates, was found guilty on all 73 counts brought against him; his son was found guilty of all 64 counts brought against him. Although sentencing was set for March 15, that date has been postponed; at this writing, sentencing is expected to take place in July.

DEPARTMENT OF INDUSTRIAL RELATIONS

CAL-OSHA

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California's Occupational Safety and Health Administration (Cal-OSHA) is part of the cabinet-level Department of Industrial Relations (DIR). The agency administers California's programs ensuring the safety and health of California workers.

Cal-OSHA was created by statute in October 1973 and its authority is outlined in Labor Code sections 140-49. It is approved and monitored by, and receives some funding from, the federal OSHA. Cal-OSHA's regulations are codified in Titles 8, 24, and 26 of the California Code of Regulations (CCR).

The Occupational Safety and Health Standards Board (OSB) is a quasi-legislative body empowered to adopt, review, amend, and repeal health and safety orders which affect California employers and employees. Under section 6 of the Federal Occupational Safety and Health Act of 1970, California's safety and health standards must be at least as effective as the federal standards within six months of the adoption of a given federal standard. Current procedures require justification for the adoption of standards more stringent than the federal standards. In addition, OSB may grant interim or permanent variances from occupational safety and health standards to employers who can show that an alternative process would provide equal or superior safety to their employees.

The seven members of the OSB are appointed to four-year terms. Labor Code section 140 mandates the composition of the Board, which is comprised of two members from management, two from labor, one from the field of occupational health, one from occupational safety, and one from the general public. In January, Governor Wilson appointed Gwendolyn Berman of Placentia to serve as the occupational safety representative on OSB; other current members are Chair Jere Ingram, John Baird, James Grobaty, John Hay, and William Jackson. At this writing, OSB continues to function with a labor representative vacancy.

The duty to investigate and enforce the safety and health orders rests with the Division of Occupational Safety and Health (DOSH). DOSH issues citations and abatement orders (granting a specific time period for remedying the violation), and levies civil and criminal penalties for serious, willful, and repeated violations. In addition to making routine investigations, DOSH is required by law to investigate employee complaints and any accident causing serious injury, and to make follow-up inspections at the end of the abatement period.

The Cal-OSHA Consultation Service provides on-site health and safety recommendations to employers who request assistance. Consultants guide employers in adhering to Cal-OSHA standards without the threat of citations or fines.

The Appeals Board adjudicates disputes arising out of the enforcement of Cal-OSHA's standards.

MAJOR PROJECTS

OSB Amends Cadmium Exposure Regulation. On January 1, OSB published notice of its intent to amend section 5155 and adopt new sections 1532 and 5207, Title 8 of the CCR; the proposed action incorporates the new provisions of the federal cadmium standards codified at 29 C.F.R. sections 1923.63 and 1910.1027. The new standards reduce the permissible exposure limit (PEL) for cadmium from 0.05 mg/M3 to 0.005 mg/M3 as an eight-hour time-weighted average and establish a new action level of 0.0025 mg/M3. The proposal also contains new provisions for employee exposure monitoring, medical surveillance, hygiene facilities, personal protective equipment, respiratory protection, employee training, recordkeeping, and report of use as a regulated carcinogen. The new standards apply to all industries, including construction, maritime, and general industry, and contain delayed start-up dates for implementing the new provisions. OSB conducted a public hearing on this rulemaking proposal on February 18 and adopted the changes at its March 18 meeting. On April 28, the proposal was approved by the Office of Administrative Law (OAL).

OSB Discusses Hand Protection Regulation. On January 14, OSB conducted a public hearing on its proposed amendment to section 3384(b), Title 8 of the CCR, which currently provides that