



so-called "territorial rating," under which a driver's premium rates are based almost solely on his/her ZIP code. In April 1990, then-Commissioner Gillespie adopted emergency regulations to implement section 1861.02; consistent with the intent of Proposition 103, the regulations embraced what is described as a "tempered approach" to ratesetting. The tempered approach tends to equalize auto insurance rates for drivers living in different localities.

In the insurance industry's lawsuit challenging the regulations, the superior court enjoined enforcement of the auto rating factors (see CRLR Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 140 for details); subsequently, Commissioner Gillespie adopted new regulations to comply with the court order. The amended regulations permit use of ZIP codes in ratesetting and are still in effect. The superior court ruled that by equalizing territorial rates, which are based on real geographic cost differentials, some drivers would be subsidizing others in violation of Insurance Code section 1861.05's prohibition against discriminatory rates. On appeal, attorneys for the Commissioner argued that Insurance Code section 1861.05 does not apply to Proposition 103's ban on territorial rating, in order to enable Garamendi to adopt new auto rating regulations which use the "tempered approach." At this writing, the court has not yet issued a ruling.

In *State Farm Fire and Casualty Co. v. Von Der Lieth*, No. S019059 (Dec. 16, 1991), the California Supreme Court ruled that State Farm may be held liable for subsidence damages incurred by a homeowner. The ruling was viewed as a surprise defeat for insurers due to the explicit exclusion of earth movement losses in most homeowners' policies and increasingly pro-insurer rulings by the Supreme Court.

The suit arose from the Von Der Lieths' request that State Farm pay the full policy limit of \$231,000 to help cover the cost of stabilizing their home against further damage from landslides in the Big Rock Mesa area of Malibu. State Farm paid \$14,076 to repair cracks that began to appear in the home but refused to pay the policy limit, stating that its homeowners' policy expressly excluded losses caused by earth movement or natural groundwater. In the suit, the Von Der Lieths claimed that the state had destabilized the mesa when the Pacific Coast Highway was built in 1933. In addition, the county was blamed for allowing homes to be built on the mesa without a sewer system to

drain away water which further eroded the property. The Von Der Lieths maintained that this third-party negligence was covered by their homeowners' policy, and in 1990 a jury agreed, awarding them \$56,500 in costs and bad faith damages against State Farm. The Second District Court of Appeal, however, overturned the verdict, upholding the policy exclusion for losses caused by earth movement.

A unanimous Supreme Court reversed the Second District's decision, stating that the jury had correctly determined that third-party negligence was the proximate cause of the loss and that State Farm was liable under the homeowners' policy. The decision is expected to spur action in the insurance industry; it is likely that some insurers will specifically exclude third-party negligence coverage or charge for it as an additional coverage.

On November 14, the California Supreme Court denied the insurance industry's petition for review of the Third District Court of Appeal's decision in *Sanford v. Garamendi*. In that case, the Third District ruled that banks (but not bank subsidiaries) may now engage in the insurance agency and brokerage business under Proposition 103. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 138 for detailed background information on this case.)

On October 17, the California Supreme Court denied the CAARP governing board's petition for review of the Second District Court of Appeal's August 1991 decision in *California Automobile Assigned Risk Plan v. Garamendi*, in which the court ruled that CAARP rates may be set by the Commissioner pursuant to pre-Proposition 103 procedures. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 139 for background information.)

On October 3, the California Supreme Court denied the insurer's petition for review of the Fourth District Court of Appeal's decision in *Weiner v. Fireman's Fund Insurance*. However, the Supreme Court decertified the Fourth District's opinion, which created an exception to *Moradi-Shalal's* ban on third-party bad faith actions against insurance companies by allowing civil suits by third parties for intentional infliction of emotional distress when an insurer's conduct is "so extreme as to exceed all bounds of that usually tolerated in a civilized society." (See CRLR Vol. 11, No. 4 (Fall 1991) p. 139 for background information.)

## DEPARTMENT OF REAL ESTATE

Commissioner: Clark E. Wallace  
(916) 739-3684

The Real Estate Commissioner is appointed by the Governor and is the chief officer of the Department of Real Estate (DRE). DRE was established pursuant to Business and Professions Code section 10000 *et seq.*; its regulations appear in Chapter 6, Title 10 of the California Code of Regulations (CCR). The commissioner's principal duties include determining administrative policy and enforcing the Real Estate Law in a manner which achieves maximum protection for purchasers of real property and those persons dealing with a real estate licensee. The commissioner is assisted by the Real Estate Advisory Commission, which is comprised of six brokers and four public members who serve at the commissioner's pleasure. The Real Estate Advisory Commission must conduct at least four public meetings each year. The commissioner receives additional advice from specialized committees in areas of education and research, mortgage lending, subdivisions and commercial and business brokerage. Various subcommittees also provide advisory input.

The Department primarily regulates two aspects of the real estate industry: licensees (as of September 1991, 257,599 salespersons and 96,310 brokers, including corporate officers) and subdivisions.

License examinations require a fee of \$25 per salesperson applicant and \$50 per broker applicant. Exam passage rates average 67% for both salespersons and brokers (including retakes). 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 of most residential subdivisions, the Department protects the public by requiring that a prospective buyer be given a copy of the "public report." The public report serves two functions aimed at protecting buyers of subdivision interests: (1) the report requires disclosure of material facts relating to title, encumbrances, and similar 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 major publications. The *Real Estate*



## REGULATORY AGENCY ACTION

*Bulletin* is circulated quarterly as an educational service to all real estate licensees. It contains legislative and regulatory changes, commentaries and advice. In addition, it lists names of licensees against whom disciplinary action, such as license revocation or suspension, is pending. Funding for the *Bulletin* is supplied from a \$2 share of license renewal fees. The paper is mailed to valid license holders.

Two industry handbooks are published by the Department. *Real Estate Law* provides relevant portions of codes affecting real estate practice. The *Reference Book* is an overview of real estate licensing, examination, requirements and practice. Both books are frequently revised and supplemented as needed. Each book sells for \$15.

The California Association of Realtors (CAR), the industry's trade association, is the largest such organization in the state. As of September 1991, approximately 131,000 licensed agents are members. CAR is often the sponsor of legislation affecting the Department of Real Estate. The four public meetings required to be held by the Real Estate Advisory Commission are usually on the same day and in the same location as CAR meetings.

### MAJOR PROJECTS:

**State of the Real Estate Recovery Program.** In the winter issue of its *Real Estate Bulletin*, DRE reviewed the status of the Real Estate Recovery Program established in Business and Professions Code section 10470 *et seq.* The Program was originally enacted in 1964, and enables aggrieved consumers who have successfully sued a real estate licensee for fraud, misrepresentation, deceit, or conversion of trust funds arising directly out of a transaction for which a license is required to collect any unpaid portion of the judgment from the Real Estate Recovery Account, within the statutory limits of the Program. The Recovery Account is funded by a surcharge on DRE licensing fees. The Program is intended to protect the public against loss resulting from misrepresentation and breach of fiduciary duty by real estate licensees who are unable to respond to damages awards.

To seek recovery of an unpaid judgment, an injured consumer must complete an application supplied by DRE no later than one year after the underlying judgment becomes final. The applicant must demonstrate to DRE that he/she has diligently pursued collection efforts against the licensee and all other judgment debtors liable to the claimant

in the transaction, and must notify the licensee that he/she is attempting to collect the unpaid portion of the judgment from the Recovery Account. The contents of the required notice inform the licensee that if payment is made from the Recovery Account, his/her license is automatically suspended and will not be reinstated until the Account is reimbursed for the payout. The judgment debtor must respond to the claim within thirty days of receiving the notice. The liability of the Recovery Account is limited to \$20,000 for any one transaction and \$100,000 for any one licensee; if the Commissioner determines that the aggregate valid claims of all aggrieved persons against a licensee are likely to exceed this limit, the amount is distributed to all eligible claimants on a pro rata basis.

The *Real Estate Bulletin* reports that substantial changes in the way in which claims against the Recovery Account are processed were accomplished in SB 512 (Chapter 690, Statutes of 1985), effective January 1, 1987. Prior to that date, applications for payment from the Account were filed with the court which rendered the judgment forming the basis of the claim. Unless the parties settled the matter, a trial commenced. DRE, which was represented in such proceedings by the Attorney General's Office, not only had to pay for legal services but also had to assign a Deputy Real Estate Commissioner to investigate each claim. Because of the dramatic increase in applications for reimbursement, the legislature passed SB 512, which significantly changed the way applications are processed. SB 512 transferred to DRE the responsibility of administratively determining whether applications should be denied or paid. If denied, the complainant may still refile the application in the court which rendered the judgment.

In the *Bulletin*, DRE noted that the new procedure has been extremely successful in cutting costs. Fewer than 25% of denied claims are refiled and Attorney General billings have declined from approximately \$700,000 in 1986-87 to an estimated \$143,000 in 1991, a drop of 80%. (See *infra* LITIGATION for related discussion of the Recovery Account.)

**Glen Ivy Offices Raided on Suspicion of Fraud.** On December 10, the Riverside County District Attorney's Office served search warrants on Glen Ivy Financial Group at its Corona headquarters and on two company executives at their homes, in connection with a criminal investigation. Although no arrests were made, the DA's office stated

that it has probable cause to believe that Glen Ivy may have been involved in fraudulent transactions in the sale of timeshares. Glen Ivy, which has not been charged with any wrongdoing, stated that "it considers the inquiry to be a very serious matter" and will take all "necessary steps to clear up the matter promptly."

Last July, DRE placed the real estate license of Glen Ivy Properties, the company's timeshare unit, on probation for five years for a number of infractions, including incomplete record-keeping in customer accounts. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 140 for background information.) At this writing, DRE is continuing its investigation into these serious allegations against Glen Ivy.

**DRE Amends Its Conflict of Interest Code.** Pursuant to Government Code section 87300, DRE proposed numerous changes to its conflict of interest code, Article 36, Chapter 6, Title 10 of the CCR. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 141 and Vol. 11, No. 3 (Summer 1991) p. 135 for background information.) The Fair Political Practices Commission approved the revisions on October 9, and the Office of Administrative Law (OAL) approved the revisions on December 12.

**Other Proposed Regulatory Changes.** In response to the testimony received at a November 14 public hearing, DRE made minor modifications to proposed new sections 2708, 2709, 2724, and 2792.11, and its proposed amendments to sections 2810.1, 3002, and 3011, Chapter 6, Title 10 of the CCR. (See CRLR Vol. 11, No. 4 (Fall 1991) pp. 140-41 for background information on these changes.) At this writing, the additional 15-day public comment period has expired, and DRE is preparing the rulemaking file for submission to OAL.

At this writing, DRE is still reviewing comments received on its proposed amendments to sections 2746, 2792.17, 2792.18, and 2806, and its proposed adoption of sections 2706 and 2807, Chapter 6, Title 10 of the CCR. (See CRLR Vol. 11, No. 3 (Summer 1991) p. 135 for detailed background information on these changes.) These regulatory changes were the subject of a public hearing in May 1991.

**Eight New Members Appointed to the Advisory Commission.** DRE Commissioner Clark Wallace recently appointed eight new members to the Real Estate Advisory Commission. The newly-appointed members include six real estate brokers: Shirley Commons Long, H. Edward Heron, Mack Powell,



Guy Puccio, Evelyn Reeves, and Sebastiano Sterpa. The Commissioner also appointed two "public" members: Kathleen Connell, a former Director of Housing for the City of Los Angeles and Managing Director of the Center for Finance and Real Estate at UCLA, and Lawrence Valdivieso, an attorney specializing in real property and subdivision matters. Commissioner Wallace expects to fill the remaining two positions in the near future.

**Assistant Commissioner for Subdivisions Appointed.** In October, Commissioner Wallace appointed Thomas R. Hensley as assistant commissioner for subdivisions. Hensley, former manager of DRE's Licensing, Examination and Education Programs, will direct statewide subdivision activities for the Department.

## LEGISLATION:

**AB 1436 (Floyd).** Existing law requires the transferor of certain residential real property to disclose specified information to the prospective transferee on a prescribed disclosure form. This bill would additionally require the transferor to disclose whether the property is covered by home warranty protection. This two-year bill is pending in the Assembly Committee on Housing and Community Development.

**SB 1083 (Robbins)** would provide that persons licensed as real estate brokers are deemed to be attorneys-in-fact for the purpose of depositing or transferring client funds to or from individual or pooled client trust deposits with banks, and that the authorized signatures and instructions of these licensees on items deposited and transfers made to and from the trust deposit of their clients are valid. This two-year bill is pending in the Senate Judiciary Committee.

**SB 71 (Kopp),** as amended April 15, would enact as a part of the Real Estate Law a Real Property Finance Broker Law for the purpose of regulating specified mortgage brokering activities. The bill would require a real estate broker conducting these activities to obtain prescribed certification, and certain other persons to obtain licensure from DRE to conduct these activities. This two-year bill is pending in the Senate Committee on Banking, Commerce and International Trade.

**SB 952 (Dills)** would enact a Mortgage Loan Broker Law; establish an Office of Mortgage Loan Broker Licensure within DRE; and require the DRE Commissioner to adopt requirements for certification as a mortgage loan broker. This two-year bill is pending

in the Senate Business and Professions Committee.

**SB 492 (Leonard),** as amended April 4, would provide that the Commissioner may suspend or revoke a real estate license at any time the licensee, acting as a licensee in performing or attempting to perform any act in connection with a transaction coming within the scope of specified real estate regulations, has knowingly or willfully disregarded the instructions of a principal to protect the interests of a third party holding a junior obligation secured by property listed by the licensee, or disregarded the instructions of a principal to protect the interests of a third party that owns, holds, or claims an interest in the real property which was the subject of a transaction subject to those real estate regulations. This two-year bill is pending in the Assembly Committee on Consumer Protection, Governmental Efficiency, and Economic Development.

**AB 1593 (Floyd),** as amended April 18, would transfer the licensing and regulatory functions of the State Banking Department, the Department of Savings and Loan, and the Department of Corporations to a Department of Financial Institutions, which the bill would create; enact a Mortgage Broker Law and transfer to the Department of Financial Institutions responsibility for regulating specified mortgage brokering activities conducted under a real estate broker's license; and require a real estate broker conducting these activities to obtain prescribed certification from the Department of Financial Institutions. This two-year bill is pending in the Assembly Committee on Banking, Finance and Bonded Indebtedness.

**AB 814 (Hauser).** Existing law provides that certain provisions of the Real Estate Law do not apply to any stenographer, bookkeeper, receptionist, telephone operator, or other clerical help in carrying out their functions. This bill would provide that these provisions do not apply to any clerk or other employee of a condominium complex who is responsible for accepting or arranging reservations for transient occupancy of less than thirty days or who acts as a cashier for the collection of deposits or rental fees for transient occupancy of less than thirty days. This two-year bill is pending in the Assembly Consumer Protection Committee.

**AB 776 (Costa)** would authorize DRE, using funds from the Education and Research Account in the Real Estate Fund, to develop a research report to explore options for the state to provide for a residential mortgage guarantee insurance program for low-

downpayment mortgages for California first-time homebuyers not currently served by the private market or by the Federal Housing Administration, and for low- and moderate-income rental housing. This two-year bill is pending in the Assembly Committee on Housing and Community Development.

**AB 1234 (Frazee),** as amended May 14, would provide that, within the limits of the fees charged and collected under the laws regulating real estate, and within the limits of prudent administration, the Real Estate Fund shall be maintained at a level equal to DRE's projected annual budget. This two-year bill is pending in the Assembly Higher Education Committee.

## LITIGATION:

On November 25, the Fourth District Court of Appeal affirmed a trial court decision which denied a real estate broker his brokerage commission because he failed to disclose the presence of a dual agency relationship. In *L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp.*, No. D012689, plaintiff Byron Culver was engaged in finding property to be acquired by his client, Del Rayo Properties, when he became aware of property owned by defendant Jaoudi located in Rancho Santa Fe. After inquiring whether the property was for sale, Culver obtained a one-year listing with Jaoudi for the property, thus becoming both the listing and selling broker and establishing a dual agency relationship. However, Culver never disclosed this relationship to Jaoudi, and in fact denied any association with the buyer. After Culver completed the deal between Del Rayo and Jaoudi, Jaoudi refused to pay him a commission; Culver then brought this action against Jaoudi.

In affirming the trial court's decision, the appellate court stated that the totality of the circumstances leads to the inevitable conclusion that Culver acted as an agent for both parties. Because Culver substantially represented the interests of both Del Rayo and Jaoudi without disclosing his dual agency, the court held that Culver was not entitled to recover any commission.

On December 9, the Second District Court of Appeal upheld a trial court's refusal to permit a real estate licensee to obtain compensation from the Real Estate Fund Recovery Account for money converted by another licensee. In *Real Estate Commissioner of State of California v. Onate*, No. B056022, Laura Onate, a licensed realtor, submitted offers and \$14,000 in deposits from four of her clients to Donald Smith, also a



## REGULATORY AGENCY ACTION

real estate licensee, for the purchase of certain properties that Smith offered for sale. Later, Onate learned that Smith converted the \$14,000 for his own use. Afraid that she might be sued, Onate reimbursed her clients in full, obtained assignments from them, and filed suit against Smith for fraud; Onate obtained a default judgment against Smith in the amount of \$25,000. Onate then applied to DRE for compensation through the Recovery Account (*see supra* MAJOR PROJECTS for related discussion). However, the DRE Commissioner objected to the application on the basis that Onate was not an aggrieved person within the meaning of Business and Professions Code section 10471(a); the trial court agreed and denied Onate's claim against the Recovery Account.

The Second District affirmed the judgment, stating that real estate licensees acting in their capacity as licensees are outside the class of aggrieved persons entitled to compensation from the Recovery Account. The court stated that because Onate was acting in her capacity as a licensee, she was in a position to guard against her colleague's deceitful and fraudulent acts. "The purpose of the statutory scheme is to protect the public against fraud in real estate transactions, not to protect licensees from their peers." The court similarly rejected Onate's claim that she succeeded to the claims of her clients when she reimbursed them for their losses. The court noted that Onate was merely discharging her liability to her clients for her probably negligent conduct, and stated that to indemnify her "would result in the absurdity of making the Recovery Account the insurer of negligent licensees."

### DEPARTMENT OF SAVINGS AND LOAN

*Commissioner: Wallace T. Sumimoto*  
(415) 557-3666  
(213) 736-2798

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:

**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 DSL into the State Banking Department by June 1992 has not been followed up by any additional guidelines or details. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 142; Vol. 11, No. 2 (Spring 1991) p. 128; and Vol. 10, No. 4 (Fall 1990) pp. 127-28 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.

DSL has processed no new state charter applications since 1985 and, as of January 1992, regulates only 42 state-chartered thrifts, compared to 158 during the mid-1980s. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 142 for background information.)

**Proposed Regulatory Changes.** Last June, DSL announced its intent to amend its conflict of interest code, which is codified in section 102.300, Chapter 2, Title 10 of the CCR. Pursuant to Government Code section 87306, amended section 102.300 will designate DSL employees who must disclose certain investments, income, interests in real property, and business positions, and who must disqualify themselves from making or participating in the making of governmental decisions affecting those interests. DSL's new conflict of interest code will conform to the model code adopted by the Fair Political Practices Commission (section 18730, Division 6, Title 2 of the CCR). (See CRLR Vol. 11, No. 4 (Fall 1991) p. 143 for background information.) The proposed amendments were recently returned to DSL by the Office of Administrative Law (OAL) for minor changes, such as adding to the list of "designated employees" those employees with the authority to purchase in the name of DSL. At this writing, the required changes have been made and the proposal has been resubmitted to OAL for approval.

### LEGISLATION:

**AB 1463 (Hayden) and SB 950 (Vuich)** are two-year bills which would 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 agriculture, business, commer-

cial, or corporate purposes. AB 1463 is pending in the Assembly Committee on Banking, Finance, and Bonded Indebtedness; SB 950 is pending in the Senate Committee on Banking, Commerce and International Trade.

**AB 1594 (Floyd)** would repeal the Savings Association Law and abolish DSL on January 1, 1993. The bill would prohibit any savings association from doing business in this state on or after that date without a federal charter, and would require savings associations converting to a federal charter on or after January 1, 1992, to file specified evidence of the federal charter with the Secretary of State. This two-year bill is pending in the Assembly Banking Committee.

**AB 1593 (Floyd)**, as amended April 18, and **SB 506 (McCorquodale)**, as amended April 8, are two-year bills which would both transfer the licensing and regulatory functions of DSL, the State Banking Department, and the regulation of credit unions by the Department of Corporations to a Department of Financial Institutions, which both bills seek to create; both bills would abolish DSL. AB 1593 is pending in the Assembly Banking Committee and SB 506 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, 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 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