



SB 35 (Robbins) would authorize DMV to accept an insurer's certificate which does not cover all vehicles registered to the licensee for purposes of reinstating the driver's license of a person who is deemed to be a negligent driver on the basis of his/her violation point count. This bill is pending in the Assembly Insurance Committee.

SB 110 (Robbins). As of January 1, 1992, DOI must require all new applicants for licensure as fire and casualty broker-agents or as life agents to meet prelicensing education standards; this bill would delay the operative date of those provisions to January 1, 1993. SB 110 is pending in the Senate Committee on Insurance, Claims and Corporations.

SB 122 (Robbins) would authorize DOI's Bureau of Fraudulent Claims to impose a special assessment on insurers to fund a program to reward persons whose information leads to the arrest and prosecution of vehicle thieves or the issuance of a warrant for suspected theft ring members or chop shop operators, or the arrest and filing of an indictment or information against suspected theft ring members or chop shop operators. This bill is pending in the Senate Appropriations Committee.

LITIGATION:

On February 21, the California Supreme Court denied Allstate's petition for review in *Allstate Insurance Co. v. Gillespie*, No. S014332, but republished the Second District Court of Appeal's opinion in the case. In that case, the Second District overturned the superior court's order compelling former Commissioner Gillespie to grant Allstate a 40% increase in its CAARP rates. (See CRLR Vol. 11, No. 1 (Winter 1991) p. 102 and Vol. 10, No. 1 (Winter 1990) pp. 107-10 for background information on this case.)

In late March, the California Supreme Court granted a petition for review of the First District Court of Appeal's decision in *Bank of the West v. Superior Court of Contra Costa County*, 226 Cal. App. 3d 835, 275 Cal. Rptr. 39 (Jan. 4, 1991), a case of first impression. In that case, the court found that standard form insurance policies which provide comprehensive and general liability (CGL) coverage for "unfair business practices" against a company and its officers cover false advertising and all other violations of California's Unfair Practices Act (Business and Professions Code section 17200). The term "unfair business practices" is defined broadly in section 17200 to include any unfair or unlawful act. Although insurance coverage of intentional torts is limited by pub-

lic policy and by the Insurance Code, plaintiffs commonly allege "negligent misrepresentation" to allow possible coverage. [Here, plaintiff contends not that the defendant lied, but that he made a statement and represented it to be true, while negligently not knowing whether or not it was true.]

However, the insurance industry argues that policy language covering advertising liability refers only to common law business torts, including common law (not statutory) unfair competition. Such common law unfair competition does not include consumer misrepresentation, and requires *competitive* injury. The industry also argues, more persuasively, that section 17200 is an action in equity, and restitution (not damages) is required of violators to disgorge unjust enrichment. Such disgorgement cannot be insured, since that would allow the violator to keep the fruits of the violation and socialize damage through insurance coverage. The final outcome of this case will be extremely important in terms of insurance public policy and the direct liability of insurance firms. Where such liability is found, the burden will be shifted to policyholders who will pay higher premiums; policyholders which are business entities will pass those higher premium costs on to customers.

DEPARTMENT OF REAL ESTATE

Acting Commissioner:

John R. Liberator

(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 July 1990, 202,408 salespersons and 98,891 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 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 November 1990, approximately 144,500 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:

OAL Rejects DRE Rulemaking Package. On February 11, DRE submitted its rulemaking package to the Office of Administrative Law (OAL); that package included the proposed adoption of sections 2833, 2849, 3050, 3051, 3052, 3053, 3054, and 3055, and the proposed amendment of sections 2785, 2792.14, 2792.20, 2792.22, 2800, 2834, 2840, 2849, 3000, 3002, 3004, 3007, 3008, 3012.2, and 3104, Title 10 of the CCR. (See CRLR Vol. 11, No. 1 (Winter 1991) pp. 103-04 and Vol. 10, No. 4 (Fall 1990) pp. 125-26 for detailed background information on these changes.)

On March 13, OAL disapproved this proposed regulatory action, finding that DRE did not meet the consistency and clarity standards of Government Code section 11349.1, did not summarize and respond to all comments, and did not comply with procedural requirements of the Administrative Procedure Act.

DRE has 120 days in which to satisfy all of OAL's concerns and resubmit the package for approval.

Pioneer Mortgage Files Chapter 11. On January 2, Pioneer Mortgage Company president Gary Naiman vowed to avoid bankruptcy amid growing investor pressure and a formal investigation by DRE. On January 9, Naiman filed for reorganization under Chapter 11 of the U.S. Bankruptcy Code for Pioneer Mortgage. At the time of the filing, DRE was engaged in an ongoing audit of Pioneer, to determine whether or not violations of real estate law had occurred; according to DRE, the bankruptcy filing will not have any affect on its investigation.

Following Pioneer's bankruptcy filing, more than 100 civil cases were filed by investors and companies with which it did business; the complexity of the litigation and the number of pending lawsuits prompted U.S. District Court Judge John S. Rhoades to order attorneys to prepare a chart that explains "who's suing whom." In addition to the proceedings in federal bankruptcy court and the U.S. District Court, lawsuits have also been filed in San Diego County Superior Court by over 90 individual investors alleging fraudulent actions on the part of Pioneer and its principals.

Sundance Mortgage Closes Its Doors. Facing charges by DRE of trust fund irregularities and failure to inform investors of borrowers' deep financial problems, Sundance Mortgage Company went out of business in January. Sundance, a San Diego trust deed company against which DRE filed a disciplinary

accusation in August 1990, entered into a settlement agreement with DRE, providing that Sundance's corporate real estate license would be revoked, as would the real estate license of its chief executive officer, Marcia Myers Spann. Sundance also faces several civil lawsuits by investors, who allege that the company engaged in fraud, securities violations, negligent misrepresentation, breach of contract, professional malpractice, conspiracy, and unfair business practices.

Champion Mortgage Files Chapter 11. In February, DRE charged Champion Mortgage Company with running an upfront loan scheme; two weeks later, the business filed for reorganization under Chapter 11 of the U.S. Bankruptcy Code. In its accusation, DRE charged San Diego-based Champion with collecting site fees and good faith deposits from borrowers, frustrating its clients with delays and lack of communication, then failing to provide the promised loans, as well as "fraud, dishonesty, and/or negligence" in its mortgage loan brokerage and advance fee collection business.

According to Champion attorney Tomas Shpall, the DRE accusation was not the catalyst for the bankruptcy court filing; instead, Shpall stated that judgments won by clients through civil court actions prompted Champion's emergency bankruptcy filing. The mortgage company's debts are listed at \$325,000, according to bankruptcy filings. Champion listed its assets as unknown, but less than \$100,000, even though DRE found that Champion collected \$3.5 million in good faith deposits and site fees in 1989 alone.

An administrative hearing on DRE's charges is tentatively scheduled to be held in the fall.

Property Mortgage Investors Seek Chapter 11 Status. In early February, DRE initiated an investigation of Property Mortgage Company (PMC), a major mortgage broker in California, after receiving reports from the public that PMC had stopped brokering new loans and suspended payments to investors who provided the cash for many of those loans. On February 14, the company's largest investors filed a petition seeking to have PMC reorganized under Chapter 11 of the U.S. Bankruptcy Code; the action has the same effect as if PMC had filed for Chapter 11 itself, freezing the investors' money and protecting PMC from lawsuits until the company devises a plan to straighten out its finances. DRE's audit of the company's business practices will continue regardless of the bankruptcy action.

LEGISLATION:

SB 492 (Leonard), as introduced February 26, would provide that the Commissioner may suspend or revoke a real estate license if a licensee, while engaged in the business or acting in the capacity of a real estate licensee, 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. This bill is pending in the Senate Business and Professions Committee.

AB 1593 (Floyd), as introduced March 8, proposes to 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. This bill would also enact a Mortgage Broker Law and would transfer to the Department of Financial Institutions responsibility for regulating specified mortgage brokering activities conducted under a real estate broker's license. The bill would require a real estate broker conducting these activities to obtain prescribed certification from the Department of Financial Institutions. This bill is pending in the Assembly Committee on Banking, Finance and Bonded Indebtedness.

AB 1822 (Frazee). Under existing law, real estate brokers engaging in certain activities with respect to transactions involving the sale of real property sales contracts or debt instruments secured by real property, and meeting either one of two prescribed criteria, are subject to special requirements as to advertising, reporting, trust funds, and disclosure. As introduced March 8, this bill would add an additional criterion under which a real estate broker is subject to these special requirements. This bill is pending in the Assembly Committee on Banking, Finance, and Bonded Indebtedness.

AB 360 (Johnson). Existing law does not require an advertisement for a loan which utilizes real property as collateral to disclose the license under which the loan would be made or arranged. As introduced January 29, this bill would require that disclosure with respect to advertisements placed by any person licensed as a real estate broker, consumer finance lender, commercial finance lender, or personal property broker. This bill is pending in the Assembly Governmental Organization Committee.

SB 630 (Boatwright). Existing law regulates persons involved in the sale, lease, or exchange of real property including real estate salespersons and



real estate brokers, as well as persons involved in the sale, lease, or exchange of mineral, oil, and gas property. As introduced March 4, this bill would provide that for the purpose of these provisions, the term "employee" shall include independent contractors, and the term "employ" shall refer to the contractual relationship of both employees and independent contractors. The bill would also provide that all obligations created under those provisions and all regulations issued by the Real Estate Commissioner relating to employees shall also apply to independent contractors. This bill is pending in the Senate Business and Professions Committee.

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. As introduced February 27, 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 bill is pending in the Assembly Committee on Consumer Protection, Governmental Efficiency, and Economic Development.

AB 776 (Costa), as introduced February 26, 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 bill is pending in the Assembly Committee on Housing and Community Development.

AB 1234 (Frazee). Under existing law, all money in the Education and Research Account in the Real Estate Fund is available for appropriation by the legislature to be used to carry out real estate laws, in the advancement of education and research in real estate at the University of California, state colleges, and community colleges, or in contracting for a particular research project in the field of real estate for the state with any university in this state accredited by the Western Association of Schools and Colleges, or with any qualified corporation or association. As introduced March 6, this bill would provide

that the money is also available for appropriation in awarding research grants or fellowships in the field of real estate to any accredited university or college in this state, or to any graduate student or faculty member thereof, or to any other person residing in this state qualified to perform that research. This bill would also require the Commissioner to issue regulations to provide rules and procedures to implement this section relating to the awarding of research grants and fellowships, and would provide for the creation of an eight-member advisory committee appointed by the Commissioner to review and make recommendations concerning the awarding of grants and fellowships. This bill is pending in the Assembly Committee on Banking, Finance, and Bonded Indebtedness.

DEPARTMENT OF SAVINGS AND LOAN

Commissioner: William D. Davis
(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:

Future of DSL Remains Uncertain. While DSL's short-term future remains reasonably secure, the long-term survival of DSL is questionable. DSL's proposed budget for fiscal year 1991-92 is \$4.2 million and 43 staff positions. DSL relies on assessment fees it imposes upon state-chartered associations for its funding. Assessments collected in 1990-91 totalled \$3.4 million, with \$2.1 million projected for 1991-92. The 1991-92 budget marks the second year of decrease from the 1989-90 budget, which totalled \$8.4 million and 124 staff positions. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 127 for background information.)

Mary Law, Chief Administrator of DSL, states that the long-term viability of DSL is uncertain because there is no

incentive for savings and loan institutions to remain state-chartered. Before Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), state-chartered savings and loans had unlimited authority to invest in subsidiaries, no limitations on their activities as service corporations, and no restrictions on direct investment in real estate. With the enactment of FIRREA, new minimum capital requirements (which preempt state law) eliminate these advantages for state-chartered institutions. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 5 and Vol. 10, No. 1 (Winter 1990) pp. 99-100 for background information on FIRREA.)

However, Ms. Law noted that only one S&L has converted to a federal charter since January 10, 1991. Some S&Ls have told DSL that they do not want to convert because they do not want DSL to be abolished; if it is, S&Ls will have no state option if they become dissatisfied with federal regulators. Yet, DSL is taking a wait-and-see attitude on further conversions which could occur before the July 1992 assessment. Currently, only 56 California state-chartered savings and loan associations are regulated by DSL.

While DSL waits, both the state legislature and Carl D. Covitz, the new Secretary of the Business, Transportation and Housing Agency, are examining whether DSL should be abolished or consolidated with the Department of Banking. (See *infra* LEGISLATION.)

Columbia Savings & Loan Seized by Federal Regulators. On January 25, federal regulators seized Beverly Hills-based Columbia Savings and Loan Association, the industry's biggest speculator in junk bonds. Columbia's assets at seizure totalled \$6.6 billion, with \$6 billion in deposits. Columbia suffered net losses of \$591 million in 1989 and \$782 million during the first nine months of 1990.

At the end of 1990, Columbia had junk bonds worth about \$2.1 billion, which it had been trying to sell. In July 1990, Toronto-based Gordon Investment Corporation had agreed to pay \$3 billion for the bonds. But federal regulators rejected the sale because Columbia would have lent Gordon 90% of the purchase price and would still be liable for losses if the bonds declined more than 10%. (See CRLR Vol. 11, No. 1 (Winter 1991) pp. 104-05 and Vol. 10, No. 4 (Fall 1990) p. 128 for background information.) The bonds were originally bought for more than \$4 million.

The takeover ordered by the Office of Thrift Supervision (OTS) brings the government's junk bond holdings to more