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, commercial, 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

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 2026 (Friedman). Existing provisions of the Savings Association Law prescribe various criminal offenses and penalties for violations thereof, and provide for forfeiture of property or proceeds derived from these violations. This bill would, among other things, expand the list of criminal offenses, as specified, the violation of which subjects the violator to the forfeiture provisions. This two-year bill is pending in the Assembly Public Safety Committee.

LITIGATION:

In ***Spiegel v. Ryan***, No. 90-55942 (Oct. 11, 1991), the U.S. Court of Appeals for the Ninth Circuit upheld the Office of Thrift Supervision's (OTS) statutory authority to issue a temporary cease and desist order requiring a former officer of a savings and loan association to make restitution pending an administrative hearing to determine whether a permanent cease and desist order should issue. On July 5, 1990, OTS issued a "Notice of Charges and Hearing and Notice of Intention to Remove and Prohibit, and to Direct Restitution, and Notice of Assessment of Money Penalty" against Columbia Savings and Loan Association and/or Thomas Spiegel, former Columbia chair and chief executive officer. On the same day, OTS ordered Spiegel to make restitution in the amount of $21 million, by no later than noon the next day, and scheduled an administrative hearing for September 4, 1990. In this action, Spiegel challenged OTS' authority to order restitution as a temporary remedy and, in the alternative, argued that the statute authorizing a prehearing deprivation of his property violates due process.

In reversing the district court's holding, the Ninth Circuit found that, on its face, 12 U.S.C. section 1818(c)(1) authorizes OTS to issue temporary cease and desist orders requiring "affirmative action to prevent . . . dissipation [of an institution's assets] or prejudice [to its depositors]." The court noted that "restitution may not only compensate an institution for past wrongs, but may also serve to prevent the dissipation of assets that may belong to it, and thereby prevent prejudice to its depositors."

Regarding Spiegel's due process challenge, the Ninth Circuit acknowledged that, "[a]s a general rule, it is true that due process requires a hearing before a person may be deprived of her property." However, the court stated that the Supreme Court has allowed outright seizure without opportunity for a prior hearing in a few limited situations, and listed the three factors common to all cases in which the Court has upheld prehearing deprivations: (1) the seizure has been directly necessary to secure an important governmental or general public interest; (2) there has been a special need for very prompt action; and (3) the state has kept strict control over the monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Unlike the district court, the Ninth Circuit found all three factors to be present in the instant case, and thus found that due process does not entitle Spiegel to a predeprivation hearing. Finally, the Ninth Circuit found that the statute (section 1818 (b) (1)) provides for a sufficiently prompt administrative hearing no later than sixty days from the notice of charges and temporary order.

In ***Federal Deposit Insurance Corporation v. McSweeney, et al.***, No. 91-0476-K(IEG) (Sept. 4, 1991), FDIC sought to recover a portion of the $80 million in losses incurred by Central Savings and Loan Association. Two of the defendants—former directors of the failed thrift—moved to dismiss the action in its entirety, claiming that (1) FDIC's action was time-barred because the statute of limitations governing the action expired prior to the time FDIC became Central's receiver, and (2) FDIC's complaint failed to plead gross negligence so as to enable it to maintain an action under the terms of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA).

Defendants contended that a two-year statute of limitations governs actions alleging a breach of fiduciary duty predicated on negligent conduct. FDIC countered that the "catch-all" four-year period in California Code of Civil Procedure section 343 governs this matter. Relying on the Ninth Circuit Court of Appeals' decision in *Davis & Cox v. Summa Corp.*, 751 F.2d 1507 (1985), the U.S. District Court for the Southern District of California ruled that, because a limitations period is not otherwise provided for breach of fiduciary duty claims, the four-year "catch-all" period dictated by section 343 applies; thus, FDIC's action was timely filed.

Defendants also argued that FIRREA limits the actions the FDIC may file against former thrift directors to those cases where the directors' conduct is pled as grossly negligent or intentional; because FDIC's complaint was based on ordinary negligence, defendants contended that the complaint must fail. In rejecting this argument, the court held that the plain language of FIRREA permits the government to proceed against directors or officers for gross conduct, while at the same time preserving the FDIC's full range of rights in states where directors have not been insulated from simple negligence. Although acknowledging that FIRREA provides that FDIC "may" bring suits for gross negligence and greater violations of duty, the court held that the plain words of the statute do not indicate exclusivity and do not bar FDIC's use of other applicable law.

In ***Far West Federal Bank v. Director, Office of Thrift Supervision***, No. 90-35752 (Dec. 17, 1991), the U.S. Ninth Circuit Court of Appeals held that Congress' 1989 enactment of FIRREA supersedes an earlier agreement entered into by the Federal Home Loan Bank (FHLB) subjecting Far West Federal Bank, a thrift institution headquartered in Portland, to more lenient requirements than those mandated by FIRREA. In 1987, Far West was facing serious financial difficulties, having a negative net worth. Hoping to attract new investors, the thrift converted from a mutual savings association to a stock savings association and entered into an agreement with FHLB under which FHLB: (1) provided Far West with a $1.5 billion line of credit; (2) waived normal growth limitations; and (3) treated the line of credit as an intangible asset included in calculating Far West's regulatory capital, allowing Far West to operate with less of its own capital than otherwise would have been required and to make the relatively large loans considered necessary to the success of Far West's plan to regain solvency. Far West operated under these terms for approximately two years, until FIRREA became law and the Office of Thrift Supervision (OTS) replaced FHLB. Because FIRREA mandated substantially more stringent capital standards for thrifts than those required by the agreement, OTS directed Far West to comply with the new standards; Far West refused and filed suit against OTS and the Federal Deposit Insurance Corporation.

In reversing the holding of the U.S. District Court for the District of Oregon, the Ninth Circuit noted that FIRREA provides that the OTS Director is required by regulation to "prescribe and maintain uniformly applicable

capital standards for savings associations"; although three specific exceptions to this general rule are enumerated, no exception based on prior FHLB agreements is provided.

The court declined to consider Far West's contention that its rights under the agreement constitute property rights and if FIRREA is interpreted as abrogating those rights, Far West's property has been taken without just compensation. The court responded that any taking that may have occurred was authorized by Congress and a suit for compensation would be within the jurisdiction of the Court of Claims. The court vacated the district court's judgment on this issue so that it might be considered by the Court of Claims if a claim for compensation is filed.

On December 4, a Los Angeles County Superior Court jury convicted financier Charles H. Keating on 17 of 18 state securities fraud counts stemming from the failure of Lincoln Savings and Loan. In ***People v. Keating***, the jury found Keating guilty of failing to tell bondholders and new bond buyers that regulators had indicated the institution could be seriously overextended. Following a nine-week trial, the jury spent eleven days deliberating and reviewing exhibits and testimony. Keating faces a maximum penalty of ten years in prison and $250,000 in fines; sentencing was scheduled for February 7. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 144; Vol. 11, No. 2 (Spring 1991) pp. 129–30; and Vol. 11, No. 1 (Winter 1991) p. 105 for extensive background information.)

On December 12, federal authorities presented Keating and four co-defendants with a 77-count indictment charging them with bank and securities fraud, conspiracy, misapplication of funds, and transporting stolen property. If convicted of these racketeering charges, Keating could be sentenced to up to 510 years in prison. In addition to these charges, Keating is also the defendant in a number of pending civil trials.

DEPARTMENT OF INDUSTRIAL RELATIONS

CAL-OSHA

Executive Director: Steven Jablonsky (916) 322-3640

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. OSB is currently functioning with two vacancies—an occupational safety representative and a labor member. Additionally, OSB Chair Mary-Lou Smith's term of office has expired, but she will continue to serve on the Board until Governor Wilson appoints her replacement.

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:

Standards for Use of Plastic Pipe in Compressed Air Systems. During a November 21 public hearing, OSB heard testimony on proposed revisions to sections 453 and 462, Title 8 of the CCR (Unfired Pressure Vessel Safety Orders), which will establish minimum safety standards pertaining to the design and performance of plastic pipe used in compressed air service. Currently, section 462 allows the use of plastic air piping in compressed air systems only if five specific requirements are met. One of the requirements is that the pipe meet American Society for Testing and Materials (ASTM) Designation No. D2513-86a; however, this specification for polyvinyl chloride (PVC) plastic pipe was written specifically for pipe used in the distribution of natural gas or petroleum fuels, and not for pipe used in compressed air systems. According to OSB, although plastic pipe has been known to explode in compressed air service, it can be used as a safe conveyance for compressed air provided specific measures are taken to ensure protection from physical and environmental damage. Since 1974, OSB has received numerous applications for permanent variances to permit the use of PVC pipe for compressed air service. The proposed amendments to sections 453 and 462 would moot many of these applications by establishing standards for the safe and effective use of plastic pipe in compressed air service.

Proposed amendments to section 453 would define the terms "brittle failure," "ductile failure," and "ductile plastic materials," to clearly describe the types of failures of plastic pipe; and "standard dimension ratios," which pertains to the manufacture and testing of plastic pipe to be used in compressed air service.