



1989) pp. 73-76 for detailed background information.) The court struck down only two sections of the initiative, leaving intact the rollback in auto insurance rates to 20% below the levels in effect on November 8, 1987.

In the opinion, written by Justice Allen Broussard, the court stated that "except for the insolvency standard, the provisions of Proposition 103 relating to the setting of rates, and procedures for the adjustment of rates, do not on their face deprive insurers of due process under the state or federal Constitutions." The "insolvency standard" refers to a portion of the initiative, section 1861.01(b), which provides for relief from rate reduction for insurance companies that are "substantially threatened with insolvency." The court determined that the insolvency standard is too high a test, and that "[o]ver the long term the state must permit insurers a fair return; we do not perceive any short term conditions that would require depriving them of a fair return."

On the subject of the statute's limitation on the power of insurers to refuse to renew policies, section 1861.03(c), the court ruled that the provision may apply "to policies in effect when the initiative was enacted," as well as policies written after the law's passage. Insurers had argued that any such restriction would unconstitutionally impair their right to contract freely. The court pointed out that insurance companies may end their obligation to their insureds by withdrawing from the California market through the procedure outlined in Insurance Code section 1070 *et seq.*, and surrender of their certificates, rather than through refusals to renew.

In section 1861.10(c), Proposition 103 provided for the formation of a consumer advocacy corporation, and would have required insurers to include a notice in premium envelopes inviting policyholders to become members of that group. The Court found that formation of such a corporation would violate article II, section 12 of the California Constitution, which forbids an initiative statute from identifying a private corporation to perform any function.

Each of the provisions struck down by the Court were found to be severable from the viable portion of the initiative.

The court did not rule on the insurers' argument that the proposition's requirement that the State Board of Equalization adjust the gross premium tax imposed upon insurance companies would violate several provisions of the California Constitution. The initiative calls

for an increase in the tax to prevent the state from losing revenue as premiums—the base upon which the tax is figured—are reduced. A decision on this matter would be inappropriate, the court declared, because of article XIII, section 32 of the California Constitution, which states: "No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax." The court went on to state that the appropriate time to adjudicate this issue would be after an insurance company had paid this increased tax and files suit for a refund of the payment.

In late May, the insurance companies which brought the suit announced their decision not to appeal the decision of the California Court to the U.S. Supreme Court.

Antitrust Suit. The Attorneys General of the eighteen states suing 32 insurance companies for alleged conspiracy recently filed briefs in response to motions to dismiss filed in December by the insurers. (See CRLR Vol. 9, No. 1 (Winter 1989) p. 76 and CRLR Vol. 8, No. 4 (Fall 1988) p. 87 for detailed background information.) According to the states, the insurers and reinsurers engaged in an "overarching conspiracy" and used "boycott, coercion and intimidation" to restrict the availability and coverage of commercial liability insurance, as well as drive up the price.

The states countered the insurers' assertion that under the terms of the McCarran-Ferguson Act, which exempts insurance companies from most of antitrust law, they are permitted to enter into in an "agreement on policy terms." Asserting that the agreement amounts to a boycott, the Attorneys General argued that any immunity under McCarran-Ferguson would be removed.

In the December motions, the insurance companies contended that the states should not be permitted to assert claims as to the policy provisions, since the commissioners of the various states approved their use. In response, the Attorneys General pointed out that even in states that did approve the policy language, such authorization did not endorse "coercive conduct" on the part of the insurers.

The states also pointed out that McCarran-Ferguson applies only to insurance companies that are regulated by state law. The sale of reinsurance, insurance sold to insurance companies, is not regulated by the states. Since reinsurance agencies are therefore not exempt from

antitrust law, their alleged collusion with insurance companies strips the insurance companies of protection as well.

The insurers' dismissal motions in the case, *In re Insurance Antitrust Litigation*, No. C88-1688WWS (U.S.D.C. N.D. Cal), were set for a hearing on July 7. The suit is being heard in San Francisco by Judge William W. Schwarzer, a former antitrust defense attorney.

DEPARTMENT OF REAL ESTATE

Commissioner: James A. Edmonds, Jr.
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The Real Estate Commissioner is appointed by the Governor and is the chief officer of the Department of Real Estate (DRE). 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: licenses (as of September 1988, 216,365 salespersons, 90,211 brokers, 17,332 corporations) and subdivisions.

License examinations require a fee of \$25 per salesperson applicant and \$50 per broker applicant. Exam passage rates average 55% for salespersons and 47% for brokers. 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



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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 \$12.50.

The California Association of Realtors (CAR), the industry's trade association, is the largest such organization in the state. Approximately 105,000 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:

Brochure on Trust Deed Investments. The Department's recent review of complaints filed by trust deed investors indicates a lack of knowledge and understanding on the part of investors of the nature of these investments, and an inability to analyze and evaluate the information provided them through the disclosure process established in 1981. Statutes now require trust deed investors to receive basic information about the transaction, parties, terms, and the property securing the loan, before completing the transaction. The typical investor often relies upon the mortgage loan broker (with whom they are doing business) for professional advice and preservation of the money invested. Since some mortgage loan brokers fail to disclose adequate information, investors fail to make fully informed decisions.

To help resolve this problem, DRE recently published a brochure entitled *Trust Deed Investments—What You Should Know!*, which addresses seven

essential elements of trust deed investments. DRE sells the brochure for \$2. In conjunction with the brochure, DRE will initiate seminars for various groups, especially senior citizens, to educate consumers on what they need to know before investing in trust deeds.

DRE Rulemaking. On May 4, the Office of Administrative Law (OAL) approved numerous regulatory changes recently adopted and submitted by the Department. Specifically, OAL approved DRE's adoption of new sections 2792.30, 2792.31, and 2977, Title 10 of the California Code of Regulations (CCR); amendments to sections 2763, 2791.8, 2792.22, 2810.1, 2846.5, 2975, 3000, 3004, 3006, 3007, 3007.3, 3007.5, 3007.6, and 3012.2; and the repeal of section 3007.4 (see CRLR Vol. 9, No. 1 (Winter 1989) p. 77 for detailed background information on these regulatory changes).

However, OAL disapproved the Department's proposed adoption of new section 2746, which would have identified specific facts which an applicant for a real estate license, and officers, directors, or persons owning over 10% of the stock of a corporate applicant, would have had to disclose in order to facilitate the Commissioner's determination of the honesty and truthfulness of the individuals involved. OAL rejected the proposed language of section 2746 on grounds it failed to meet the clarity and reference standards in Government Code section 11349.1.

LEGISLATION:

SB 743 (Seymour) would make it a crime to make, issue, publish, deliver, or transfer as true and genuine any subdivision public report which is false, forged, altered, or counterfeit and knowingly so, or to participate in the making, issuance, delivery, transfer, or publication of a subdivision public report with knowledge that it is forged, false, altered or counterfeit. This bill is pending in the Assembly Ways and Means Committee.

AB 527 (Hannigan) would, among other things, enact the Real Estate Appraisers' Licensing and Certification Law; authorize the Commissioner to appoint a Real Estate Appraisal Advisory Board to assist the DRE in the administration of the new law; authorize a licensed real estate broker to appraise all types of real estate and real property in this state; specify standards and procedures for licensure as a real estate appraiser and certification as a state-certified real estate appraiser; and specify certain provisions regarding disciplinary proceedings, examinations, licensing fees, and continuing

education requirements for real estate appraisers. At this writing, this bill is pending in the Assembly Ways and Means Committee.

SB 910 (Vuich), as amended May 16, would appropriate \$1,400,000 from the Education and Research Account in the Real Estate Fund to the DRE as a loan, repayable as specified, to establish a regulatory structure for the licensing and certification of real estate appraisers. This bill would become operative contingent upon the chaptering of AB 527. SB 910 is pending in the Senate Appropriations Committee.

SB 1216 (Beverly) would enact the Real Estate Appraisers Licensing and Certification Law prohibiting a person from engaging in real estate appraisal activity without being licensed by DRE. This bill is pending in the Senate Business and Professions Committee.

SB 1316 (Seymour) would specify that an application for a real estate broker license examination or real estate salesperson license examination must be in writing to the Commissioner, and would specify that the Commissioner may prescribe the format and content of the broker or salesperson examination application. The bill would also specify that the application for the broker examination or salesperson examination must be accompanied by the real estate broker or salesperson license examination fee.

Under existing law, a real estate salesperson may be issued a restricted license, as specified, which may be restricted by, among other things, employment by a particular real estate broker. A restricted license may be suspended without a hearing. This bill would provide that a salesperson license may be restricted if a salesperson licensee or applicant has not complied with specified educational requirements within 18 months after the issuance of the license. The bill would also provide that a restricted salesperson license containing a condition requiring compliance with these educational requirements shall be automatically suspended upon the licensee's failure to comply with the condition, which shall not be lifted until the suspended licensee has submitted the required evidence of course completion and the Commissioner has given written notice to the licensee of the lifting of the suspension.

Existing law specifies that certain designated employees of the DRE, although not peace officers, are authorized to exercise the power of arrest and the power to serve warrants with respect to the laws governing subdivided lands. This bill would additionally permit these



designated employees to exercise the power to arrest and the power to serve warrants with respect to the Real Estate Law. SB 1316 passed the Senate on June 1 and is pending in the Assembly Committee on Governmental Efficiency and Consumer Protection.

AB 1042 (Bane). Existing law prohibits interest earned by a real estate broker's trust accounts from inuring to the benefit of the broker or any person licensed to the broker. This bill would specify that, notwithstanding these provisions or any other provision of law, benefits accruing from the placement in a demand deposit account of a commercial bank of funds received by a real estate broker who collects payments or provides services in connection with a loan secured by a lien on real property shall inure to the broker, unless otherwise agreed in writing by the broker and lender or noteowner on the loan. The bill would specify that the borrower shall receive at least a specified rate of interest on impound account payments. At this writing, AB 1042 is pending in the Assembly Finance and Insurance Committee.

SB 1128 (Green). Existing law requires real estate brokers who negotiate loans to be secured by a dwelling to cause certain written disclosures to be delivered to the prospective borrower before the prospective borrower becomes obligated on the loan. As amended May 3, this bill would require a prescribed general notice on balloon payments to be included in these written disclosures. This bill passed the Senate on June 8 and is pending in the Assembly Finance and Insurance Committee.

SB 988 (Beverly). Current law exempts specified financial institutions from real estate licensure and certain provisions applicable to real estate brokers and real estate securities dealers, and from certain provisions prohibiting taking unconscionable advantage of owners of real property in foreclosure. As amended May 23, this bill would expand that exemption to include bank subsidiaries, bank holding companies and their subsidiaries, savings banks and their subsidiaries, subsidiaries of savings and loan associations, holding companies of savings banks and savings and loan associations, and subsidiaries of those holding companies. SB 988 would exempt employees of mortgage bankers, as defined, when acting on behalf thereof, in originating, acquiring, or selling a promissory note in a mortgage banking transaction; it would also exempt employees of real estate brokers, when acting as an agent

for institutional investors specified in the bill. This bill is pending in the Senate Appropriations Committee.

AB 2242 (Costa) would include, within the list of acts requiring licensure as a real estate broker, assisting or offering to assist another in filing an application for conducting a business opportunity upon lands owned by the state or federal government. This bill passed the Assembly on June 13 and is pending in the Senate Business and Professions Committee.

The following is an update on bills reported in detail in CRLR Vol. 9, No. 2 (Spring 1989) at page 89:

AB 339 (Hauser), which would require any person intending to offer subdivided land for sale or lease to disclose to the DRE whether the adjacent land is zoned for timberland production, is still pending in the Assembly Local Government Committee.

AB 405 (Sher), which requires that as of July 1, 1989, all contracts to convey real property which contain an arbitration provision shall entitle the provision "ARBITRATION OF DISPUTES" and also contain a specified notice, was signed by the Governor on May 25 (Chapter 22, Statutes of 1989).

SB 352 (Presley) has been amended and no longer applies to DRE.

SB 251 (Craven), which would make several changes in the current law governing real property securities and mortgage brokers, has been amended. Among other things, it would:

- delete the prohibition against the payment of interest on specified funds retained by real estate brokers pursuant to the terms of a promissory note or real property contract;

- exempt from certain disclosure requirements loans and real property sales contracts where the purchaser or lender is a personal property broker, consumer finance lender, or commercial finance lender;

- increase the bond required to be filed by real property securities dealers from \$5,000 to \$10,000, and authorize the filing of cash or cash equivalents in lieu of the bond; and

- revise the definition of "broker-controlled funds" for purposes of certain disclosures required by brokers negotiating loans secured by a dwelling. The bill would also revise the late charges respecting balloon charges that may be charged to the borrower, and would authorize real estate licensees to impose service charges in connection with these loans for beneficiary statements and payoff demands.

At this writing, SB 251 is pending in the Senate Appropriations Committee.

LITIGATION:

In *Temple v. Kerwin (Real Estate Commissioner)*, No. H004200 (Apr. 20, 1989), the Sixth District Court of Appeal held that claimants against the Real Estate Recovery Account may recover economic losses, including interest, from the fund, but may not recover for damages awarded for emotional distress.

In a fraud action filed against a DRE licensee, the Temples were awarded almost \$300,000 in damages, including \$100,000 in emotional distress damages. They were able to recover only \$412 from the licensee. They applied to DRE for a payment of \$20,000, the statutory maximum, from the Real Estate Recovery Account. The Commissioner denied the application; however, a trial court reversed the Commissioner. On appeal, on the issue of emotional distress damages, the court held that a claimant against the Account may seek amounts unpaid on a judgment that represent an "actual and direct loss" to the claimant. The program is intended to compensate only economic losses suffered by the actions of a real estate licensee, not noneconomic losses such as emotional distress.

FUTURE MEETINGS:

September 29 in Los Angeles.
January 19 in Anaheim.
March 30 in Sacramento.

DEPARTMENT OF SAVINGS AND LOAN

Commissioner: William J. Crawford
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The Department of Savings and Loan (DSL) is headed by a commissioner who has "general supervision over all associations, savings and loan holding companies, service corporations, and other persons" (Financial Code section 8050). DSL holds no regularly scheduled meetings, except when required by the Administrative Procedure Act. The Savings and Loan Association Law is in sections 5000 through 10050 of the California Financial Code. Departmental regulations are in Title 10, Chapter 2, of the California Code of Regulations.

MAJOR PROJECTS:

Delayed Funds Availability Regulations Effective. DSL's proposed regula-