settle the case.

Pursuant to the settlement, and until January 1, 1993, retailers must post illustrated warning signs for their customers containing the following message: "Before pouring wine, wipe bottle tops clean with damp cloth to avoid residue from lead foil capsules. The purpose of this is to remove any residue from the capsules only. Many wine bottles are sealed with corks covered by lead foil capsules. These capsules can leave a deposit of a small amount of lead on the lip of the bottle, where it will mix with the wine when poured. Lead is a chemical known to the state of California to cause birth defects or other reproductive harm. Not all wine bottle capsules contain lead—some are made of plastic or other metals. Most vintners have agreed to stop using lead capsules on any wine bottled after December 31, 1991. In the meantime, remember to: [followed by an illustration of the wipe and pour method]."

In ***People v. Brewer***, No. A051318 (Oct. 30, 1991), the First District Court of Appeal considered the constitutionality of Oakland Municipal Ordinance section 3-4.21, which originally provided that "[n]o person shall drink or have in his possession an open container of any alcoholic beverage: (1) on any public street, sidewalk, or other public way; (2) within 50 feet of any public way while on private property open to public view without the express permission of the owner, his agent, or the person in lawful possession thereof." In 1981, a municipal court found those portions of the ordinance that were linked to its "public way" language to be unconstitutionally vague; all references to a "public way" were subsequently deleted from the ordinance.

The instant case arose when Oakland police officer Timothy Sanchez saw George Brewer standing in front of a liquor store, apparently drinking from a container enveloped in a brown paper bag; upon seeing Sanchez, Brewer set down the bag and began walking away. Sanchez checked the bag and found it contained a partially consumed can of beer. Believing that he had observed a violation of the ordinance, Sanchez initiated a detention that led to his discovery of cocaine on Brewer.

At the ensuing trial for the possession of cocaine, Brewer moved to suppress the evidence generated by the search. A trial court granted the motion, finding that (1) the ordinance's attempted regulation of alcohol possession is preempted by the exclusive power of the state; (2) Oakland does have the power to prohibit alcohol consumption; but (3) the preempted portion of the ordinance is not severable from the legitimate portion.

On appeal, the First District affirmed the trial court's first two holdings, but reversed the trial court's finding that the preempted portion is not severable from the rest, noting that "[t]he test of 'mechanical severability' requires parsing the Ordinance to delete the segments found preempted and unconstitutional in order to determine if the remaining provisions have sufficient grammatical, functional, and volitional characteristics to deserve an independent reincarnation." After severing the vague and preempted language, the court noted that the statute would read as follows: "No person shall drink any alcoholic beverage: (1) on any street or sidewalk; (2) while on private property open to public view without the express permission of the owner, his agent, or the person in lawful possession thereof." The First District found that the reconstructed version is capable of an independent existence, grammatically coherent, and functionally complete. The court concluded that, "[a]s thus reconstructed, the ordinance constituted a valid and effective statute at the time Officer Sanchez detained defendant. Sanchez was therefore entitled to use it as the basis for initiating the detention."

On December 5, a settlement was reached in ***Patricia Aguayo, et al. v. David Dilchert, et al.***, No. US-90-20091-JW, filed in U.S. District Court for the Northern District of California. This civil rights class action concerned a raid of Club Elegante, a Hispanic-owned nightclub in San Francisco's Mission District; the raid was jointly conducted by the Immigration and Naturalization Service (INS) and ABC on July 22, 1989. According to witnesses, INS and ABC officials burst into the nightclub, sealed all exits, and kept dozens of people detained for as long as two hours while questioning them about their age and immigration status. One witness contended, "There was severe racism. If you were in that club and your skin wasn't white, you were a suspect." Although admitting no wrongdoing, INS and ABC agreed to pay $83,000 in damages to settle the matter; as part of the settlement, 33 people who were at the nightclub during the raid will receive $2,000 each. ABC did find 25 minors in the establishment and filed an accusation against the licensee for violation of Business and Professions Code section 25665; the licensee admitted the charge and was assessed a 60-day license suspension.

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

Pursuant to Financial Code section 200 *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 proposed name does not so closely resemble as to cause confusion 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 or relocation of branch offices and the establishment 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 travelers checks unless licensed. The superintendent also regulates the safe-deposit business.

The superintendent examines the condition of all licensees. However, as the result of the increasing number of banks and trust companies within the state and the reduced number of examiners following passage of Proposition 13, the superintendent now conducts examinations only when necessary, but at least once every two years. The Department is coordinating its examinations with the FDIC so that every other 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 all 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:

California Banks Lose $74 Million in Third Quarter of 1991. A decline in real estate values, which contributed to banking crises in the 1980s in Texas and New England, is being blamed for the huge losses recently suffered by California banks. Two California banks posted particularly large losses during the third quarter of 1991: First Interstate Bancorp reported losses of $207.5 million in the third quarter and Security Pacific Corp., which is expected to merge with BankAmerica Corp. (see CRLR Vol. 11, No. 4 (Fall 1991) p. 123 for background information), announced losses of $508.5 million during the same quarter.

Three Top Positions at SBD Filled. Governor Wilson recently appointed Stanley Cardenas to the position of Chief Deputy Superintendent of Banks. Cardenas, an attorney, has been with SBD since his 1988 appointment to the position of Senior Deputy Superintendent of Banks.

Replacing Cardenas as Senior Deputy Superintendent of Banks is Robert M. Boice, Jr., who comes to SBD from a position as senior treasury analyst at United States Leasing International. Boice previously served for three years as an analyst at the Federal Home Loan Bank of San Francisco.

The newly-created position of Chief State Bank Examiner has been filled by Harold D. Doyle, who has been with SBD since 1956.

DSL Merger With Banking Department. The September 1991 announcement by Carl Covitz, Secretary of the Business, Transportation and Housing Agency, regarding the upcoming merger of the Department of Savings and Loan (DSL) into SBD by June 1992 has not been followed up by any additional guidelines or details. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 123 for background information.) Many expect the legislature to direct Covitz to conduct a study into the feasibility of consolidating the state's regulatory functions involving banks and savings associations and report his findings to the legislature and the Governor.

Update on Federal Banking Reforms. In early 1991, congressional and Bush administration officials both cited banking legislation as a top priority and began considering major banking reform legislation aimed at modernizing the banking industry. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 123; Vol. 11, No. 3 (Summer 1991) p. 118; and Vol. 11, No. 2 (Spring 1991) p. 116 for background information.) However, in late November, Congress abandoned its plans for major financial reform and instead approved a $70 billion loan to replenish the Federal Deposit Insurance Corporation's (FDIC) bank deposit insurance fund, which is virtually broke. The loan will be repaid by the nation's banks over the next fifteen years. However, some critics doubt the banking industry's ability to repay the loan, citing the unpredictable nature of the economy and the depressed condition of real estate markets.

In addition to providing the loan, Congress also created a system of aggressive early intervention by regulators at troubled banks. While such changes are generally viewed as essential, many note that they will require banks to raise more capital, a potentially difficult task given the present economy and banking structure.

LEGISLATION:

S. 263 (Dixon) is federal legislation which would reform the regulation of financial services and strengthen the enforcement authority of depository institution regulatory agencies. Among other things, the bill would repeal existing provisions of the Banking Act of 1933 which (1) prohibit a bank that is a member of the Federal Reserve System (member bank) from affiliating with a securities firm; and (2) prohibit member banks from employing officers, directors, or employees who are also employed by a firm primarily engaged in securities activities. The bill would allow bank holding companies to own shares of securities affiliates which engage in (1) underwriting, distributing, or dealing in securities of any type; (2) securities brokerage, investment advisory, or other accepted securities activities; and (3) other activities permitted by the Board of Governors of the Federal Reserve System. The bill would also prohibit mergers between certain large banks or bank holding companies (those having assets of more than $30 billion) and large securities firms (those having assets of more than $15 billion). This bill is pending in the Senate Banking, Housing, and Urban Affairs Committee.

AB 1593 (Floyd), as amended April 18, and ***SB 506 (McCorquodale)***, as amended August 19, would both transfer the licensing and regulatory functions of SBD, DSL, and the Department of Corporations to a Department of Financial Institutions, which both bills seek to create; both bills would abolish SBD. AB 1593 is pending in the Assembly Committee on Banking, Finance and Bonded Indebtedness and SB 506 is pending in the Senate Committee on Banking, Commerce, and International Trade.

SB 893 (Lockyer) would authorize the establishment of the California Financial Consumers' Association, a private, nonprofit public benefit corporation established to inform and advise consumers on financial service matters, represent and promote the interests of consumers in financial service matters,

intervene as a party or otherwise participate on behalf of financial service consumers in any regulatory proceeding, sue on behalf of members in regard to any financial service matter, and take related actions. This two-year bill is pending in the Senate Banking Committee.

AB 696 (Lancaster). Existing law provides that with the prior written approval of the Superintendent, a bank may change the location of a place of business from one location to another in the same vicinity upon application and a fee of $100. This bill would increase that fee to $250. This two-year bill is pending in the Senate Banking Committee.

SB 949 (Vuich). Existing law provides that the failure of a bank or trust company to open a branch office within one year after the Superintendent approves the application terminates the right to open the office, except that prior to the expiration of the one-year period, a one-year extension may be granted by the Superintendent in which to open and operate a branch office upon filing an application with the Superintendent and the payment of a $100 fee. This bill would increase that fee to $300. This two-year bill is pending in the Senate Banking Committee.

AB 1596 (Floyd). The California Public Records Act requires that records of state and local agencies be open to public inspection, with specified exceptions, including specified documents filed with state agencies responsible for the regulation or supervision of the issuance of securities or of financial institutions. As amended April 30, this bill would revise this exception and limit it to records of any state agency responsible for the regulation or supervision of the issuance of securities or of financial institutions, when the records are received in confidence and are proprietary and their release would result in an unfair competitive disadvantage to the person supplying the information or the records constitute filings or reports whose disclosure would be counterproductive to the regulatory purpose for which they are used. This two-year bill is pending in the Assembly Governmental Organization Committee.

SB 950 (Vuich) and ***AB 1463 (Hayden)***. With specified exceptions, existing law prohibits a commercial bank from lending in the aggregate an amount in excess of 70% of the amount of its savings and other time deposits upon the security of real property. These bills would specify that the percentage limitation applies with respect to the aggregate amount of accounts subject to a negotiable order of withdrawal, savings deposits, money market accounts, super now accounts, and other time deposits of a commercial bank, including certificates of deposit. SB 950 is pending in the Senate Banking Committee and AB 1463 is pending in the Assembly Banking Committee.

AB 1195 (Lancaster) would provide that for compensation or in expectation of compensation, a bank or trust company may, on behalf of another or others, sell, buy, lease, exchange, or offer to sell, buy, lease, or exchange, or solicit prospective sellers, purchasers, or lessees of, or negotiate the sale, purchase, lease, or exchange of any business opportunity. This two-year bill is pending in the Assembly Banking Committee.

LITIGATION:

In ***Beasley v. Wells Fargo Bank***, No. A048490 (Nov. 12, 1991), the First District Court of Appeal affirmed a $5 million judgment in a class action which challenged Wells Fargo Bank's assessment of fees against credit card customers who failed to make timely payments ("late fees") or exceeded their credit limits ("overlimit fees"). Wells Fargo increased both fees on December 1, 1982, and notified customers of the increases in its "Customer Agreement and Disclosure Statement" forms. This litigation commenced in 1986 when Alice Beasley filed a class action against Wells Fargo, seeking recovery of late and overlimit fees already assessed and an injunction against future imposition of these fees; the complaint included allegations that plaintiffs were entitled to monetary recovery under Civil Code section 1671, which governs the validity of liquidated damages provisions, and to injunctive relief under Business and Professions Code section 17200 *et seq.*, which proscribes unfair business practices. Wells Fargo filed a cross-complaint for breach of contract, seeking to recover "all sums due and owing" to the bank by "certain members of the purported class" who had been assessed "certain service charges."

Regarding the validity of the fees as liquidated damages, a jury found that Wells Fargo had not made a reasonable endeavor to estimate a fair average compensation for loss. Thus, the jury found that the purported liquidated damages provisions in the Customer Agreement and Disclosure Statement form were void, and awarded plaintiffs $5 million in actual damages. The court independently decided the unfair business practices claim, ruling for Wells Fargo because "the equities do not favor granting injunctive relief nor, as a matter of policy, is this Court well suited to regulating retail bank pricing via injunction on an ongoing basis." The court dismissed Wells Fargo's cross-complaint without prejudice.

Wells Fargo appealed the decision, contending that plaintiffs had no right to a jury trial in an action for relief from liquidated damages, and even if they did, the subissue of the validity of the fees as liquidated damages was a matter to be decided by the trial judge. The First District acknowledged that, ordinarily, an action for affirmative relief from late and overlimit fees would be considered equitable, with no right to a jury trial. However, the court found that Wells Fargo's cross-complaint concerned an action at law to recover the fees, to which plaintiffs could seek defensive relief with a right to a jury trial; thus, the court held that "the bank's objection to a jury trial was substantively meritless."

The First District also agreed that "[t]he court, not the jury, should have decided whether it had been impracticable or extremely difficult to fix actual damages and whether Wells Fargo had made a reasonable endeavor to estimate a fair average compensation for its loss." However, the First District noted that Wells Fargo had the burden of showing that the error is reversible and ruled that the bank failed to demonstrate any actual prejudice from the error.

The court also rejected Wells Fargo's contentions that plaintiffs were not entitled to monetary relief under Civil Code section 1671, holding that section 1671(d) permits a consumer to seek monetary relief, both offensively and defensively, from liquidated damages.

In a related action, ***Beasley v. Wells Fargo Bank***, No. A049948 (Nov. 12, 1991), the First District upheld the trial court's award of almost $2 million in attorneys' fees and costs to plaintiffs in the class action discussed above, finding that (1) the award was not precluded by the fact that the litigation resulted in a common fund recovery from which attorneys' fees could have been paid; (2) the consumer protection action involved was in the public interest for purposes of a private attorney general award; (3) the trial judge did not abuse his discretion in applying a lodestar multiplier to the fee award; and (4) expert witness fees and other non-recoverable expenses may be awarded under the private attorney general statute. In addition, the court granted plaintiffs' request for an award of attorneys' fees accumulated during the successful defense of both appeals ("fees on fees"),

and directed the trial court to determine the appropriate amount of that award.

DEPARTMENT OF CORPORATIONS

Commissioner: Thomas Sayles
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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 Chapter 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: Franchise Investment Statute, Credit Union Statute, Industrial Loan Law, Personal Property Brokers Law, Health Care Service Plan Law, Escrow Law, Check Sellers and Cashers Law, Securities Depositor Law, California Finance Lenders Law, and Security Owners Protection Law.

A Consumer Lenders Advising Committee advises the commissioner on policy matters affecting regulation of consumer lending companies licensed by the Department of Corporations. The committee is composed of leading executives, attorneys, and accountants in consumer finance.

MAJOR PROJECTS:

Regulatory Action Under the Health Care Service Plan Act. DOC recently adopted two packages of changes to its regulations under the Knox-Keene Health Care Service Plan Act of 1975.

First, the Department adopted changes to its rules relating to existing discrimination prohibitions and subscriber and group contract notification requirements. DOC repealed section 1300.67.10, Title 10 of the CCR, which prohibits discrimination by health care service plan (HCSP) contracts; this section was recently codified as Health and Safety Code section 1365.5. The Department also amended subsections (a)(6) and (a)(7) of section 1300.67.4, Title 10 of the CCR, to conform with recent legislation which added Article 5.5 (commencing with section 1374.20) to Chapter 2.2 of Division 2 of the Health and Safety Code. These new statutes require a specified written notice of changes in premium rates or coverage prior to a group contract renewal effective date. Thus, subsections (a)(6) and (a)(7) of section 1300.67.4 were amended to delete a hand-delivery mode of forwarding the notice and to provide for mailing at the most current address of record. Finally, DOC revised subsections (a)(2)(A) and (c)(9) of section 1300.67.4 to include an appropriate reference to the CCR. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 126 for background information.) At this writing, these proposed changes await review and approval by the Office of Administrative Law (OAL).

The second regulatory package contains amendments to DOC's standards for Medicare supplement policies offered by HCSPs under the Department's jurisdiction. Through a series of statutes and regulations, the federal government has set forth a program for the certification of policies, certificates, and contracts offered by private HCSPs and other entities to supplement the benefits of the federal Medicare program (sometimes called "Medigap" policies). The federal program preempts state law, except in states with approved regulatory programs which (1) provide for the application of Medigap policy standards which are equal to or more stringent than the standards of the Model Regulation on such policies adopted by the National Association of Insurance Commissioners in 1979; and (2) require Medigap policy or contract performance which is expected to meet or exceed specified loss ratio standards. California is a state with an approved regulatory program, but it must amend its regulations to comply with the federal law. Thus, in August DOC proposed to amend seven existing Medigap policy regulations and adopt ten new ones. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 126 for background information.) Following a comment period ending on October 11, DOC adopted the proposed regulatory changes (with one exception) and submitted the rulemaking file to OAL for approval.

On November 25, OAL approved all but two of DOC's proposed actions; it disapproved the Department's amendments to section 1300.67.52 and its adoption of section 1300.64.54, which establish minimum benefit standards for Medigap supplement contracts offered by HCSPs. Health and Safety Code section 1367.15(a) requires such contracts to "[m]eet the minimum benefit standards as established by the Commissioner of Corporations and Insurance Commissioner jointly." According to OAL, none of the materials submitted for review addressed this "joint establishment" requirement. In response to