No. 13-____

IN THE

# Supreme Court of the United States

BANK OF AMERICA, N.A.,

*Petitioner,*

v.

HAROLD C. ROSE AND KIMBERLY LANE,

*Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of California

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

This case involves a state high court's decision authorizing private enforcement of a federal statute despite Congress' intent that it not be privately enforced. The Truth in Savings Act (TISA), 12 U.S.C. §§ 4301 *et seq*., governs disclosures regarding consumer deposit accounts in banks. Congress repealed TISA's civil liability provision, leaving TISA to be enforced only by federal banking agencies. Respondents' claim under California's Unfair Competition Law (UCL) was based explicitly and solely on alleged TISA violations. That claim is barred by federal law because Congress' intent to foreclose private enforcement of TISA also bars indirect enforcement of TISA through a UCL claim.

Yet, the California Supreme Court held that TISA's savings clause—which authorizes the States to enact laws governing consumer deposit account disclosures—overrode Congress' foreclosure of private enforcement of TISA. That ruling conflicts with this Court's precedents, contravenes Congress' intent, and violates the Supremacy Clause.

The question presented is: When Congress has not authorized private enforcement of a federal statute and has foreclosed indirect enforcement, may a state law that borrows other statutes as predicates for liability be used to privately enforce that federal statute, based on a savings clause that permits States to enact their own laws relating to the specific subject of the federal legislation.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Bank of America, N.A. Respondents are Harold C. Rose and Kimberly Lane.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Petitioner Bank of America, N.A. is wholly owned by BANA Holding Corporation. BANA Holding Corporation is wholly owned by BAC North America Holding Company. BAC North America Holding Company is wholly owned by NB Holdings Corporation, which in turn is wholly owned by Bank of America Corporation. No publicly held company owns 10% or more of the stock of Bank of America Corporation.

## TABLE OF CONTENTS

APPENDIX

## TABLE OF AUTHORITIES

### CASES

**CONSTITUTIONS**

**FEDERAL STATUTES**

**STATE STATUTES**

**REGULATIONS**



**LEGISLATIVE MATERIALS**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Bank of America, N.A. respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of California.

## OPINIONS BELOW

The opinion, order, and judgment of the California Superior Court are unreported and are reprinted in the Appendix to the Petition ("App.") at 29a-43a. The opinion of the California Court of Appeal is reported at 133 Cal.Rptr.3d 615 (Cal. Ct. App. 2011) and is reprinted at App. 14a-28a. The opinion of the California Supreme Court is reported at 304 P.3d 181 (Cal. 2013) and is reprinted at App. 1a-13a.

## JURISDICTION

The California Supreme Court issued its judgment and opinion on August 1, 2013. App. 1a-13a. The time for filing this petition was extended to November 29, 2013 by Justice Kennedy's Order. No. 13A351 (Oct. 9, 2013). This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the U.S. Constitution, art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The savings clause of the Truth in Savings Act, 12 U.S.C. § 4312, provides in pertinent part:

> [TISA] do[es] not supersede any provisions of the law of any State relating to the disclosure of yields payable or terms for accounts to the extent such State law requires the disclosure of such yields or terms for accounts, except to the extent that those laws are inconsistent with the provisions of this chapter, and then only to the extent of the inconsistency.

The full text of TISA, 12 U.S.C. §§ 4301-4313, effective to July 20, 2011, is reproduced at App. 44a-60a. The text of TISA's former Civil Liability provision, 12 U.S.C. § 4310, effective to September 29, 2001, is reproduced at App. 61a-66a.

**STATEMENT**

This Court consistently has instructed that congressional foreclosure of private enforcement of a federal statute means that the statute may not be privately enforced either directly or indirectly. This instruction applies with equal force in state courts because the Supremacy Clause, U.S. Const. art. VI, cl. 2, requires state courts to adhere to federal law and effectuate Congress' intent. Finding that private enforcement of TISA created undue and unnecessary burdens on banks and regulators alike, Congress repealed TISA's civil liability provision, evidencing Congress' judgment that TISA should be enforced by federal banking regulators alone and not through private lawsuits.

Nonetheless, the California Supreme Court authorized indirect private enforcement of TISA through a private action under California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code §§ 17200 *et seq.*, which borrows violations of other statutes by making them actionable under the UCL. This does exactly what the Supremacy Clause and this Court's precedents forbid: it overrides congressional intent to foreclose private enforcement of a federal statute. The decision—which conflicts profoundly with federal law, including this Court's precedents—will contravene congressional intent and have significant consequences that reach far beyond the private enforcement of TISA in California.

### A. The Federal Truth In Savings Act

TISA was enacted as part of the Federal Deposit Insurance Corporation Improvement Act of 1991 to "require the clear and uniform disclosure of … the rates of interest which are payable on [, …] and the fees that are assessable against [, consumer] deposit accounts." Pub. L. 102–242, § 262, 105 Stat. 2236 (1991) (codified at 12 U.S.C. §§ 4301 *et seq.*).

As originally enacted, TISA contemplated two types of enforcement—administrative and private. The "Administrative Enforcement" provision, 12 U.S.C. § 4309, provides that TISA "shall be enforced under— (1) Section 1818 of this title by the appropriate Federal banking agency." Section 1818, in turn, gives broad enforcement authority to federal banking agencies and prescribes procedures—including notice and hearings—for administrative enforcement. Federal banking agencies may, among other things: issue cease-and-desist orders for violations (§ 1818(b)-(d)); require parties to "make restitution or provide reimbursement, indemnification, or guarantee against loss" (§ 1818(b)(6)); apply to United States district courts for the enforcement of their orders (§ 1818(i)); and impose civil and criminal penalties (§ 1818(i)). 12 U.S.C. § 1818 (2008) (amended 2010).[1]

TISA, as originally enacted, also provided for private enforcement. TISA's "Civil Liability" provision, former § 4310, permitted individual account holders to sue in both state and federal court for TISA violations and obtain "actual damages," civil penalties in "individual actions," and class damages subject to a cap. 12 U.S.C. § 4310 (1991) (repealed 1996).

Congress later concluded that private enforcement of TISA was unnecessarily burdensome for regulators and banks, and that unified agency enforcement was preferable.[2] In 1996, Congress passed an act repealing TISA's civil liability

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[1] All of § 1818's administrative procedures remained in place when the statute was amended by the Consumer Financial Protection Act of 2010 ("CFPA"). Pub. L. 111-203, 124 Stat. 1376 (2010). The CFPA provides an additional method of agency enforcement by giving the Consumer Financial Protection Bureau—but not private individuals—the power to bring civil actions to enforce TISA's requirements. *See* 12 U.S.C. § 5564(a). The CFPA also permits state attorneys general to bring civil actions to enforce the CFPA or the Bureau's regulations in certain circumstances, if the state gives prior notice to the Bureau so the Bureau may intervene, remove the action to district court, or appeal any order or judgment arising from the action. 12 U.S.C. § 5552(b).

[2] *See infra* at 22-24.

provision, eliminating the private cause of action as of 2001 and leaving the administrative proceedings outlined in § 1818 as the only means of enforcing TISA. Pub. L. 104-208, § 2604(a), 110 Stat. 3009, 3009-470 (1996). In March 2001, six months before TISA's private right of action provision was to sunset, Congress reaffirmed its intent to bar private enforcement of the statute when it rejected the proposed "Truth in Savings Enhancement Act of 2001" (H.R. 1057, 107th Cong. (2001) (proposed)), which would have kept the civil liability provision in place. After 2001, therefore, "private parties may no longer sue for violations of TISA." *Schnall v. Amboy Nat. Bank*, 279 F.3d 205, 209 n.2 (3d Cir. 2002).

TISA includes a savings clause providing that TISA does not supersede state laws "relating to the disclosure of yields payable or terms for accounts to the extent such State law requires the disclosure of such yields or terms for accounts, except to the extent that those laws are inconsistent with the provisions of this chapter, and then only to the extent of the inconsistency." 12 U.S.C. § 4312.

Soon after TISA was first enacted, California repealed its Financial Code provisions governing deposit account disclosure requirements, because they were ineffective to the extent they differed from TISA and because TISA "provide[d] adequate safeguards for consumers." 1993 Cal. Stats. ch. 107, §§ 1-3 (repealing former Cal. Fin. Code §§ 855, 865). After Congress repealed TISA's "Civil Liability" section, California did not enact a new, TISA-like statute. Thus, California no longer has a law "relating to the disclosure of yields payable or terms for accounts," of the type described in TISA's savings clause. 12 U.S.C. § 4312.

### B. The Underlying Allegations And The California Trial And Appellate Court Rulings

Respondents' complaint asserted a single cause of action under the UCL. The issue here involves the UCL's unlawful prong, which "borrows violations from other laws by making them independently actionable as unfair competitive practices." *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 943 (Cal. 2003) (citation omitted). Any federal or state statute theoretically may serve as a predicate for a UCL unlawful claim *See, e.g.*, *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1094 (Cal. 1998).

Respondents "ma[d]e clear that their [UCL] claim is solely based on alleged violations of TISA. They wr[ote], 'This class action arises from Defendant's violations of the Truth in Savings Act ... and its implementing Regulation DD [12 C.F.R. §§ 230.1 *et seq*. (2005)].'" App. 23a (quoting Respondents' brief). Petitioner demurred, arguing that because Congress prohibited private enforcement of TISA, Respondents could not sue for TISA violations under the guise of a UCL claim. App. 32a-33a. The trial court sustained Petitioner's demurrer and dismissed

Respondents' complaint, concluding that the UCL may not be used to "plead around" Congress' bar of private enforcement of TISA. App. 38a-39a. Respondents appealed to the California Court of Appeal.

The California Court of Appeal affirmed the dismissal, holding that Congress' repeal of TISA's civil liability provision meant that private parties may not sue for alleged TISA violations under the UCL's unlawful prong. App. 25a-26a. In reaching its conclusion, the court adhered to federal law by recognizing that Congress' intent regarding private enforcement was paramount and acknowledging that under federal law Congress' express rejection of private enforcement of a statute foreclosed both direct and indirect private enforcement. App. 24a-25a. Citing this Court's precedent, the Court of Appeal explained that "federal courts are reluctant to allow indirect lawsuits based on violations of federal law when Congress has not authorized it, because *such an action 'is in essence a suit to enforce the statute itself.'*" *Id.* (quoting *Astra USA, Inc. v. Santa Clara County*, 131 S.Ct. 1342, 1348 (2011)) (emphasis added). The Court of Appeal therefore held that allowing indirect private enforcement of TISA through a UCL claim would improperly circumvent congressional intent. App. 26a.

### C. The California Supreme Court's Decision

The California Supreme Court rejected the Court of Appeal's view of federal law and held that a UCL claim may be based solely on an alleged TISA violation, despite Congress' repeal of TISA's private right of action provision and rejection of private enforcement of TISA. App. 13a.

Instead of adhering to this Court's precedents—which hold that Congress' intent to foreclose private enforcement of a federal statute bars indirect enforcement of that statute through another law that would borrow it as a predicate—the California Supreme Court reasoned that Respondents' claim was not barred because it enforced only the UCL, not TISA. And, instead of looking to Congress' specific intent to foreclose private enforcement of TISA, as reflected in its repeal of that statute's private right of action provision in favor of an administrative enforcement scheme, the California Supreme Court concluded that TISA's savings clause authorized Respondents' UCL claim.

On the private enforcement issue, the California Supreme Court concluded that Respondents' claim did not enforce TISA itself. App. 6a-7a. In reaching that conclusion, the court did not put the focus where it belonged—on *Congress'* intent regarding private enforcement of TISA. Instead, the court looked to the *California* legislature's intent "in enacting the UCL" to confer a right to bring suit and to provide particular relief (restitution and injunctive relief) regardless of whether the predicate statute authorized private enforcement. App. 7a ("'[A]s we have long recognized, it is in enacting the UCL itself, and not by virtue of particular predicate statutes, that the Legislature has conferred upon private plaintiffs "specific power" to prosecute unfair competition claims.'") (citations omitted); App. 11a ("the UCL … is meant to provide remedies *cumulative* to those established by other laws…"). Therefore, according to the California Supreme Court, a UCL claim predicated solely on alleged TISA violations does not constitute private enforcement of TISA. App. 7a.

The California Supreme Court also concluded that Respondents' UCL claim was authorized by TISA's savings clause. The court construed TISA's savings clause broadly to cover all "private actions under state laws consistent with TISA" (App. 9a), despite the savings clause's plain language which applies only to TISA-like state statutes "relating to the disclosure of yields payable or terms for accounts" (App. 5a-6a; 12 U.S.C. § 4312). The court reasoned that Congress, by not repealing the savings clause, "expressly permit[ted] private actions under state laws consistent with TISA," and that the UCL was such a law. App. 9a, 5a.

## REASONS FOR GRANTING THE PETITION

Review of the California Supreme Court's decision allowing private enforcement of TISA is urgently needed. That decision conflicts with established federal law and involves an exceptionally important legal issue with significant consequences.

*First*, the California court's holding that a UCL claim may be predicated solely on alleged TISA violations fundamentally conflicts with this Court's precedents and the settled federal law principle that there may be no indirect private enforcement of a federal statute when Congress has not expressed an intent to allow private enforcement. Here, Congress has clearly expressed its intent to foreclose private enforcement of TISA by: repealing TISA's civil liability provision; creating a comprehensive administrative enforcement scheme; and plainly stating its reasons for eliminating (and declining to restore) private enforcement.

The California Supreme Court, however, reasoned that it could disregard what Congress has said about private enforcement of TISA—including Congress' repeal of TISA's private right of action provision and rejection of efforts to revive it—because, in that court's view, TISA's savings clause authorizes private enforcement. But that reasoning incorrectly conflates two distinct questions: (1) whether TISA preempts state statutes regulating activities covered by TISA; and (2) whether Congress intended TISA to be privately enforced. As this Court has instructed, each must be answered separately, by looking at Congress' intent on two different issues: (1) did Congress authorize the States to enact and enforce their own laws similar to a federal statute; and (2) did Congress authorize private enforcement of the federal statute?

TISA's savings clause is relevant only to the first question. It provides that the States may adopt their own laws "relating to the disclosure of yields payable or terms for accounts," to the extent that they do not conflict with TISA. 12 U.S.C. § 4312. Because California has not done so, TISA's savings clause does not apply here. And TISA's savings clause does not address the second question—the one implicated by Respondents' UCL claims—and does not override Congress' intent to foreclose private enforcement of TISA. *Rose's* reading of TISA's savings clause both misconstrues the statute's plain language in a consequential way and disregards Congress' intent on the issue of private enforcement.

*Second*, the California court's decision will have profound effects. As a result of *Rose*, individuals can bring suit in California based on TISA violations simply by proceeding indirectly under the UCL. Congress deliberately foreclosed private enforcement of TISA. *Rose* circumvents that clear congressional mandate and engenders the same problems Congress sought to avoid by repealing TISA's private right of action provision. *Rose's* impact on TISA in California alone is good reason for review.

Moreover, *Rose* threatens even broader repercussions. Invoking *Rose's* reasoning, plaintiffs will be able to predicate UCL causes of action on a host of other federal statutes and regulations, even when Congress did not intend that they be privately enforced. Creating further conflict and adding further complication, such claims will face a different fate when brought in federal court than when brought in California state court because federal courts will be bound by this Court's precedents, not *Rose*, on the question of whether the UCL can be used as a means to indirectly enforce those federal statutes.

Finally, *Rose's* reasoning provides a roadmap for courts in other States to use their state consumer protection statutes as a vehicle for private enforcement of federal statutes and regulations, regardless of congressional intent regarding their private enforcement.

In sum, the need for this Court's review is immediate and acute. *Rose* involves a manifestly important legal question, which the California Supreme Court answered in a way that substantially conflicts with this Court's precedents and circumvents the will of Congress regarding private enforcement of federal statutes. Granting review will allow this Court to intervene to prevent plaintiffs from using the California UCL and other state laws to privately enforce TISA and other similar federal statutes—notwithstanding Congress' silence on, and even express intent to foreclose, private enforcement of those statutes.

## I. The California Supreme Court's Decision Conflicts With This Court's Precedents

This Court's settled jurisprudence instructs that, unless Congress has expressed an intent to authorize private enforcement, a federal statute may not be privately enforced either directly or indirectly. Congress has barred private enforcement of TISA. TISA's savings clause does not override that clear congressional intent. The California Supreme Court's decision contravenes federal law and Congress' intent regarding private enforcement by allowing Respondents to enforce TISA via the UCL.

As an initial matter, there can be no doubt that the California court decided a question of federal law. The central issue—whether Congress' foreclosure of private enforcement of TISA bars indirect private enforcement—is a federal law question. *See Middlesex Cnty. Sewerage Authority v. Nat'l Sea Clammers Ass'n,* 453 U.S. 1, 13 (1981) (whether to allow private enforcement of a federal statute depends on the intent of Congress); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (statutory intent on private enforcement is determinative).[3]

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[3] Indeed, the California Supreme Court expressly said that it was construing congressional intent and purported to apply this Court's precedents. App. 5a-6a.

### A. The California Supreme Court's Decision Conflicts With The Settled Principle Of Federal Law That Federal Statutes May Not Be Privately Enforced Unless Congress Authorized Private Enforcement

It is up to Congress to decide whether the laws it enacts may be privately enforced. *Alexander*, 532 U.S. at 286. A federal statute may be privately enforced only if Congress intended to create both (1) a right, not just a benefit, for a particular class of people; and (2) a private remedy. *Alexander*, 532 U.S. at 286; *see also Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-85 (2002).

Congressional intent is the touchstone with respect to both direct enforcement of a federal statute and indirect enforcement of the statute via another provision of law. *See Alexander*, 532 U.S. at 286-87 (in the absence of congressional intent, courts may not authorize private enforcement "no matter how desirable that might be as a policy matter, or how compatible with the statute"); *Gonzaga* 536 U.S. at 283-85. *Rose* contravenes Congress' intent that TISA should not be privately enforced.

A federal statute may not be enforced directly through a private civil action unless Congress' intent to authorize private enforcement is apparent from the statute itself. That intent is clear when Congress has included in the statute an express private right of action provision, such as TISA's former § 4310.

Or Congress' intent can be implicit in the text and structure of the statute. Either way, Congress' intent is "determinative" and the statute itself is the beginning and end of the search for congressional intent. *Alexander*, 532 U.S. at 286 ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."); *Sea Clammers*, 453 U.S. at 13 ("The key to the inquiry is the intent of [Congress]."); *Astra*, 131 S.Ct. at 1347 ("Recognition of any private right of action for violating a federal statute … must ultimately rest on congressional intent to provide a private remedy.") (internal quotation marks, citation, and alteration omitted).

Where a statute does not contain an express private right of action provision, it may implicitly authorize direct private enforcement, but only where the language and structure of the statute manifest a congressional intent both to confer a right on a particular class of persons and to create a private remedy. *Alexander*, 532 U.S. at 286. "Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Alexander*, 532 U.S. at 289 (internal quotation marks and citations omitted); *Gonzaga*, 536 U.S. at 284 n.3 ("where a statute does not include … explicit 'right- or duty- creating language,' we rarely impute to Congress an intent to create a private right of action"). And the "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander*, 532 U.S. at 290.

TISA does not contain an express private right of action provision; Congress repealed it. And TISA does not implicitly authorize direct private enforcement because its text and structure do not manifest an intent to confer a right or create a private remedy. As for the rights inquiry, TISA focuses on the persons regulated—*i.e.*, banks—and its directives deal with what banks are required to do. *See*, *e.g.*, 12 U.S.C. §§ 4302(a) ("each advertisement, announcement, or solicitation initiated by any depository institution or deposit broker … shall state the following information … in a clear and conspicuous manner …."); 4303 ("Each depository institution shall maintain a schedule of fees, charges, interest rates, and terms and conditions applicable to each class of accounts offered by the depository institution, in accordance with the requirements of this section and regulations which the Bureau shall prescribe."). TISA, therefore, does not manifest "an intent to confer rights on a particular class of persons." *Alexander*, 532 U.S. at 289; *Gonzaga*, 536 U.S. at 284 n.3.

As for the remedy inquiry, TISA contains an administrative enforcement provision, 12 U.S.C. § 4309, but no private enforcement provision, indicating that Congress did not intend to create a private remedy. Thus, TISA may not be directly enforced.

Nor may TISA be indirectly enforced. Indirect private enforcement, like direct private enforcement, is authorized only if Congress has expressed an intent both to confer a right and to create a private remedy. *See Gonzaga*, 536 U.S. at 285-86. Congressional intent to confer a right still must be found in the statute itself, but the intent to create a remedy may be found in a different statute—one serving as a vehicle for indirect enforcement of the predicate statute. *Id.*

Section 1983 is the paradigmatic example of a statute providing a vehicle for indirect enforcement of another statute. 42 U.S.C. § 1983. It creates a private remedy to enforce the rights created in other federal statutes. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). This Court, however, has clearly instructed that § 1983 creates a remedy for violations of other statutes only where the predicate statute, on its own terms, confers rights on a class of beneficiaries. *Gonzaga*, 536 U.S. at 285 ("the initial inquiry—determining whether a statute confers any right at all—is no different from the initial inquiry" regarding direct enforcement); *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119-20 (2005) (no § 1983 indirect enforcement of the Telecommunications Act of 1996 (TCA), 47 U.S.C. § 332(c)(7), because the TCA did not create an "individually enforceable right"); *Gonzaga*, 536 U.S. at 285 (no § 1983 indirect enforcement of the federal Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, because it creates no individual right).

This Court also has explained that—because § 1983 expressly creates a private remedy—there is a presumption that it can be used to enforce any federal rights-creating statute. *Gonzaga*, 536 U.S. at 285. However, that presumption is overcome—and § 1983 cannot be used to enforce a federal statute—where Congress has manifested its intent to foreclose indirect private enforcement of the predicate statute. *Sea Clammers*, 453 U.S. at 19. As with direct enforcement, deference to congressional intent is strictly required. *Rancho Palos Verdes*, 544 U.S. at 124 ("limitations upon the remedy contained in the [predicate] statute are deliberate and are not to be evaded through § 1983").

This Court's decision in *Sea Clammers* illustrates both the legal principle and the reason for it. 453 U.S. 1. In addressing whether the Clean Water Act (CWA), 33 U.S.C. §§ 1251 *et seq*., and the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C. §§ 1401 *et seq*. may be indirectly enforced through a § 1983 claim, this Court first held that Congress' creation of elaborate enforcement provisions meant that Congress had not implicitly authorized *direct* enforcement. 453 U.S. at 14-15. Then, this Court went on to hold that § 1983 could not be used to enforce to the statutes *indirectly* because "the existence of [the statutes'] express remedies demonstrates not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under § 1983." *Id.* at 21.

In short, although Congress has authorized the indirect enforcement of federal statutes via § 1983, indirect enforcement of a statute is not authorized if "Congress did not intend [a private] remedy for … [the] right [created by the statute]," and Congress' intent to bar indirect enforcement often is clear from "the statute's creation of a 'comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'" *Rancho Palos Verdes*, 544 U.S. at 120 (quoting *Blessing v. Freestone*, 520 U.S. 329, 341 (1997)).

With even greater emphasis, this Court has instructed that a *state* law cause of action may not be used to indirectly enforce a federal statute where Congress has not authorized private enforcement. For example, in *Astra USA, Inc. v. Santa Clara County*, this Court held that a private party could not indirectly enforce § 340B of the Public Health Services Act, 42 U.S.C. § 256b, through a state law breach of contract claim. 131 S.Ct. 1342, 1345 (2011).

In *Astra*, public hospitals and community health centers sought to sue a drug manufacturer based on allegations that it was charging them prices higher than permitted under § 340B. *Id.* at 1345. The defendant manufacturer had opted into the § 340B program by entering into a contract with the federal government (a "Pharmaceutical Pricing Agreement," or PPA) to supply pharmaceuticals to the health centers at prices determined by a statutory formula. *Id.* at 1346. The health centers—which conceded that there was no private right of action under § 340B—sued under a state law contract theory, basing their claims entirely on "allegations that the manufacturers charged more than the § 340B ceiling price." *Id.* at 1347-48.

This Court held that the plaintiff health centers could not indirectly privately enforce the provisions of the statute by bringing state law claims. *Id.* at 1345. This conclusion was based on a pragmatic assessment of what the lawsuit actually alleged and the legal foundation on which it actually rested. As this Court explained, because health centers may not sue under the statute, "it would make scant sense to allow them to sue on a form contract implementing the statute, setting out terms identical to those contained in the statute." *Id.* at 1345. This Court recognized that the contract claim was "in essence a suit to enforce the statute itself," explaining: "Though labeled differently, suits to enforce § 340B and suits to enforce PPAs are in substance one and the same. Their treatment, therefore, must be the same, no matter the clothing in which [the plaintiffs] dress their claims." *Id.* at 1345, 1348.

The result should have been the same here for the same reasons. An examination of TISA's text and structure shows that Congress did not intend for TISA to be privately enforced at all. In TISA, Congress enacted a comprehensive regulatory scheme and granted federal banking agencies broad remedial power to address TISA violations. *See supra* at 4-7. As this Court put it in *Sea Clammers*, "[i]n view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under" the federal statute. *Sea Clammers*, 453 U.S. at 14.

Congress' intent to foreclose private enforcement of TISA also is evident in Congress' affirmative decision to repeal TISA's private right of action provision, as well as its subsequent rejection of attempts to restore it. Repeal of a statutory provision constitutes an affirmative act; it is not equivalent to legislative silence. *Hamdan v. Rumsfeld*, 548 U.S. 557, 558 (2006) ("Congress' rejection of the very language that would have achieved the result the Government urges weighs heavily against the Government's interpretation."); *Fox v. Standard Oil Co. of New Jersey*, 294 U.S. 87, 96 (1935) (rejection of amendment is a "circumstance to be weighed along with others" in statutory interpretation).

The reasons Congress repealed TISA's civil liability provision—namely, to eliminate unnecessary burdens on banks and regulators and to leave enforcement solely in the hands of agencies in order to promote uniformity and avoid inconsistent enforcement through conflicting judicial decisions—underscore Congress' intent to foreclose any private enforcement and illuminate why any private enforcement would undermine Congress' objectives.

The repeal was simultaneously proposed in each house of Congress to implement a unified, less burdensome administrative enforcement scheme for TISA. *See* Financial Institutions Regulatory Relief Act of 1995 ("the House Bill") H.R. 1362, 104th Cong. (1st Sess. 1995); Economic Growth and Regulatory Paperwork Reduction Act of 1995 ("the Senate Bill") S. 650, 104th Cong. (1st Sess. 1995). The House Report on the House Bill explained that the civil liability provision was being repealed in order to lessen the burden on regulatory agencies responsible for implementing the statute. H.R. Rep. No. 104-193, at 104 (1995) ("The imposition of civil liability for violation of the TISA has resulted in financial institutions seeking numerous clarifications and commentaries from the Federal Reserve Board increasing the regulatory burden for both the industry and the Board."). The report further explained that TISA's civil liability provision was being repealed to lessen this burden, while leaving federal banking agencies the "authority to take administrative actions to enforce TISA." *Id.* Similarly, the Senate Committee on Banking, Housing, and Urban Affairs' report on the Senate Bill explained that the repeal was meant to provide "an administrative enforcement scheme" for TISA as an effort to reduce the unnecessary regulatory burden and attendant liability facing banks. S. Rep. No. 104-185, at 21 (1995).

Thus, Congress has expressly considered and foreclosed private enforcement of TISA, in favor of a comprehensive administrative enforcement scheme. *See Doe v. Chao*, 540 U.S. 614, 615 (2004) (concluding that a certain category of damages could not be awarded under the Privacy Act where the "drafting history shows that Congress cut out the very language in the bill that would have authorized such damages"); *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 200 (1974) (deletion of provision in committee "strongly militates against a judgment that Congress intended a result that it expressly declined to enact").

Allowing indirect private enforcement—as *Rose* does—frustrates Congress' intent to permit only agency enforcement of a federal statute. For example, this Court recognized in *Astra* that allowing individual private suits, "[f]ar from assisting" the administrative agency "would undermine the agency's efforts to administer both Medicaid and § 340B harmoniously and on a uniform, nationwide basis," because they "could spawn a multitude of dispersed and uncoordinated lawsuits." 131 S.Ct. at 1349. This result was to be avoided—even though the Department of Health and Human Services could not meet its enforcement burden. *Id.* at 1349-50. Despite evidence of insufficient enforcement resources, this Court declined to infringe on Congress' policymaking function. It was enough simply to note that "Congress did not respond to the reports of inadequate … enforcement by inviting [health centers] to launch lawsuits in district courts across the country." *Id.* at 1350.

The same considerations hold true here. The repeal of TISA's private right of action provision demonstrates that Congress intended to halt the multiplicity of private TISA-based lawsuits in favor of administrative enforcement, and for similar reasons. *Compare id.* at 1349 (permitting private lawsuits would undermine administration of the statute and "spawn a multitude of dispersed and uncoordinated lawsuits") *with* H.R. Rep. No. 104-193, at 104 (1995) ("The imposition of civil liability for violation of the TISA has resulted in financial institutions seeking numerous clarifications and commentaries … increasing the regulatory burden for both the industry and the Board.") *and* S. Rep. No. 104-185, at 21 ("In light of the fact that … the requirements of TISA compliance present a variety of potential technical pitfalls, and attendant liability …, the Committee decided to amend the law so that it would have an administrative remedial enforcement scheme.").

Just as "Congress vested authority to oversee compliance with the 340B Program in HHS and assigned no auxiliary enforcement role to covered entities," *Astra*, 131 S.Ct. at 1347, Congress vested authority to oversee compliance with TISA in federal banking agencies, and it explicitly revoked the role that previously had been assigned to private litigants. 12 U.S.C. § 4309; 12 U.S.C. § 1818.

Private suits are not permissible just because they might encourage compliance with a federal statute. "[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law" because "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). As this Court explained in *Astra*, "[t]he absence of a private right to enforce the statutory ceiling price obligations would be rendered meaningless if [health centers] could overcome that obstacle by suing to enforce the contract's ceiling price obligations instead." *Astra*, 131 S.Ct. at 1348.

That is precisely what happened here—*Rose* renders TISA's administrative-enforcement-only regime meaningless. The California Supreme Court justified its decision by reasoning that Respondents' UCL claim enforced the UCL, not TISA. But, just as in *Astra*, Respondents' claim was based entirely on an alleged failure to comply with a federal statute. It would make "scant sense" to permit plaintiffs to sue under the UCL, based solely on allegations of TISA violations. *See Astra*, 131 S.Ct. at 1345.[4]

Ultimately, congressional intent is the touchstone on the indirect enforcement question. If Congress has not expressed an intent to authorize private enforcement of a statute, there may be no indirect enforcement via another law that borrows the federal statute as a predicate. And surely, where Congress has expressed its intent to bar private enforcement of federal statute, as it has here, indirect private enforcement is barred as well. Congress unequivocally declared its intent to foreclose private suits to enforce TISA when it repealed TISA's civil liability section in favor of enforcement solely through a comprehensive administrative scheme. That express intent means that there can be no indirect private enforcement of TISA—including using TISA as the predicate for a claim under the UCL's unlawful prong.

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[4] Unlike federal law, the California Supreme Court takes the position that a UCL unlawful prong claim does not enforce the predicate statute. *Stop Youth Addiction*, 950 P.2d 1086. That court also takes the position that a state statute may serve as a predicate for a UCL claim unless the California legislature has expressly said otherwise. *Id.* But—because Respondents' UCL claim is predicated solely on TISA, just as the *Astra* plaintiffs' state law contract claims were predicated solely on Public Health Services Act § 340B—those California state law principles are not controlling and cannot override federal law or congressional intent on private enforcement.

The Supremacy Clause requires adherence to Congress' clear intent, which under this Court's precedents forecloses indirect private enforcement of TISA through a UCL claim. Yet, the California Supreme Court held that such a claim was authorized.

### B. The California Supreme Court's Conclusion That TISA's Savings Clause Overrides Congress' Specific Intent To Bar Private Enforcement Of TISA Conflicts With Federal Law

The California Supreme Court purported to rely on TISA's savings clause to find congressional intent to allow indirect enforcement of TISA via the UCL. That reasoning, however, creates yet further conflict with federal law. As discussed below, TISA's savings clause does not override Congress' manifest intent to bar private enforcement of TISA.

On its face, the savings clause has nothing to do with private enforcement of TISA. *Rose* conflates two separate questions: what did Congress intend regarding state laws covering the same subject matter as TISA; and what did Congress intend regarding private enforcement of TISA itself? TISA's savings clause is relevant only to the first question, and it does not authorize indirect private enforcement via state law causes of action in the face of Congress' foreclosure of private suits.

The California Supreme Court's reasoning is anchored on a misconstruction of TISA's savings clause. The court began by observing that "[b]y leaving TISA's savings clause in place, Congress explicitly approved the enforcement of state laws 'relating to the disclosure of yields payable or terms for accounts … except to the extent that those laws are inconsistent with [TISA] ….'" App. 5a (quoting 12 U.S.C. § 4312). That is correct. But the court went astray when it concluded "[t]he UCL is just such a state law." *Id.*

An examination of the plain text of TISA's savings clause shows the court's error. TISA's savings clause permits the States to enact consistent state legislation governing the same subject matter covered by TISA—that is, state legislation "relating to the disclosure of yields payable or terms" for consumer bank accounts. 12 U.S.C. § 4312. But California has no such legislation—indeed, it repealed its own TISA-like statute. And the UCL is not a statute relating to the disclosure of yields payable or terms for accounts—and thus does not fall within the ambit of TISA's savings clause.

The California Supreme Court invoked *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005), to support its reading of TISA's savings clause. App. 6a. But *Bates'* holding depends on the very distinction the California court ignored: the difference between a state law claim enforcing a federal statute and a state law claim enforcing a

State's statutory or common law requirements that parallel the federal statute.

In *Bates*, this Court considered whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 *et seq*.—which imposes environmental and labeling requirements—preempted farmers' state common law and statutory claims for damages to their peanut crops. 544 U.S. 431. Unlike this case and *Astra*, *Bates* did not involve state law claims to enforce a federal law. The farmers in *Bates* asserted state law claims to vindicate state-law and common-law rights. They did not claim that the defendant violated FIFRA (*id.* at 456, Thomas, J. concurring in part and dissenting in part)—unlike Respondents here and the plaintiffs in *Astra*, who brought claims based solely on alleged violations of federal statutes.

FIFRA's savings clause, like TISA's, allowed the States to regulate in the same area as the federal statute, provided the regulations did not conflict with or add to the federal requirements. [5] Before

[5] FIFRA's preemption and savings clauses provided that a "State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by" FIFRA, and they prohibited states from imposing "any requirements for labeling or packaging in addition to or different from those" in FIFRA. 7 U.S.C. § 136v(a)-(b).

considering whether the farmers' claims were preempted, this Court first determined whether they fell within the scope of FIFRA's savings and preemption provisions. *Id.* at 442. This Court found that it was "beyond dispute" that FIFRA's savings and preemption provisions applied because "Texas … regulates the sale and use of federally registered pesticides…." *Id.* at 432.

*Bates* then held that, given FIFRA's savings clause, FIFRA did not preempt consistent state laws governing insecticides. *Id.* at 445-46. Likewise, FIFRA did not preempt claims under state laws providing a "traditional damages remedy for violations of *common-law duties* when those duties parallel federal requirements." *Id.* at 447 (quoting *Medtronic Inc. v. Lohr*, 518 U.S. 470, 495 (1996)) (emphasis added). But *Bates* also held that the savings clause did not permit States to create remedies for breaches of duties *created by the federal statute* itself. *See id.* at 453 (holding that claims would be preempted if they imposed labeling and packaging requirements that were not rooted in state statutory or common law, or that conflicted with FIFRA's requirements); *see also Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 352-53 (2001) (distinguishing between state law claims based on state laws "that parallel federal safety requirements," which are permitted, and state law claims based solely on alleged violations of a federal statute, which are not permitted).

The California Supreme Court was correct, therefore, when it found that claims may be predicated on "California statutes that simply adopt federal requirements." App. 5a. That was one of the holdings of *Bates*. But Respondents' UCL claim was not predicated on a California statute adopting TISA's requirements.[6] Nor did it seek traditional damages for a violation of a common law duty that paralleled TISA's requirements. Instead, Respondents' claim was predicated solely on alleged violations of TISA itself. As explained above, that is forbidden by federal law. The California intermediate appellate court recognized this and followed this Court's direction not to permit "indirect lawsuits based on violations of federal law when Congress has not authorized it, because such an action 'is in essence a suit to enforce the statute itself'" App. 24a (quoting *Astra*, 131 S.Ct. at 1348).

The California Supreme Court, by contrast, reasoned that the lack of a state law predicate did not matter because "the California Legislature could have provided a private right of action in a statute

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[6] Unlike California's UCL, the Texas statute relied upon by the farmers in *Bates* does not borrow other statutes as predicates for liability. Tex. Bus. & Com. Code, § 17.43 ("violation of a provision of law other than this subchapter is not in and of itself a violation [unless] the act or practice is proscribed by a provision of this subchapter or is declared by such other law to be actionable under this subchapter").

otherwise identical to TISA." App. 5a. But to say that the California legislature *could* enact a TISA-like statute is decidedly different than saying that it *has* enacted such a statute.[7] It has not. Thus, the California Supreme Court read the savings clause too broadly when it concluded that it authorized Respondents' UCL claim. The savings clause permits private actions only under state laws "relating to the disclosure of yields payable or terms for accounts" that are consistent with TISA. 12 U.S.C. § 4312. The UCL is not such a law.

The California Supreme Court's misreading of TISA's savings clause stemmed from its erroneous view that the savings clause expressed Congress' intent on the question of indirect private enforcement of TISA. App. 5a. A savings clause addresses only whether Congress authorized the States to enact their own laws similar to a federal statute, not whether Congress intended to authorize private enforcement of the federal statute.

*Rose* flouts the distinction between these two questions that this Court recognized in *Sea Clammers*. There, this Court ruled that the

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[7] Importantly, California's enforcement of its own TISA-like statute would not implicate the negative consequences Congress sought to resolve by repealing TISA's private action provision, namely inconsistent *TISA law* and the concomitant burden on federal banking agencies.

CWA and the MPRSA could not be indirectly enforced through § 1983. *Sea Clammers*, 453 U.S. at 18. Two justices argued in dissent that the statutes' savings clauses authorized indirect enforcement. *Id.* at 29-30 (Stevens, J., dissenting). The majority responded that "the saving clauses do not refer at all to a suit for redress of a violation of these statutes—regardless of the source of the right of action asserted." *Id.* at 20 n.31. The text of the savings clauses (preserving "any right which any person … may have under any statute or common law or to seek … any other relief") made clear that Congress intended "to allow further enforcement of antipollution standards arising under *other* statutes or state common law"—not to allow indirect enforcement of the CWA or the MPRSA standards themselves. *Id.* As in this case, the savings clauses preserved enforcement of other statutes, but did not permit a plaintiff to indirectly enforce the statutes in question when Congress clearly did not intend for private enforcement. *See id.* ("We therefore, are not persuaded that the saving clauses limit the effect of the overall remedial schemes provided expressly in the [statutes] …. [W]e think it clear that those express remedies preclude suits for damages under § 1983, and that the saving clauses do not require a contrary conclusion.").

Thus, the California Supreme Court missed the mark when it broadly construed Congress' decision to leave TISA's savings clause intact as authorizing private actions indirectly enforcing TISA.

*See* App. 9a. TISA's savings clause means that Congress left the States free to enact their own statutes imposing requirements consistent with TISA and to enforce those statutes as they see fit. But TISA's savings clause does not authorize indirect private enforcement of TISA itself through a UCL cause of action.

In sum, the California Supreme Court's decision cannot be reconciled with controlling federal law. As explained above, federal law forbids indirect private enforcement of a statute when Congress has manifested its intent to bar private enforcement, and TISA's savings clause does not cover claims to enforce TISA under the UCL. As the California Court of Appeal held, allowing such a suit constitutes an impermissible "end run" around the limits Congress set on who may enforce TISA, as well as the reasons for those limits. App. 26a. The California Supreme Court authorized that end run by holding that Respondents may assert a UCL claim based solely on alleged TISA violations, notwithstanding Congress' judgment that TISA should not be privately enforced. This Court's review, therefore, is urgently needed.

## II. The California Supreme Court's Decision Involves An Exceptionally Important Issue And There Is An Immediate And Urgent Need For Review

The problems engendered by *Rose* are manifest and may be widespread. The opinion is likely to have a disruptive effect on TISA and other federal statutes both in California and elsewhere.

Allowing UCL claims based on TISA undermines Congress' judgment when it repealed TISA's civil liability provision. Congress repealed TISA's private right of action to implement a unified and comprehensive administrative enforcement scheme to lessen the burden on the regulatory agencies and the industry. H.R. Rep. No. 104-193, at 104 (1995). *See supra* at 22-24.

Indirect private enforcement of TISA will impose the same unnecessary burdens and also inevitably will lead to inconsistent enforcement as a result of conflicting judicial decisions. Exposing financial institutions to the risk of private civil suits under the UCL for technical violations of TISA and its implementing regulation will invariably cause them to seek guidance from federal regulators, frustrating Congress' purpose in repealing TISA's civil liability provision.

Moreover, UCL claims based on federal statutes will be treated differently in California state court than they are in federal court because *Rose* departs from federal law. This inevitable conflict will arise because federal courts will be bound by this Court's precedents, not *Rose*, on the question of whether the UCL can be used to indirectly enforce a federal statute. The Ninth Circuit does—and must—adhere to this Court's precedents holding that federal statutes cannot be privately enforced indirectly if doing so frustrates Congress' intent regarding private enforcement. *See, e.g.*, *Almond Hill School v. U.S. Dep't of Agriculture*, 768 F.2d 1030, 1035, 1038 (9th Cir. 1985) (relying on *Sea Clammers* and holding no indirect enforcement of FIFRA through a claim under § 1983); *Vinson v. Thomas*, 288 F.3d 1145, 1155 (9th Cir. 2002) (citing *Sea Clammers* and holding no indirect private enforcement of the ADA and Rehabilitation Act through a claim under § 1983). Federal district courts in California likewise have adhered to federal law and rejected efforts to base UCL claims on federal statutes when Congress has foreclosed private enforcement. *Hartless v. Clorox Co.*, No. 06CV2705, 2007 WL 3245260, *3-4 (S.D. Cal. Nov. 2, 2007) (plaintiff may not maintain UCL claim based on FIFRA because Congress considered and rejected private actions to enforce FIFRA); *Banga v. Allstate Ins. Co.*, No. S-08-1518, 2010 WL 1267841, *3 (E.D. Cal., Mar. 31, 2010) ("violation of [a section of the Fair Credit Reporting Act] cannot serve as the predicate for a UCL claim" because that section contains "a bar to private suit"). And at least one federal court already has relied on this Court's guidance to hold that Congress' repeal of TISA's private right of action bars indirect private enforcement of TISA. *Gunther v. Capital One*, *N.A.*, 703 F. Supp. 2d 264, 270-71 (E.D.N.Y. 2010) ("to permit a breach of contract suit based on TISA's substance would frustrate Congress's express indication that TISA be enforced exclusively by public entities" and "would impermissibly undermine Congress's expressed intent that TISA be enforced by a regulatory agency and not private citizens"). If *Rose* remains the law in California, the conflict between state and federal law will make the forum outcome determinative, encouraging strategic forum shopping.

*Rose* also opens the door to indirect enforcement of other federal statutes through the UCL, regardless of whether Congress intended to authorize their private enforcement. Many federal statutes reflect Congress' intent not to authorize their private enforcement. And many of those statutes contain savings clauses like TISA's. If *Rose* stands, private litigants will be able to enforce a broad range of federal statutes through a UCL cause of action, including the following:

- Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g(b)(1)(E) (permitting disclosure of educational information to "authorities to whom such information is specifically allowed to be … disclosed pursuant to State statute"); *Gonzaga*, 536 U.S. at 290 (FERPA does not create a private right of action);

- Securities Exchange Act of 1934, 15 U.S.C. § 77r(c) ("the securities commission … of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions"); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) (no private damage remedy under § 17(a) of the Securities Exchange Act);

- Occupational Safety and Health Act (OSHA), 29 U.S.C. § 653(b)(4) ( "[n]othing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to … affect … the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment"); *Taylor v. Brighton Corp.*, 616 F.2d 256, 258-64 (6th Cir. 1980) (no implied private damage remedy under OSHA's retaliation provision);

- Protecting Tenants at Foreclosure Act (PTFA), 12 U.S.C. § 5220(d) ("[t]he requirements of this section shall not supersede any other duty or requirement imposed on the Federal property managers under otherwise applicable law"); *Logan v. U.S. Bank Nat'l Ass'n*, 722 F.3d 1163, 1173 (9th Cir. 2013) ("Because we cannot infer a congressional intent to create a private right of action from the language of the statute, the statutory structure, or any other source, 'the essential predicate for implication of a private remedy simply does not exist'") (quoting *Thompson v. Thompson*, 484 U.S. 174, 179 (1988));

- Investment Advisors Act of 1940, 15 U.S.C. § 80b–18a(a) ("[n]othing in this subchapter shall affect the jurisdiction of the securities commissioner … of any State"); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979) (no private cause of action for damages under the Investment Advisors Act);

- Wilderness Act of 1964, 16 U.S.C. § 1133(d)(6) ("Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws"); *Izaak Walton League of Am., Inc. v. Kimbell*, 558 F. 3d 751, 758 (8th Cir. 2009) (the Wilderness Act does not create a private right of action);

- Endangered Species Act, 16 U.S.C. § 1535(f) (state law is void only to the extent it conflicts with the Act, which "shall not otherwise be construed to void any State law or regulation which is intended to conserve … wildlife"); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992) (there is no individual right to enforce federal environmental law in the public interest: only the executive branch has standing to enforce the law).

For any of these statutes—and all others where Congress included a savings clause but did not permit private enforcement—*Rose* paves the way for California courts to functionally override Congress' judgment that there should be no private enforcement merely by pointing to the statute's savings clause.

What is more, the problems engendered by *Rose* could spread beyond California. Other state courts could avoid Congress' foreclosure of private enforcement by adopting *Rose's* reasoning and authorizing private enforcement of a federal statute through their consumer protection statutes.[8] For example, violations of "Federal consumer protection statutes" constitute violations of the Massachusetts state consumer protection statute. *Barnes v. Fleet Nat. Bank, N.A.*, 370 F.3d 164, 176 (1st Cir. 2004)

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[8] Many states have enacted broad consumer protection statutes similar to the UCL. *See, e.g.*, Alaska Stat. § 45.50.471; Conn. Gen. Stat. § 42-110b; Fla. Stat. § 501.204; Ga. Code § 10-1-393; Haw. Rev. Stat. § 480-2(a); 815 Ill. Comp. Stat. 505/2; Iowa Code § 714.16; La. Rev. Stat. § 51:1405; Me. Rev. Stat. tit. 5, § 207; Md. Code. Com. Law. II, § 13-101; Mass. Gen. Laws ch. 93A, § 2(a); Miss. Code § 75-24-5; Mo. Rev. Stat. § 407.020(1); Mont. Code § 30-14-103; Neb. Rev. Stat. § 59-1602; N.C. Gen. Stat. § 75-1.1; Ohio Rev. Code § 1345.02; Okla. Stat. tit. 15, § 752(14); 73 Pa. Cons. Stat. § 201-3; R.I. Gen. Laws § 6-13.1-2; S.C. Code § 39-5-20; Tenn. Code § 47-18-104; Vt. Stat. tit. 9, § 2453(a); Wash. Rev. Code § 19.86.020; W.Va. Code § 46A-6-104; Wis. Stat. §§ 421-429.

(holding that, before the repeal of TISA's private right of action provision, violation of TISA is a *per se* violation of Massachusetts consumer protection statute) (citing Mass. Gen. Laws ch. 93A, § 2(a), and 940 Mass. Code Regs. 3.16(4)). If Massachusetts adopted *Rose's* reasoning, Massachusetts plaintiffs could sue to privately enforce TISA by invoking the state consumer protection law regardless of the repeal of TISA's private right of action.

Because substantial harm will result in California if *Rose* is allowed to stand and elsewhere if the California Supreme Court's reasoning is followed, there is an immediate need for this Court to set things right.

## CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted.

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**IN THE SUPREME COURT OF CALIFORNIA**

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HARROLD ROSE et al.,
Plaintiffs and Appellants,
v.
BANK OF AMERICA, N.A.,
Defendant and Respondent.

S199074

Ct.App. 2/2 B230859

Los Angeles County
Super. Ct. No. BC433460

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May a claim of unlawful business practice under California's unfair competition law be based on violations of a federal statute, after Congress has repealed a provision of that statute authorizing civil actions for damages? We hold that it may, when Congress has also made it plain that state laws consistent with the federal statute are not superseded.

DISCUSSION

The federal Truth in Savings Act (TISA; 12 U.S.C. § 4301 et seq.) regulates banks' disclosures to customers.[1] For 10 years beginning in 1991, TISA allowed civil damages to be sought for failure to comply with its requirements. (Former § 4310; Fed. Deposit Ins. Corp. Improvement Act of 1991, Pub.L. No. 102-242, § 271 (Dec. 19, 1991) 105 Stat. 2236, 2340.)[2] The provision authorizing lawsuits was repealed in 1996, effective September 30, 2001.

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[1] Further unspecified statutory references are to title 12 U.S.C.

[2] Former section 4310(a) stated:

"Except as otherwise provided in this section, any depository institution which fails to comply with any requirement imposed under this Act or any regulation prescribed under this Act with respect to any person who is an account holder is liable to such person in an amount equal to the sum of —

"(1) any actual damage sustained by such person as a result of the failure;

"(2)(A) in the case of an individual action, such additional amount as the court may allow, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or

"(B) in the case of a class action, such amount as the court may allow, except that —

"(i) as to each member of the class, no minimum recovery shall be applicable; and

"(ii) the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same depository institution shall not be more than the lesser of $500,000 or 1 percent of the net worth of the depository institution involved; and

"(3) in the case of any successful action to enforce any liability under paragraph (1) or (2), the costs of the action, together with a reasonable attorney's fee as determined by the court."

(Omnibus Consolidated Appropriations Act of 1997, Pub.L. No. 104-208, § 2604(a) (Sept. 30, 1996) 110 Stat. 3009-470.) This case involves the effect of that repeal on claims brought under the unfair competition law (UCL; Bus. & Prof. Code, § 17200 et seq.).

The UCL sets out three different kinds of business acts or practices that may constitute unfair competition: the unlawful, the unfair, and the fraudulent. (Bus. & Prof. Code, § 17200; *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 (*Cel-Tech*).) Violations of federal statutes, including those governing the financial industry, may serve as the predicate for a UCL cause of action. (See *Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1480; *Roskind v. Morgan Stanley Dean Witter & Co.* (2000) 80 Cal.App.4th 345, 352.)

After the expiration of section 4310, plaintiffs filed a class action against Bank of America (the Bank), alleging unlawful and unfair business practices based on violations of TISA disclosure requirements. [3] Plaintiffs asked for restitution, injunctive relief, and attorney fees. The Bank demurred, arguing that Congress had expressly prohibited private rights of action under TISA. The trial court sustained the demurrer with leave to amend, which plaintiffs declined. On appeal from the ensuing judgment, the Court of Appeal affirmed,

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3 Plaintiffs asserted violations of sections 4301(b) and 4305(c), and parts 230.4(b), 230.3(a), and 230.5(a) of the TISA regulations found in title 12 of the Code of Federal Regulations.

reasoning that Congress's repeal of former section 4310 reflected its intent to bar any private action to enforce TISA.

Plaintiffs contend the Court of Appeal erroneously failed to consider the effect of TISA's savings clause, which preserves the authority of states to regulate bank disclosures so long as state law is consistent with TISA. (§ 4312.)[4] They argue that because the UCL borrows TISA's requirements, it is entirely consistent with the federal law. Plaintiffs characterize the question as one of federal preemption. The Bank responds that considerations of preemption are irrelevant, and instead frames the issue as one of congressional intent to disallow private enforcement of TISA.

Whether framed in terms of preemption or not, the issue before us is a narrow one. The Bank and the courts below have taken the position that

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[4] Section 4312 provides: "The provisions of this subtitle do not supersede any provisions of the law of any State relating to the disclosure of yields payable or terms for accounts to the extent such State law requires the disclosure of such yields or terms for accounts, except to the extent that those laws are inconsistent with the provisions of this subtitle, and then only to the extent of the inconsistency. The Bureau [of Consumer Financial Protection] may determine whether such inconsistencies exist." (See also 12 C.F.R § 230.1(d); *id.*, § 230, appen. C.)

In 1993, the California Legislature repealed deposit disclosure requirements formerly provided in the Financial Code, noting they were ineffective to the extent they differed from federal law and "the federal deposit disclosure laws provide adequate safeguards for consumers." (Stats. 1993, ch. 107, § 3, pp. 1151-1152.)

Congress ruled out any private enforcement of TISA by repealing former section 4310. However, considerations of congressional intent favor plaintiffs. By leaving TISA's savings clause in place, Congress explicitly approved the enforcement of state laws "relating to the disclosure of yields payable or terms for accounts . . . except to the extent that those laws are inconsistent with the provisions of this subtitle, and then only to the extent of the inconsistency." (§ 4312.) The UCL is such a state law.

The Bank contends the UCL is not a statute "relating to the disclosure of yields payable or terms for accounts" under section 4312. It concedes that the California Legislature could have provided a private right of action in a statute otherwise identical to TISA. (See *Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, 447-448 (*Bates*) [provision of state law remedy does not make state law inconsistent with federal statute that provides no remedy].) Indeed, California statutes that simply adopt federal requirements have served as the bases for UCL causes of action. (See *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1086-1087 [UCL claim based on Health & Saf. Code, § 110100, subd. (a)]; [5]

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[5] Health and Safety Code section 110100, subdivision (a) provides: "All food labeling regulations and any amendments to those regulations adopted pursuant to the federal act, in effect on January 1, 1993, or adopted on or after that date shall be the food labeling regulations of this state." As noted in *Farm Raised Salmon Cases*, *supra*, 42 Cal.4th at page 1086, other provisions of the Health and Safety Code use language identical to the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 et seq.). The Bank contends we recognized in *Farm Raised Salmon Cases* that a UCL claim cannot be based on a federal

*Continued on following page*

*Washington Mutual Bank v. Superior Court* (1999) 75 Cal.App.4th 773, 786-787 [UCL claim based on former Fin. Code, § 50505].[6]) In the Bank's view, however, the UCL may not be employed to borrow *directly* from a federal statute if Congress has decided not to allow private enforcement of the federal law.

That argument fails. When Congress permits state law to borrow the requirements of a federal statute, it matters not whether the borrowing is accomplished by specific legislative enactment or by a more general operation of law. (*Bates*, *supra*, 544 U.S. at p. 447 [state law need not explicitly incorporate federal standards to meet requirement of equivalence]; *In re Jose C.* (2009) 45 Cal.4th 534, 546 [distinction between state laws imposing independent criminal punishment and those incorporating federal criminal law is "immaterial" and "purely formal"].) The Bank's position elevates form over substance, and ignores the familiar principles on which the UCL operates.

Contrary to the Bank's insistence that plaintiffs are suing to enforce TISA, a UCL action does not

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*Continued from previous page*

statute that does not itself provide for a private right of action. Not so. There we considered only a cause of action premised on Health and Safety Code violations. We had no occasion to consider whether the claim might have been founded on federal law.

6 Former Financial Code section 50505 provided: "Any person who violates any provision of the federal Real Estate Settlement Procedures Act, as amended (12 U.S.C.A. Sec. 2601 et seq.), or any regulation promulgated thereunder, violates this division." (Stats. 1994, ch. 994, § 7, p. 5789.)

"enforce" the law on which a claim of unlawful business practice is based. "By proscribing 'any unlawful' business practice, [Business and Professions Code] 'section 17200 "borrows" violations of other laws and treats them as unlawful practices' that the [UCL] makes *independently* actionable. [Citations.]" (*Cel-Tech*, *supra*, 20 Cal.4th at p. 180, italics added.) In *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 570 (*Stop Youth Addiction*), we explained the independent nature of a UCL action. There the UCL claim was based on alleged violations of Penal Code section 308, which bans the sale of cigarettes to minors. The defendant contended the suit was barred because Penal Code section 308 and the Stop Tobacco Access to Kids Enforcement Act (STAKE Act; Bus. & Prof. Code, §§ 22950- 22959) "embodie[d] the Legislature's intent to create a comprehensive, exclusive scheme for combating the sale of tobacco to minors." (*Stop Youth Addiction*, at p. 560.) We rejected this argument, and emphasized that the plaintiff was enforcing the UCL, not the statutes underlying their claim of unlawful business practice.

"[A]s we have long recognized, it is in enacting the UCL itself, and not by virtue of particular predicate statutes, that the Legislature has conferred upon private plaintiffs 'specific power' (*People v. McKale* [(1979)] 25 Cal.3d [626,] 633) to prosecute unfair competition claims." (*Stop Youth Addiction*, *supra*, 17 Cal.4th at p. 562.) The Attorney General, as amicus curiae, argued that allowing the suit to go forward would "transform the criminal law into a body of civil law giving rise to private causes of action." (*Id.* at p. 566.) We disagreed. "[Plaintiff] does not contend a 'private right of action' exists for it (or any other private plaintiff) to proceed under Penal Code section 308. [Plaintiff] seeks relief from alleged unfair competition, not to enforce the Penal Code." (*Stop Youth Addiction*, at p. 566.)

We returned to the same point in *Stop Youth Addiction* in response to the defendant's argument that the UCL claim encroached on public prosecutors' prerogative to decide whether to bring criminal prosecutions under Penal Code section 308. "[A]s previously discussed, [plaintiff] is not suing under, or to enforce, Penal Code section 308 or the STAKE Act. Rather, [plaintiff] seeks to enforce *the UCL* by means of restitution and an injunction forbidding Lucky to continue selling cigarettes to children. . . . [W]e agree with [plaintiff that] the fact a UCL action is based upon, or may even promote the achievement of, policy ends underlying section 308 or the STAKE Act, does not, of itself, transform the action into one for the 'enforcement' of section 308." (*Stop Youth Addiction*, *supra*, 17 Cal.4th at p. 576, fn. omitted.)

Thus, we have made it clear that by borrowing requirements from other statutes, the UCL does not serve as a mere enforcement mechanism. It provides its own distinct and limited equitable remedies for unlawful business practices, using other laws only to define what is "unlawful." (See *Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134, 1150 [UCL provides equitable avenue for prevention of unfair business practices, with streamlined procedures and limited remedies].) The UCL reflects the Legislature's intent to discourage business practices that confer unfair advantages in the marketplace to the detriment of both consumers and law-abiding competitors.

In this case, the Bank makes the same analytical error we identified in *Stop Youth Addiction*. Plaintiffs are not suing to enforce TISA, nor do they seek damages for TISA violations. Instead, they pursue the equitable remedies of restitution and injunctive relief, invoking the UCL's restraints against unfair competition. Doing so is entirely consistent with the congressional intent reflected in the terms and history of TISA. Congress expressly left the door open for the operation of state laws that hold banks to standards equivalent to those of TISA.

The Bank relies on *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, *Stop Youth Addiction*, *supra*, 17 Cal.4th 553, *Cel-Tech*, *supra*, 20 Cal.4th 163, and *Farm Raised Salmon Cases*, *supra*, 42 Cal.4th 1077, for the proposition that a plaintiff may not employ the UCL to "plead around" a legislative determination foreclosing private enforcement of another statute. While that proposition is valid as far as it goes, it does not go far enough to help the Bank. When Congress repealed section 4310, foreclosing private actions for damages under TISA, it left section 4312 intact, expressly permitting private actions under state laws consistent with TISA. Thus, the abolition of the TISA remedy does not amount to a bar against UCL claims. It is settled that a UCL action is not precluded "merely because some other statute on the subject does not, itself, provide for the action or prohibit the challenged conduct. To forestall an action under the [UCL], another provision must actually 'bar' the action or clearly permit the conduct." (*Cel-Tech*, *supra*, 20 Cal.4th at p. 183; see *Zhang v. Superior Court* (Aug. 1, 2013, S178542) __

Cal.4th __ [pp. 12-14]; *Stop Youth Addiction*, *supra*, 17 Cal.4th at p. 566.)

The Bank claims Congress's intent to bar private actions under TISA is demonstrated by its rejection, in 2001, of a proposed amendment seeking to restore the provision for civil actions formerly found in section 4310. (H.R. No. 1057, 107th Cong., 1st Sess., § 3, p. 4 (2001).) However, this failed amendment says nothing about Congress's intent with respect to *state law* claims. The retention of section 4312, allowing states to maintain laws consistent with TISA, demonstrates the intent to permit state law remedies.

The Bank also relies on federal case law. It notes that an action brought under 42 U.S.C. section 1983 may not be premised on violations of a federal statute that does not authorize private suits, if "Congress [acted] in a manner that would suggest a prohibition on private enforcement." (*Almond Hill School v. U.S. Dept. of Agriculture* (9th Cir. 1985) 768 F.2d 1030, 1035 (*Almond Hill*).) "An intent to foreclose private remedies may be inferred if the remedial devices in the statute are 'sufficiently comprehensive' to suggest exclusivity." (*Ibid.*; see *Middlesex County Sewerage Authority v. National Sea Clammers Association* (1981) 453 U.S. 1, 19-20; *Vinson v. Thomas* (9th Cir. 2002) 288 F.3d 1145, 1155.) Here, TISA's preservation of state law alternatives does not "suggest exclusivity." (*Almond Hill*, at p. 1035.) [7]

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[7] We note that, insofar as *Almond Hill* rested its conclusion on the idea that the enforcement scheme of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA; 7 U.S.C. § 136 et seq.) demonstrates Congress's intent to foreclose *any*

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Furthermore, the UCL, unlike 42 U.S.C. section 1983, is meant to provide remedies *cumulative* to those established by other laws, absent express provision to the contrary. (Bus. & Prof. Code, § 17205.) We have long recognized that the existence of a separate statutory enforcement scheme does not preclude a parallel action under the UCL. (*Stop Youth Addiction*, *supra*, 17 Cal.4th at pp. 572-573, citing cases.)[8]

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private remedy (see *Almond Hill*, *supra*, 768 F.2d at pp. 1037-1038), it has been undermined by the Supreme Court's subsequent holding in *Bates*, *supra*, 544 U.S. at pages 447-448, that state law requirements consistent with FIFRA are enforceable. Similarly, *Bates* casts doubt on the validity of an unpublished federal case cited by the Bank and the Court of Appeal below, which held that a UCL claim could not be premised on FIFRA violations because Congress had barred private enforcement actions. (*Hartless v. Clorox Co.* (S.D.Cal., Nov. 2, 2007, No. 06CV2705) 2007 WL 3245260, pp. *3-*4.)

The Bank mentions another unpublished federal court opinion cited by the Court of Appeal, *Banga v. Allstate Ins. Co.* (E.D. Cal., Mar. 31, 2010, No. 5-08-1518) 2010 WL 1267841. (See *Farm Raised Salmon Cases*, *supra*, 42 Cal.4th at p. 1096, fn. 18 [unpublished federal court opinions are citable, but not necessarily persuasive].) The *Banga* court ruled that UCL claims based on violations of the Fair Credit Reporting Act (FCRA; 15 U.S.C. § 1681 et seq.) were either preempted by the FCRA or precluded by FCRA provisions establishing an absolute bar to relief. (*Banga*, at pp. *3-*4.) Here, the Bank does not argue preemption and, as we have explained, fails to show that TISA bars relief under state law.

8 One court has held that the UCL does not apply to claims arising from securities transactions, relying in part on the existence of "the comprehensive regulatory umbrella of the Securities and Exchange Commission over such transactions." (*Bowen v. Ziasun Technologies, Inc.* (2004) 116 Cal.App.4th 777,

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The Bank refers as well to *Gunther v. Capital One, N.A.* (E.D.N.Y. 2010) 703 F.Supp.2d 264. Gunther sought damages for breach of contract, alleging that TISA requirements had been incorporated by his bank account agreement. The court dismissed this claim, holding that the agreement's terms effected no such incorporation. It also noted that allowing the claim would be contrary to Congress's intent in repealing former section 4310's private right of action. (*Gunther*, at pp. 270-271.) Here, however, we are not confronted with an attempt to incorporate TISA into the parties' contract to support a damages claim. Plaintiffs pursue the distinct restitutionary and injunctive remedies provided by the UCL, a state law enforceable under section 4312.

We need not consider whether the outcome would be different if the UCL permitted damage awards. As matters stand, the relief available under the UCL is quite different from the remedies formerly provided in TISA, which included actual damages, limited additional amounts, costs, and attorney fees. (See fn. 2, *ante*.) Private plaintiffs suing under the UCL may seek only injunctive and restitutionary relief, and the UCL does not authorize attorney fees. (See *Zhang v. Superior Court*, *supra*, __ Cal.4th __ [pp. 4-6].)

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789, fn. 9.) Whatever the scope and merits of that holding may be (see *Betz v. Trainer Wortham & Co.* (N.D.Cal. 2011) 829 F.Supp.2d 860, 866; *In re Charles Schwab Corp. Sec. Litig.* (N.D.Cal. 2009) 257 F.R.D. 534, 553), it does not apply here. Congress expressly contemplated the enforcement of state laws consistent with TISA. (§ 4312.)

We hold that TISA poses no impediment to plaintiffs' UCL claim of unlawful business practice.[9]

DISPOSITION

The Court of Appeal's judgment is reversed.

**CORRIGAN, J.**

**WE CONCUR:**

**CANTIL-SAKAUYE, C.J.**
**KENNARD, J.**
**BAXTER, J.**
**WERDEGAR, J.**
**LIU, J.**
**MAURO, J.***

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[9] The Court of Appeal also determined that plaintiffs' claim of *unfair* business practice was not viable. We do not reach this question. Both plaintiffs' petition for review and their opening brief are limited to questions related to their ability to borrow TISA violations for purposes of their claim of *unlawful* business practice. For the first time in their reply brief, plaintiffs argue that the court below erred with respect to their unfair business practice claim. Even this belated contention is not fully briefed. The Court of Appeal identified three separate tests for "unfairness" under the UCL, and applied all three of them. Plaintiffs assert in cursory fashion that the court misapplied one of these tests. We decline to address this claim, which is neither properly raised nor sufficiently briefed. (See *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 421, fn. 4; Cal. Rules of Court, rules 8.504(b)(1), 8.516(b)(1), 8.520(b)(2)(B), (3).)

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* Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Filed 11/21/11

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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HAROLD ROSE et al.,
Plaintiffs and Appellants,
v.

BANK OF AMERICA, N.A.,
Defendant and Respondent.

B230859

(Los Angeles County
Super. Ct. No. BC433460)

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APPEAL from a judgment of the Superior Court of Los Angeles County. Jane L. Johnson, Judge. Affirmed.

The Rossbacher Firm, Henry H. Rossbacher, James S. Cahill, Talin K. Tenley for Plaintiffs and Appellants.

Reed Smith, Margaret M. Grignon, Scott H. Jacobs, Zareh A. Jaltorossian for Defendant and Respondent.

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Plaintiffs allege that a bank violated the federal Truth in Savings Act (TISA) by failing to properly disclose fee increases on personal bank accounts. (12 U.S.C. § 4301 et seq.)[1] TISA formerly allowed a private right of action against banks that failed to comply with the law's disclosure provisions. (§ 4310(a).) The statutory provision allowing a private right of action was repealed in 2001.

When Congress repealed the statutory right of consumers to enforce TISA, it intended to bar *all* private actions alleging TISA violations, including indirect enforcement suits brought under California's unfair competition law (UCL). (Bus. & Prof. Code, § 17200.) The UCL may not be deployed to redress TISA violations. Plaintiffs' UCL action—based on technical violations of TISA—was properly dismissed.

## FACTS

Plaintiffs in this putative class action lawsuit have deposit accounts at defendant Bank of America (the Bank). They allege that the Bank failed to properly notify them about price increases on fees applicable to their deposit accounts, in violation of TISA. The Bank informed plaintiffs on their written account statements that there were "upcoming pricing changes" as detailed in an "enclosed brochure." Plaintiffs claim that the notice was not clear and conspicuous, nor did it specify the exact

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[1] All undesignated statutory references in this opinion to title 12 of the United States Code. References to section 4310 are to former title 12 of the United States Code section 4310, which was repealed in 2001.

increase for their personal accounts or the precise date the increase would take effect. After announcing the increase, the Bank deducted higher monthly fees from plaintiffs' accounts.

Based on the alleged TISA violations, plaintiffs assert a single cause of action for violation of the UCL, claiming that the Bank's practices are unlawful and unfair. They seek restitution of all money improperly deducted for increased service fees taken by the Bank from their personal accounts, interest, injunctive relief, attorney fees and costs.

The Bank demurred to the complaint. It argued that Congress has expressly prohibited a private right of action to enforce TISA, presenting an insurmountable obstacle to plaintiffs' UCL claim based on TISA. Plaintiffs countered that they retain their state causes of action—including a UCL claim premised on TISA violations—because TISA does not preempt state law, nor does it expressly bar enforcement via the UCL.

The trial court sustained the demurrer with leave to amend. It found that the repeal of TISA's civil enforcement provision showed that Congress intended to bar private actions, and the UCL cannot be used to "plead around" an absolute bar to relief. The court granted leave to amend, so that plaintiffs could articulate another basis for relief, apart from TISA. Plaintiffs gave notice that they did not intend to file an amended pleading. The court signed an order of dismissal and entered judgment in favor of the Bank. This timely appeal from the judgment ensued.

## **DISCUSSION**

Appeal lies from the dismissal order after the trial court sustained demurrers and plaintiffs were unable to amend the pleading. (Code Civ. Proc., §§ 581d, 904.1, subd. (a)(1); *Serra Canyon Co. v. California Coastal Com.* (2004) 120 Cal.App.4th 663, 667; *Tanen v. Southwest Airlines Co.* (2010) 187 Cal.App.4th 1156, 1162.) We review de novo the ruling on the demurrer, exercising our independent judgment to determine whether a cause of action has been stated as a matter of law. (*Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115.)

## **The Truth in Savings Act**

TISA was enacted in 1991 "to require the clear and uniform disclosure of . . . the rates of interest which are payable on deposit accounts by depository institutions; and . . . the fees that are assessable against deposit accounts, so that consumers can make a meaningful comparison between the competing claims of depository institutions with regard to deposit accounts." (§ 4301(b).) The goal is to enhance economic stability, improve competition among banks, and enable consumers to make informed decisions regarding deposit accounts by requiring uniform disclosure of the terms, conditions, and fees associated with bank accounts. (§ 4301(a).) To implement TISA, the Federal Reserve Board issued Regulation DD. (§ 4308; 12 C.F.R. § 230.1, 57 Fed.Reg. 43376, amended Jan. 29, 2009, 74 Fed.Reg. 5593.) A bank can be liable either for a violation of TISA itself or for a violation of Regulation DD. (*Barnes v. Fleet Nat. Bank, N.A.* (1st Cir. 2004) 370 F.3d 164, 170-171.)

Originally, TISA provided a private right of action against any depository institution that failed to comply with statutory or regulatory disclosure requirements. The "private attorney general" provision was contained in section 4310, and allowed individual account holders to sue for civil penalties and damages arising from TISA violations. (*Schnall v. Amboy Nat. Bank* (3d Cir. 2002) 279 F.3d 205, 209, fn. 2 & 217.)[2] Though the Federal Reserve Board is expressly authorized to enforce TISA under section 4309, "the Board has limited resources to devote to enforcement, and Congress may have deemed it more cost-effective to cede TISA enforcement to individuals in the private sector who stand to profit from efficiently detecting and prosecuting TISA violations." (*Schnall v. Amboy Nat. Bank*, *supra*, 279 F.3d at p. 217.) Because TISA is a consumer protection statute, a violation of its terms also violated state laws prohibiting unfair or deceptive acts or practices in the conduct of any trade or commerce. (*Barnes v. Fleet Nat. Bank*, *supra*, 370 F.3d at pp. 175-176. [applying Massachusetts unfair competition law in a case to which § 4310 applied].)

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[2] Section 4310, entitled "civil liability," stated that if any depository institution fails to comply with TISA, it is liable to account holders for actual and statutory damages. The statute authorized class action awards based on the amount of actual damages awarded; the frequency and persistence of the bank's failure to comply; the bank's resources; the number of affected depositors; and the extent to which noncompliance was intentional. No liability could be imposed for a "bona fide error" such as a clerical, calculation, computer, or printing error. Jurisdiction over TISA private enforcement actions was conferred concurrently on federal and state courts.

In 1996, Congress amended section 4310, adding a "sunset clause" that repealed the private right of action provision on September 30, 2001. (*Schnall v. Amboy Nat. Bank*, *supra*, 279 F.3d at p. 209, fn. 2.) Before the sunset clause took effect, efforts were made to retain a private right of action for the banking public. At the Bank's request, we take judicial notice of the proposed Truth in Savings Enhancement Act of 2001 (H.R. No. 1057, introduced during the first session of the 107th Congress, in March 2001). The proposed bill would have amended TISA to authorize state authorities to sue for injunctive relief to enforce TISA disclosure requirements, and would have reinstated civil liability lawsuits against noncompliant banks. Legislative efforts to prevent the repeal of section 4310 failed.

The repeal of section 4310 "entirely eliminated the [private] cause of action, thereby releasing banks from future claims of private parties to recover actual and statutory damages for TISA violations." (*Schnall v. Amboy Nat. Bank*, *supra*, 279 F.3d at p. 209, fn. 2.) Although private parties may no longer sue banks for violations of TISA, various federal agencies—including the Bureau of Consumer Financial Protection and the Comptroller of the Currency—may enforce bank compliance with TISA. (§§ 1818(b)(1), 4309; Pub. L. No. 111-203 (Jul. 21, 2010) Title X, §§ 1100B(1), 1100H, 124 Stat. 2110, 2113 (the Consumer Financial Protection Act of 2010); *Schnall v. Amboy Nat. Bank*, *supra*, 279 F.3d at p. 209, fn. 2.)

**<u>The Unfair Competition Law</u>**

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code, § 17200.) Its coverage is broad, embracing "'"anything that can properly be called a business practice and that at the same time is forbidden by law."'" (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1200.) Members of the public have standing to sue under the UCL if they have suffered injury in fact, and lost money or property as a result of unlawful or unfair acts. (Bus. & Prof. Code, § 17204; *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227-228.) Recovery is limited to injunctive relief and restitution. (Bus. & Prof. Code, § 17203.) Successful plaintiffs may not receive damages or attorney fees. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 179 (*Cel-Tech*).)

The UCL "'borrows' violations from other laws, making them independently actionable as unfair competitive practices." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143; *Cel-Tech*, *supra*, 20 Cal.4th at p. 180.) Federal law can serve as a predicate for a UCL claim. (*Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1480.) A statute that is silent about *direct* enforcement of its provisions may underlie a lawsuit brought under the UCL. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 565.)

There are limits on "borrowing." A UCL claim may not go forward if it is "'based on conduct which is absolutely privileged or immunized by another statute.'" (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, *supra*, 17 Cal.4th at p. 565.) When a legislative body expresses its intent to prohibit enforcement of a law through a private action, a plaintiff may not "'plead around' an 'absolute bar to relief' simply 'by recasting the cause of action as one for unfair competition.'" (*Cel-Tech*, *supra*, 20 Cal.4th at p. 182; *Manufacturer's Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 283.) "If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination. When specific legislation provides a 'safe harbor,' plaintiffs may not use the general unfair competition law to assault that harbor." (*Cel-Tech*, *supra*, 20 Cal.4th at p. 182.)

To forestall a UCL action, another law "must actually 'bar' the action . . . ." (*Cel-Tech*, *supra*, 20 Cal.4th at p. 183.) Often, the absolute bar to relief under the UCL comes in the form of a privilege. For example, in *Rubin v. Green*, *supra*, 4 Cal.4th at pages 1201-1203, the litigation privilege of Civil Code section 47 provided absolute immunity for defendants' conduct, which did not evaporate when plaintiff attached a different label, the UCL, to the defendants' privileged conduct. Sometimes, the bar to a UCL action is implicit in the legislative scheme. For example, the Insurance Code grants the Insurance Commissioner "exclusive" authority to take control of and liquidate the assets of insurance companies. (Ins. Code, § 1037.) In light of this "exclusive" authority, neither a policyholder nor the state Attorney General may bring a UCL action seeking restitution from the insurance company because it would usurp a function that is "quintessentially within the scope of the Commissioner's power as conservator and trustee of the insolvent company." (*State of California v. Altus Finance* (2005) 36 Cal.4th 1284, 1305.)

A legislative intent to deny standing to bring a private action is determined from the text of the statute or legislative history. In *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 300, the legislative history showed that insurance legislation contemplated only *administrative* enforcement, not private enforcement, which "is a strong indication the Legislature never intended to create" a private right of action. If standing to bring a private action for enforcement of a statute is legislatively or judicially abolished, no UCL claim can be maintained to enforce the statute. (*Safeco Ins. Co. v. Superior Court* (1990) 216 Cal.App.3d 1491, 1493-1494.)

A law itself may expressly address enforcement and say, "No civil actions" and "This section shall be enforced exclusively . . . by the Federal agencies and officials." (15 U.S.C. § 1681m(h)(8) [the Fair Credit Reporting Act].) In that instance, no private right of action under the UCL can be asserted. (*Banga v. Allstate Insurance Company* (E.D. Cal. 2009) 2009 WL 3073925, pp. 5-6.)[3] Alternatively, even if the law does not expressly say "No civil actions," the courts may imply a legislative intent to bar private civil actions to indirectly enforce the statute by providing a comprehensive administrative remedy. For

[3] Unpublished federal opinions have persuasive value when construing federal statutes, and they are not subject to the state court rule that bars citation of unpublished California opinions. (*Harris v. Investor's Business Daily, Inc.* (2006) 138 Cal.App.4th 28, 34; Cal. Rules of Court, rule 8.1115(a).)

example, the administrative enforcement scheme laid out in the Federal Insecticide, Fungicide and Rodenticide Act prevents concerned individuals from pursuing a private remedy under the auspices of either the UCL or title 42 of the United States Code section 1983, especially because Congress considered and rejected an amendment to permit citizen lawsuits. (*Almond Hill School v. U.S. Dept. of Agriculture* (9th Cir. 1985) 768 F.2d 1030, 1035-1038; *Hartless v. Clorox Co.* (S.D. Cal. 2007) 2007 U.S. Dist. LEXIS 81686.)

In sum, what the courts look for is some basis for concluding that the legislative body "intended to bar unfair competition causes of action based on" violations of the underlying statute. (*Stop Youth Addiction v. Lucky Stores, Inc.*, *supra*, 17 Cal.4th at p. 565.)

**UCL Actions to Enforce TISA Violations Cannot Be Maintained in State Court**

Plaintiffs' complaint and brief make clear that their claim is solely based on alleged violations of TISA. They write, "This class action arises from Defendant's violations of the Truth in Savings Act . . . and its implementing Regulation DD." They argue that "the ability of consumers to enforce TISA protections at issue here under California law survives the sunset amendment" of section 4310.

The Bank maintains that the 2001 repeal of the private right of action authorized by section 4310 proves that Congress intended to bar private actions premised on TISA violations, exclusively leaving only federal agencies to enforce TISA. It is true that "the repeal of § 4310 not only withdrew the jurisdiction of federal district courts to hear private TISA enforcement actions, but also entirely eliminated the cause of action, thereby releasing banks from future claims of private parties to recover actual and statutory damages for TISA violations." (*Schnall v. Amboy Nat. Bank*, *supra*, 279 F.3d at p. 209, fn. 2.) Congress intended that "private parties may no longer sue for violations of TISA." (*Ibid.*) This forecloses a *direct* suit to enforce TISA. The question is whether an *indirect* suit to enforce TISA survives the sunset clause repealing section 4310.

The federal courts are reluctant to allow indirect lawsuits based on violations of federal law when Congress has not authorized it, because such an action "is in essence a suit to enforce the statute itself." (*Astra USA, Inc. v. Santa Clara County* (2011) ____ U.S.____, ____ [131 S.Ct. 1342, 1348 ] [rejecting a county's attempt to enforce the Public Health Services Act through a breach of contract claim, as the statute only allows the federal government to sue for overcharges].) While allowing private lawsuits "would spread the enforcement burden instead of placing it '[entirely] on the government . . . [this] is hardly what Congress contemplated when it 'centralized enforcement in the government.'" (*Id.* at pp. 1348-1349.) Permitting a breach of contract suit would allow nongovernment litigants "'to circumvent Congress's decision not to permit private enforcement of the statute.'" (*Id.* at p. 1348, fn. 4.)

We are cautioned that "private rights of action to enforce federal law must be created by Congress. [Citation.] The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. [Citation.] Statutory intent on this latter point is determinative.

[Citations.] Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." (*Alexander v. Sandoval* (2001) 532 U.S. 275, 286-287. See also *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 576-577 [there is no individual right to enforce federal environmental law in the public interest: only the executive branch has standing to enforce the law].)

One federal court has found that Congress intended to prevent TISA from forming the basis of a bank depositor's lawsuit for breach of contract. "[R]eading TISA's requirements into the parties' contract would impermissibly undermine Congress's expressed intent that TISA be enforced by a regulatory agency and not private citizens." (*Gunther v. Capital One, N.A.* (E.D.N.Y. 2010) 703 F.Supp.2d 264, 270.) The court grounded its finding in Congress's repeal of section 4310, so that a breach of contract claim would amount to an "end run" around the congressional refusal to allow private enforcement of TISA. (*Gunther v. Capital One, N.A.*, at pp. 270-271.) The court concluded that a breach of contract suit is "based on TISA's substance [and] would frustrate Congress's express indication that TISA be enforced exclusively by public entities." (*Id.* at p. 271.)

We do not believe that California consumers can seek injunctive relief and restitution against a bank for "unlawful" conduct when Congress has clearly rejected a private right to enforce TISA. Congress indicated its intent in 1996, when it enacted a sunset clause that expressly repealed the statute allowing individuals to enforce TISA. It reconfirmed that intent when, in 2001, it rebuffed legislation to reinstate civil liability suits against noncompliant banks. When the legislative history shows that legislators expressly considered and *rejected* specific legislation, we need not speculate about legislative intent. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 88-89.) Only federal authorities have standing to enforce bank compliance with TISA. Allowing private plaintiffs to recover on a UCL claim based solely on TISA violations would constitute an "end run" around the limits on enforcement set by Congress. (*Gunther v. Capital One, N.A.*, *supra*, 703 F.Supp.2d at pp. 270-271.)

**Plaintiffs' Claim of "Unfair" Business Practices**

Plaintiffs seek to go beyond the "unlawful" prong of the UCL by claiming that the Bank's practices in announcing pricing changes were "unfair," offended public policy, and caused substantial injury because the bank deducted money for the fees from plaintiffs' accounts. In addition, the conduct threatened "an incipient violation" of TISA, or violated the policy or spirit of TISA. The allegedly unfair conduct occurred in the ordinary course of business and is part of a pattern or scheme that affected the public interest.

A business practice may violate the UCL if it is "unfair" even if not "unlawful." (*Cel-Tech*, *supra*, 20 Cal.4th at p. 180.) Courts may not "impose their own notions of the day as to what is fair or unfair." (*Id*. at p. 182.) Our Supreme Court has not announced a definitive test for unfair business practices in consumer cases, and the intermediate appellate courts have devised a variety of tests. One test requires that the consumer action be "'tethered to specific constitutional, statutory, or regulatory provisions.'" (*Drum v. San Fernando Valley Bar*

*Assn.* (2010) 182 Cal.App.4th 247, 256.) A second test asks whether the alleged business practice "'is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers and requires the court to weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim.'" (*Id.* at p. 257.) A third test employs the definition of "unfair" from the Federal Trade Commission Act, and requires (1) a substantial consumer injury; (2) that is not outweighed by any countervailing benefits to consumers; and (3) causes an injury that consumers could not reasonably have avoided. (*Ibid.* Accord: *Davis v. Ford Motor Credit Co. LLC* (2009) 179 Cal.App.4th 581, 594-597)

Plaintiffs' complaint fails the first test, because their unfairness claim cannot be tethered to TISA, for the reasons explained in the preceding section. With respect to the balancing test, the pleading does not sufficiently allege "grave harm" to the victim or immoral, unethical, oppressive, and unscrupulous conduct by the Bank. The complaint acknowledges that plaintiffs received advance notice, written in their bank statements, of an upcoming price increase, along with an explanatory brochure and a suggestion to visit the Bank's website for more information. Ultimately, the Bank increased its monthly service charge by $3, and imposed a "check enclosure" fee of $3. While having to pay an increased fee is never pleasant, plaintiffs were warned beforehand, and had an opportunity to change banks before the increases took effect. The Bank's conduct did not reach any level of unethical or immoral conduct. Finally, the pleading fails the third test because plaintiffs could have reasonably avoided the imposition of higher fees in successive months by reading the brochure enclosed with their statement, detailing the monthly fee increases, and—before the increase took place—they could have moved their money to a different bank or to a credit union with lower fees, instead of incurring higher fees month after month by continuing to do business with the Bank. (See *Davis v. Ford Motor Credit Co. LLC*, *supra*, 179 Cal.App.4th at p. 598 [a car seller's imposition of successive late fees for successive months reasonably could have been avoided if the plaintiff had made timely payments].)

Plaintiffs declined the opportunity to amend their pleading to allege additional facts or theories. When a plaintiff declines to amend, we must presume that the challenged pleading states plaintiff's strongest possible case. (*Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 252.) The complaint was inadequate, and was properly dismissed after plaintiffs elected to not to amend. (*Soliz v. Williams* (1999) 74 Cal.App.4th 577, 585.)

**DISPOSITION**

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.

**ORIGINAL FILED**
**DEC 17 2010**
**LOS ANGELES**
**SUPERIOR**
**COURT**

**SUPERIOR COURT OF THE**
**STATE OF CLAIFORNIA**

**COUNTY OF LOS ANGELES**
**– CENTRAL CIVIL WEST**

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HAROLD C. ROSE and KIMBERLY LANE,
Individually and on behalf of
all others Similarly situated,
Plaintiff,
vs.
BANK OF AMERICA, N.A.,
and DOES 1 Through 50, inclusive,
Defendants.

Case No. BC433460

COURT ORDER RE DEMURRER

Judge Jane L. Johnson
Dept. 308

---

**<u>DEMURRER TO COMPLAINT</u>**

Date of Hearing: December 8, 2010

This court, having reviewed and received the pleading, as well as authorities cited therein, and having considered the argument of counsel, rules as follows on Defendants' Special Motion to Strike:

Defendant Bank of America demurs to the putative class action complaint filed by Plaintiffs Harold C. Rose and Kimberly Lane. The demurrer is sustained with leave to amend.

A. ALLEGATIONS IN COMPLAINT

On April 30, 2009, Defendant Bank of America advised Plaintiffs Harold C. Rose and Kimberly Lane of the following on their written account statements:

> Important Information: Please see the enclosed brochure for information about upcoming pricing changes to some deposit accounts. In addition, we've included information on how to help prevent or minimize deposit fees as well as details on improvements we've made to serve you better. If you would like more information, visit ankofamerica.com/pricingchanges.

Plaintiffs alleges that this announcement, as well as the brochure posted on Defendant's website, "did not clearly and conspicuously (a) disclose which categories of fees (and their amounts) applicable to Plaintiffs' particular accounts services were changing; (b) direct Plaintiffs' attention to the particular changes for their accounts; and (c) inform Plaintiffs of the precise date when changes to fees on their accounts would occur." ¶¶22, 23.

In addition, Plaintiff Rose alleges that Defendants did not notify him in advance, in writing, that Defendant intended to charge him a $3.00 "check enclosure fee" per each account statement period for returning cancelled checks to Plaintiff. The charge was first placed on the June 10, 2009 account statement, and deducted from his personal deposit account. ¶¶22, 24.

Plaintiff Lane alleges that Defendants did not notify her in advance, in writing, that Defendant intended to charge her on her personal deposit an increase from $5.95 to $8.95 per month for her monthly servicing charge. The increased charge was first placed on the June 30, 2009 account statement, and deducted from her personal account. ¶¶22, 25. The announcement "was also further deficient in that it did not clearly differentiate the proposed specific changes in fees to Plaintiffs' account from the fee changes to the accounts of other Class members." ¶22.

The putative class action complaint alleges a single cause of action for violation of the Unfair Competition Law. The members of the class include:

> …all natural persons residing in California who hold deposit accounts primarily for personal, family or household purposes in California at Defendant Bank of America, N.A. This case arises from Defendants' violation of the Truth in Savings Act…and the California Unfair Competition Law…In or about April 2009 Defendants did not properly notify in advance Plaintiffs and other Class members about specific pricing changes to fees applicable to their particular deposits held at Defendant Bank of America, N.A. [See ¶¶1, 10, 13(a) and 26]

Defendant now demurs to the Complaint.

B. OPERATIVE LAW

A demurrer tests the sufficiency of a complaint as a matter of law and raises only questions of law. See Cal. Code. Civ. Proc. § 589; Schmidt v. Foundation Health, 35 Cal. App. 4th 1702, 1706 (1995). In testing the sufficiency of the complaint, the court must assume the truth of (1) the properly pleaded factual allegations; (2) facts that can be reasonably inferred from those expressly pleaded; and (3) judicially noticed matters. See Blank v. Kirwan, 39 Cal. 3d 311, 318 (1985). Accordingly, "[w]hether the plaintiff will be able to prove the pleaded facts is irrelevant to ruling upon the demurrer." Stevens v. Superior Court, 180 Cal. App. 3d 605, 609-610 (1986).

A general demurrer is proper where the complaint "does not state facts sufficient to constitute a cause of action" or discloses a defense that would bar recovery. See Cal. Code Civ. Proc., § 430.10(e); Casterson v. Superior Court, 101 Cal. App. 4th 177, 183 (2002). If there is a reasonable possibility that a defect in the complaint could be cured by amendment, the court should sustain the demurrer with leave to amend. See City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 68 Cal. App. 4th 445, 459-460 (1998). However, "where the nature of the plaintiff's claim is clear, and under substantive law no liability exists, a court should deny leave to amend because no amendment could change the result." Id.

C. 17200 CANNOT BE USED TO PLEAD AROUND AN ABSOLUTE BAR TO RELIEF

Defendant demurs to the putative class action complaint on the sole basis that the Truth in Savings Act, upon which the §17200 cause of action is based, does not allow for a private right of action.

"The UCL defines 'unlawful competition' to include an 'unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising….' (Bus. & Prof.Code, § 17200.) 'By proscribing 'any unlawful' business practice, '[Business & Professions Code,] section 17200 'borrows' violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable.' (Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548, 973 P.2d 527 ( Cel-Tech ).)" See Nelson v. Pearson Ford Co. (2010) 186 Cal.App.4th 983, 1013.

The purpose of the Truth in Savings Act ("TISA"), 12 U.S.C. §4301, et. seq., upon which the §17200 cause of action is based, is to require the clear and uniform disclosure of (1) the rates of interest which are payable on deposit accounts by depository institutions; and (2) the fees that are assessable against deposit accounts, so that consumers can make a meaningful comparison between the competing claims of depository institutions with regard to deposit accounts. See 12 U.S.C. §4301(b). However, enforcement of TISA, per 12 U.S.C. §4309(a), is through a Federal Banking Agency or the

National Credit Union Administration Board.[1] While there once existed a private right of action under TISA, this right was repealed on September 30, 2001. See Barnes v. Fleet Nat. Bank, N.A., 370 F.3d 164, 169, fn. 4 ("The provision of TISA granting a private right of action, 12 U.S.C. § 4310, was repealed on September 30, 2001.")

Nevertheless, a federal statute which does not provide a private right cause of action may still be a basis upon which a §17200 claim can be asserted. As noted in Washington Mut. Bank, FA v. Superior Court (1999) 75 Cal.App.4th 773, 783:

> We agree and similarly conclude that the mere absence of a private right of action in a federal law does not mean that a private right of action under state law is inherently in conflict with the federal law and is preempted. We will not presume that Congress cavalierly preempted all private state causes of action simply by enacting a limited provision preempting state laws that are inconsistent with the RESPA or Regulation X. Indeed, courts are reluctant to find that state provisions are inconsistent with federal law unless the state law directly conflicts with the federal law, undermines the federal law, or makes it

---

[1] Although 12 U.S.C. §4309(a) was amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of July 21, 2010, the agencies responsible for the enforcement of TISA did not change.

> impossible to comply with both federal and state law.

By contrast, Safeco Ins. Co. v. Sup.Ct. (1990) 216 Cal.App.3d 1491, did not allow a §17200 claim to proceed where it was based on Ca. Insurance Code, §790.03. In Safeco, the Court reaffirmed the Ca. Supreme Court's opinion in Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal.3d 287, which absolutely prohibited any cause of action based on Ca. Insurance Code, §790.03, since it "would render Moradi-Shalal meaningless." Safeco Ins. Co. v. Sup.Ct. (1990) 216 Cal.App.3d 1491, 1494 ("To permit plaintiff to maintain this action would render Moradi-Shalal meaningless. This we have neither the power nor the desire to do. Plaintiff's action is, therefore, barred.") See also Textron Financial Corp. v. National Union Fire Ins. Co. of Pittsburgh (2000) 118 Cal.App.4th 1061, 1070:

> While insurance companies are subject to California laws generally applicable to other businesses, including laws governing unfair business practices (Ins.Code, § 1861.03, subd. (a)), parties cannot plead around Moradi-Shalal 's holding by merely relabeling their cause of action as one for unfair competition.

Plaintiffs' reliance on State Farm Fire & Casualty Co. v. Superior Court (1996) 45 Cal.App.4th 1093 is misplaced. In that case, the Court of Appeal allowed the UCL action to proceed as it was based on common law fraud and the breach of the covenant of good faith and fair dealing. As the Court noted on page 1107: "While plaintiffs' allegations obviously charge violations of several of the statutory proscriptions in section 790.03…they also allege acts amounting to common law fraud and multiple breaches of the implied covenant of good faith…[¶] While Moradi-Shalal clearly held that the Legislature did not intend to create new causes of action when it enacted section 790.03, it is also clear that the Legislature did not intend in any way to circumscribe the previously existing common law right of an insured to seek redress for an insurer's fraudulent deception or breach of the covenant of good faith implied in the policy." Plaintiff's reliance on Stop Youth Addiction, Inc. v. Lucky Stores, Inc. (1998) 17 Cal.4th 553 as well because the borrowed statute (Penal Code 308) was silent on the private right of action issue. Unlike this case, there was no legislative intent expressed to bar a private right of action.

Thus, whether a §17200 cause of action may proceed, under any of the three prongs, depends on whether the "borrowed" statute absolutely bars a private cause of action or is merely silent on this issue. As explained in Hartless v. Clorox Co., 2007 WL 3245260 (S.D.Cal. 2007) at *4:

> Defendant, in reply, agrees with plaintiff that, in some instances, a statute that does not provide a private right of action could serve as a predicate for a UCL claim. Reply at 4. However, defendant contends that where private rights of action to enforce a statute have been expressly barred by Congress, that statute may not serve as a predicate for a UCL claim. Id. Defendant points out that Stop Youth Addiction, as well as the other cases cited by plaintiff, does not address an express prohibition by

> Congress on private causes of action to enforce the predicate statute at issue. Id.…
>
> This Court agrees with defendant. This Court finds that plaintiff is precluded from enforcing FIFRA privately by using it as a predicate for her UCL claim based on Congress' express rejection of private actions to enforce it. See Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir.2000) (a private action under the unlawful prong of the UCL will be forestalled if the predicate statute actually bars the private action); Southern California Water Co. v. Aerojet-General Corp., 2003 WL 255371634 *9-10 (C.D.Cal.) (finding only an absolute bar to private actions will preclude the use of a statute as a predicate to a UCL claim); Almond Hill, 768 F.2d at 1035-38 (finding plaintiff precluded from bringing a 42 U.S.C. § 1983 claim to enforce FIFRA because Congress had foreclosed private rights of action to enforce it). Therefore, this Court finds that plaintiff's UCL claim based on a violation of FIFRA must be dismissed.

See also Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 182: "A plaintiff may thus not 'plead around' an 'absolute bar to relief' simply 'by recasting the cause of action as one for unfair competition.'"

The issue, then, is whether the repeal of the private right to bring a cause of action under TISA constitutes an "absolute bar" which would prohibit a §17200 action.

In Gunther v. Capital One, N.A., 703 F.Supp.2d 264, 270-271 (E.D.N.Y. 2010), the Court noted:

> In addition, the Court agrees with Capital One Bank that reading TISA's requirements into the parties' contract would impermissibly undermine Congress's expressed intent that TISA be enforced by a regulatory agency and not private citizens…
>
> The Court finds both of these cases analogous to the present situation. TISA has no private right of action, and as in Grochowski and Broder, to permit a breach of contract suit based on TISA's substance would frustrate Congress's express indication that TISA be enforced exclusively by public entities.

See also Hirschbach v. NVE Bank, 496 F.Supp.2d 451, 456 (D.N.J. 2007):

> The Court's conclusion that this controversy does not belong in federal court is underscored by Congress's repeal of the private right of action under TISA and related withdrawal of federal jurisdiction over such claims in 2001. 12 U.S.C. § 4310 (2000) (repealed 2001); Schnall v. Amboy Nat'l Bank, 279 F.3d 205, 209 n. 2 (3d Cir.2002).

Thus, because the repeal of the private cause of action reflects an intent to absolutely bar a private cause of action, §17200 could not be used to "plead around" an "absolute bar to relief" simply "by recasting the cause of action as one for unfair competition." Cel-Tech Communications, Inc. v. Los

Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 182. To the extent the opposition relies on Smith v. Wells Fargo Bank (2005) 135 Cal.App.4th 1463, the issue before the Court was whether federal law preempted state law and not whether TISA provided for a private right of action[2]. Similarly, Stop Youth Addiction, Inc. v. Lucky Stores, Inc. (1998) 17 Cal.4th 553, 567-568, also primarily concerned itself with the issue of preemption. As the defendant notes in its reply: "Nor does the absence of preemption bear on the requirements for stating a cause of action under the UCL." See Reply, page 8, lies 11-12.

D. CONCLUSION

Accordingly, per the foregoing, the demurrer is sustained. Out of an abundance of caution, leave is granted to articulate some basis for the 17200 claim other than a statute which bars a private right of action.

IT IS SO ORDERED.

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2 Defendant does not argue that TISA preempts California law.

**SUPERIOR COURT OF CALIFORNIA,**
**COUNTY OF LOS ANGELES**

| | |
|---|---|
| DATE: 12/17/10 | DEPT. 308 |
| HONORABLE JANE L. JOHNSON | JUDGE |
| HONORABLE | JUDGE PRO TEM |
| C. CONCEPCION/C.A. | Deputy Sheriff |
| C. WRIGHT | DEPUTY CLERK |
| | ELECTRONIC RECORDING MONITOR |
| NONE | Reporter |

| | | |
|---|---|---|
| 8:30 am | BC433460 | Plaintiff Counsel |
| | HAROLD C. ROSE ET AL | NO APPEARANCES |
| | VS | Defendant Counsel |
| | BANK OF AMERICA N A | |

**NATURE OF PROCEEDINGS:**

COURT'S RULING ON SUBMITTED MATTER, DEMURRER OF DEFENDANT BANK OF AMERICA, N.A., TAKEN UNDER SUBMISSION ON DECEMBER 8, 2010

This Court, having reviewed and received the pleading, as well as authorities cited therein, and having considered the argument of counsel, rules as follows on Defendants' Special Motion to Strike.

The Demurrer is sustained with leave to amend for the reasons set forth in the 9-page Court Order Re Demurrer filed this date and a copy mailed to counsel listed below.

Clerk to give notice.

CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of Dec. 17, 2010 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: December 17, 2010

John A. Clarke, Executive Officer/Clerk
By: C. Wright, Deputy

Henry H. Rossbacher
James S. Cahill
THE ROSSBACHER FIRM
811 Wilshire Blvd., Suite 1650
Los Angeles, Ca 90017-2666

Scott H. Jacobs
Zareh S. Jaltorossian
REED SMITH LLP
355 S. Grand Avenue, Suite 2900
Los Angeles, CA 90071

**ORIGINAL FILED**
**FEB 10 2011**
**LOS ANGELES**
**SUPERIOR COURT**

**RECEIVED**
**JAN 12 2011**
**Dept. 308**

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CENTRAL CIVIL WEST

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HAROLD C. ROSE and KIMBERLY LANE,
individually and on behalf of
all others similarly situated,
Plaintiffs,
vs.

BANK OF AMERICA, N.A.,
and DOES 1 through 50, inclusive,
Defendants.

Case No. BC 433460

**ORDER OF DISMISSAL AND JUDGMENT IN FAVOR OF DEFENDANT BANK OF AMERICA, N.A.**

Compl. Filed: March 9, 2010

The Honorable Jane L. Johnson
Department 308

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TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

On December 17, 2010, this Court sustained the Demurrer of Defendant Bank of America, N.A to the Complaint of Plaintiffs Harold C. Rose and Kimberly Lane ("Plaintiffs") with leave to amend. On January 7, 2011, plaintiffs filed and served a Notice of Intent Not to File Amended Complaint. Accordingly, the Court does hereby ORDER, ADJUDGE AND DECREE that:

1. Plaintiffs' Complaint against Defendant Bank of America, N.A. is dismissed;
2. Plaintiffs shall take nothing by their Complaint against Defendant Bank of America, N.A.;
3. Defendant Bank of America, N.A. is granted judgment in its favor;
4. Defendant Bank of America, N.A. shall be awarded its costs of suit incurred herein, in the amount of $______________.

IT IS SO ORDERED.

Date: Feb. 10, 2011

**JANE L. JOHNSON**
HONORABLE JANE L. JOHNSON
JUDGE OF THE SUPERIOR COURT

**United States Code**
**Title 12. Banks and Banking**
**Chapter 44. Truth in Savings**

**12 U.S.C §§ 4301-4313**

Effective to July 20, 2011

**§ 4301. Findings and purpose**

**(a) Findings**

The Congress hereby finds that economic stability would be enhanced, competition between depository institutions would be improved, and the ability of the consumer to make informed decisions regarding deposit accounts, and to verify accounts, would be strengthened if there was uniformity in the disclosure of terms and conditions on which interest is paid and fees are assessed in connection with such accounts.

**(b) Purpose**

It is the purpose of this chapter to require the clear and uniform disclosure of—

**(1)** the rates of interest which are payable on deposit accounts by depository institutions; and

**(2)** the fees that are assessable against deposit accounts, so that consumers can make a meaningful comparison between the competing claims of depository institutions with regard to deposit accounts.

### § 4302. Disclosure of interest rates and terms of accounts

**(a) In general**

Except as provided in subsections (b) and (c) of this section, each advertisement, announcement, or solicitation initiated by any depository institution or deposit broker relating to any demand or interest-bearing account offered by an insured depository institution which includes any reference to a specific rate of interest payable on amounts deposited in such account, or to a specific yield or rate of earnings on amounts so deposited, shall state the following information, to the extent applicable, in a clear and conspicuous manner:

**(1)** The annual percentage yield.

**(2)** The period during which such annual percentage yield is in effect.

**(3)** All minimum account balance and time requirements which must be met in order to earn the advertised yield (and, in the case of accounts for which more than 1 yield is stated, each annual percentage yield and the account minimum balance requirement associated with each such yield shall be in close proximity and have equal prominence).

**(4)** The minimum amount of the initial deposit which is required to open the account in order to obtain the yield advertised, if such minimum amount is greater than the minimum balance necessary to earn the advertised yield.

**(5)** A statement that regular fees or other conditions could reduce the yield.

**(6)** A statement that an interest penalty is required for early withdrawal.

**(b) Broadcast and electronic media and outdoor advertising exception**

The Board may, by regulation, exempt advertisements, announcements, or solicitations made by any broadcast or electronic medium or outdoor advertising display not on the premises of the depository institution from any disclosure requirements described in paragraph (4) or (5) of subsection (a) of this section if the Board finds that any such dis-closure would be unnecessarily burdensome.

**(c) Disclosure required for on-premises displays**

The disclosure requirements contained in this section shall not apply to any sign (including a rate board) disclosing a rate or rates of interest which is displayed on the premises of the depository institution if such sign contains—

**(1)** the accompanying annual percentage yield; and

**(2)** a statement that the consumer should request further information from an employee of the depository institution concerning the fees and terms applicable to the advertised account.

**(d) Misleading descriptions of free or no-cost accounts prohibited**

No advertisement, announcement, or solicitation made by any depository institution or deposit broker may refer to or describe an account as a free or no-cost account (or words of similar meaning) if—

**(1)** in order to avoid fees or service charges for any period—

**(A)** a minimum balance must be maintained in the account during such period; or

**(B)** the number of transactions during such period may not exceed a maximum number; or

**(2)** any regular service or transaction fee is imposed.

**(e) Misleading or inaccurate advertisements, etc., prohibited**

No depository institution or deposit broker shall make any advertisement, announcement, or solicitation relating to a deposit account that is inaccurate or misleading or that misrepresents its deposit contracts.

**§ 4303. Account schedule**

**(a) In general**

Each depository institution shall maintain a schedule of fees, charges, interest rates, and terms and conditions applicable to each class of accounts offered by the depository institution, in accordance with the requirements of this section and regulations which the Board shall prescribe. The Board shall specify, in regulations, which fees, charges, penalties, terms, conditions, and account restrictions must be included in a schedule required under this subsection. A depository institution need not include in such schedule any information not specified in such regulation.

**(b) Information on fees and charges**

The schedule required under subsection (a) of this section with respect to any account shall contain the following information:

**(1)** A description of all fees, periodic service charges, and penalties which may be charged or assessed against the account (or against the account holder in connection with such account), the amount of any such fees, charge, or penalty (or the method by which such amount will be calculated), and the conditions under which any such amount will be assessed.

**(2)** All minimum balance requirements that affect fees, charges, and penalties, including a clear description of how each such minimum balance is calculated.

**(3)** Any minimum amount required with respect to the initial deposit in order to open the account.

**(c) Information on interest rates**

The schedule required under subsection (a) of this section with respect to any account shall include the following information:

**(1)** Any annual percentage yield.

**(2)** The period during which any such annual percentage yield will be in effect.

**(3)** Any annual rate of simple interest.

**(4)** The frequency with which interest will be compounded and credited.

**(5)** A clear description of the method used to determine the balance on which interest is paid.

**(6)** The information described in paragraphs (1) through (4) with respect to any period after the end of the period referred to in paragraph (2) (or the method for computing any information described in any such paragraph), if applicable.

**(7)** Any minimum balance which must be maintained to earn the rates and obtain the yields disclosed pursuant to this subsection and a clear description of how any such minimum balance is calculated.

**(8)** A clear description of any minimum time requirement which must be met in order to obtain the yields disclosed pursuant to this subsection and any information described in paragraph (1), (2), (3), or (4) that will apply if any time requirement is not met.

**(9)** A statement, if applicable, that any interest which has accrued but has not been credited to an account at the time of a withdrawal from the account will not be paid by the depository institution or credited to the account by reason of such withdrawal.

**(10)** Any provision or requirement relating to nonpayment of interest, including any charge or penalty for early withdrawal, and the conditions under which any such charge or penalty may be assessed.

**(d) Other information**

The schedule required under subsection (a) of this section shall include such other disclosures as the Board may determine to be necessary to allow consumers to understand and compare accounts, including frequency of interest rate adjustments, account restrictions, and renewal policies for time accounts.

**(e) Style and format**

Schedules required under subsection (a) of this section shall be written in clear and plain language and be presented in a format designed to allow consumers to readily understand the terms of the accounts offered.

**§ 4304. Disclosure requirements for certain accounts**

The Board shall require, in regulations which the Board shall prescribe, such modification in the disclosure requirements under this chapter relating to annual percentage yield as may be necessary to carry out the purposes of this chapter in the case of—

**(1)** accounts with respect to which determination of annual percentage yield is based on an annual rate of interest that is guaranteed for a period of less than 1 year;

**(2)** variable rate accounts;

**(3)** accounts which, pursuant to law, do not guarantee payment of a stated rate;

**(4)** multiple rate accounts; and

**(5)** accounts with respect to which determination of annual percentage yield is based on an annual rate of interest that is guaranteed for a stated term.

## § 4305. Distribution of schedules

### (a) In general

A schedule required under section 4303 of this title for an appropriate account shall be—

**(1)** made available to any person upon request;

**(2)** provided to any potential customer before an account is opened or a service is rendered; and

**(3)** provided to the depositor, in the case of any time deposit which has a maturity of more than 30 days is renewable at maturity without notice from the depositor, at least 30 days before the date of maturity.

### (b) Distribution in case of certain initial deposits

If—

**(1)** a depositor is not physically present at an office of a depository institution at the time an initial deposit is accepted with respect to an account established by or for such person; and

**(2)** the schedule required under section 4303(a) of this title has not been furnished previously to such depositor,

the depository institution shall mail the schedule to the depositor at the address shown on the records of the depository institution for such account no later than 10 days after the date of the initial deposit.

**(c) Distribution of notice of certain changes**

If—

**(1)** any change is made in any term or condition which is required to be disclosed in the schedule required under section 4303(a) of this title with respect to any account; and

**(2)** the change may reduce the yield or adversely affect any holder of the account, all account holders who may be affected by such change shall be notified and provided with a description of the change by mail at least 30 days before the change takes effect.

**(d) Distribution in case of accounts established by more than 1 individual or by a group**

If an account is established by more than 1 individual or for a person other than an individual, any distribution de-scribed in this section with respect to such account meets the requirements of this section if the distribution is made to 1 of the individuals who established the account or 1 individual representative of the person on whose behalf such account was established.

**(e) Notice to account holders as of effective date of regulations**

For any account for which the depository institution delivers an account statement on a quarterly or more frequent basis, the depository institution shall include on or with the first regularly scheduled mailing sent after the end of the 6-month period beginning on the date of publication of regulations issued by the Board in final form, a statement that the account holder has the right to request an account schedule containing the terms, charges, and interest rates of the account, and that the account holder may wish to request such an account schedule.

**§ 4306. Payment of interest**

**(a) Calculated on full amount of principal**

Interest on an interest-bearing account at any depository institution shall be calculated by such institution on the full amount of principal in the account for each day of the stated calculation period at the rate or rates of interest disclosed pursuant to this chapter.

**(b) No particular method of compounding interest required**

Subsection (a) of this section shall not be construed as prohibiting or requiring the use of any particular method of compounding or crediting of interest.

**(c) Date by which interest must accrue**

Interest on accounts that are subject to this chapter shall begin to accrue not later than the business day specified for interest-bearing accounts in section 4005 of this title, subject to subsections (b) and (c) of such section.

**§ 4307. Periodic statements**

Each depository institution shall include on or with each periodic statement provided to each account holder at such institution a clear and conspicuous disclosure of the following information with respect to such account:

**(1)** The annual percentage yield earned.

**(2)** The amount of interest earned.

**(3)** The amount of any fees or charges imposed.

**(4)** The number of days in the reporting period.

**§ 4308. Regulations**

**(a) In general**

**(1) Regulations required**

Before the end of the 9-month period beginning on December 19, 1991, the Board, after consultation with each agency referred to in section 4309(a) of this title and public notice and opportunity for comment, shall prescribe regulations to carry out the purpose and provisions of this chapter.

**(2) Effective date of regulations**

The regulations prescribed under paragraph (1) shall take effect not later than 9 months after publication in final form.

**(3) Contents of regulations**

The regulations prescribed under paragraph (1) may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of accounts as, in the judgment of the Board, are necessary or proper to carry out the purposes of this chapter, to prevent circumvention or evasion of the requirements of this chapter, or to facilitate compliance with the requirements of this chapter.

**(4) Date of applicability**

The provisions of this chapter shall not apply with respect to any depository institution before the effective date of regulations prescribed by the Board under this subsection (or by the National Credit Union Administration Board under section 4311(b) of this title, in the case of any depository institution described in clause (iv) of section 461(b)(1)(A) of this title).

**(b) Model forms and clauses**

**(1) In general**

The Board shall publish model forms and clauses for common disclosures to facilitate compliance with this chapter. In devising such forms, the Board shall consider the use by depository institutions of data processing or similar automated machines.

**(2) Use of forms and clauses deemed in compliance**

Nothing in this chapter may be construed to require a depository institution to use any such model form or clause prescribed by the Board under this subsection. A depository institution shall be deemed to be in compliance with the disclosure provisions of this chapter if the depository institution—

(A) uses any appropriate model form or clause as published by the Board; or

(B) uses any such model form or clause and changes it by—

(i) deleting any information which is not required by this chapter; or

(ii) rearranging the format,

if in making such deletion or rearranging the format, the depository institution does not affect the substance, clarity, or meaningful sequence of the disclosure.

**(3) Public notice and opportunity for comment**

Model disclosure forms and clauses shall be adopted by the Board after duly given notice in the Federal Register and an opportunity for public comment in accordance with section 553 of Title 5.

**§ 4309. Administrative enforcement**

**(a) In general**

Compliance with the requirements imposed under this chapter shall be enforced under—

**(1)** section 8 of the Federal Deposit Insurance Act [12 U.S.C.A. § 1818]—

**(A)** by the appropriate Federal banking agency (as defined in section 3(q) of the Federal Deposit Insurance Act [12 U.S.C.A. § 1813(q)]) in the case of insured depository institutions (as defined in section 3(c)(2) of such Act [12 U.S.C.A. § 1813(c)(2)]);

**(B)** by the Federal Deposit Insurance Corporation in the case of depository institutions described in clause (i), (ii), or (iii) of section 19(b)(1)(A) of the Federal Reserve Act [12 U.S.C.A. § 461(b)(1)(A)] which are not insured depository institutions (as defined in section 3(c)(2) of the Federal Deposit Insurance Act [12 U.S.C.A. § 1813(c)(2)]); and

**(C)** by the Director of the Office of Thrift Supervision in the case of depository institutions described in clause (v) and or (vi) of section 19(b)(1)(A) of the Federal Reserve Act [12 U.S.C.A. § 461(b)(1)(A)] which are not insured depository institutions (as defined in section 3(c)(2) of the Federal Deposit Insurance Act [12 U.S.C.A. § 1813(c)(2)]); and

**(2)** the Federal Credit Union Act [12 U.S.C.A. § 1751 et seq.], by the National Credit Union Administration Board in the case of depository institutions described in clause (iv) of section 19(b)(1)(A) of the Federal Reserve Act [12 U.S.C.A. § 461(b)(1)(A)].

**(b) Additional enforcement powers**

**(1) Violation of this chapter treated as violation of other acts**

For purposes of the exercise by any agency referred to in subsection (a) of this section of such agency's powers under any Act referred to in such subsection, a violation of a requirement imposed under this chapter shall be deemed to be a violation of a requirement imposed under that Act.

**(2) Enforcement authority under other acts**

In addition to the powers of any agency referred to in subsection (a) of this section under any provision of law specifically referred to in such subsection, each such agency may exercise, for purposes of enforcing compliance with any requirement imposed under this chapter, any other authority conferred on such agency by law.

**(c) Regulations by agencies other than the Board**

The authority of the Board to issue regulations under this chapter does not impair the authority of any other agency referred to in subsection (a) of this section to make rules regarding its own procedures in enforcing compliance with the requirements imposed under this chapter.

**§ 4310. Repealed. Pub.L. 104-208, Div. A, Title II, § 2604(a), Sept. 30, 1996, 110 Stat. 3009-470**

**§ 4311. Credit unions**

**(a) In general**

No regulation prescribed by the Board under this chapter shall apply directly with respect to any depository institution described in clause (iv) of section 461(b)(1)(A) of this title.

**(b) Regulations prescribed by NCUA**

Within 90 days of the effective date of any regulation prescribed by the Board under this chapter, the National Credit Union Administration Board shall prescribe a regulation substantially similar to the regulation prescribed by the Board taking into account the unique nature of credit unions and the limitations under which they may pay dividends on member accounts.

**§ 4312. Effect on State law**

The provisions of this chapter do not supersede any provisions of the law of any State relating to the disclosure of yields payable or terms for accounts to the extent such State law requires the disclosure of such yields or terms for accounts, except to the extent that those laws are inconsistent with the provisions of this chapter, and then only to the extent of the inconsistency. The Board may determine whether such inconsistencies exist.

**§ 4313. Definitions**

For the purposes of this chapter—

(1) Account

The term "account" means any account intended for use by and generally used by consumers primarily for personal, family, or household purposes that is offered by a depository institution into which a consumer deposits funds, including demand accounts, time accounts, negotiable order of withdrawal accounts, and share draft accounts.

(2) Annual percentage yield

The term "annual percentage yield" means the total amount of interest that would be received on a $100 deposit, based on the annual rate of simple interest and the frequency of compounding for a 365-day period, expressed as a percentage calculated by a method which shall be prescribed by the Board in regulations.

(3) Annual rate of simple interest

The term "annual rate of simple interest"—

**(A)** means the annualized rate of interest paid with respect to each compounding period, expressed as a percentage; and

**(B)** may be referred to as the "annual percentage rate".

(4) Board

The term "Board" means the Board of Governors of the Federal Reserve System.

(5) Deposit broker

The term "deposit broker"—

**(A**) has the meaning given to such term in section 1831f(f)(1) of this title; and

**(B)** includes any person who solicits any amount from any other person for deposit in an insured depository institution.

(6) Depository institution

The term “depository institution” has the meaning given such term in clauses (i) through (vi) of section 461(b)(1)(A) of this title, but does not include any nonautomated credit union that was not required to comply with the requirements of this chapter as of September 30, 1996, pursuant to the determination of the National Credit Union Administration Board.

(7) Interest

The term “interest” includes dividends paid with respect to share draft accounts which are accounts within the meaning of paragraph (3).

(8) Multiple rate account

The term “multiple rate account” means any account that has 2 or more annual rates of simple interest which take effect at the same time or in succeeding periods and which are known at the time of disclosure.

## United States Code
## Title 12. Banks and Banking
## Chapter 44. Truth in Savings

### 12 U.S.C. § 4310

Effective October 28, 1992
to September 29, 2001

### § 4310. Civil liability

### (a) Civil liability

Except as otherwise provided in this section, any depository institution which fails to comply with any requirement imposed under this chapter or any regulation prescribed under this chapter with respect to any person who is an account holder is liable to such person in an amount equal to the sum of--

**(1)** any actual damage sustained by such person as a result of the failure;

**(2)(A)** in the case of an individual action, such additional amount as the court may allow, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or

**(B)** in the case of a class action, such amount as the court may allow, except that--

**(i)** as to each member of the class, no minimum recovery shall be applicable; and

**(ii)** the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same depository institution shall not be more than the lesser of $500,000 or 1 percent of the net worth of the depository institution involved; and

**(3)** in the case of any successful action to enforce any liability under paragraph (1) or (2), the costs of the action, together with a reasonable attorney's fee as determined by the court.

**(b) Class action awards**

In determining the amount of any award in any class action, the court shall consider, among other relevant factors--

**(1)** the amount of any actual damages awarded;

**(2)** the frequency and persistence of failures of compliance;

**(3)** the resources of the depository institution;

**(4)** the number of persons adversely affected; and

**(5)** the extent to which the failure of compliance was intentional.

**(c) Bona fide errors**

**(1) General rule**

A depository institution may not be held liable in any action brought under this section for a violation of this chapter if the depository institution demonstrates by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

**(2) Examples**

Examples of a bona fide error include clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a depository institution's obligation under this chapter is not a bona fide error.

**(d) No liability for overpayment**

A depository institution may not be held liable in any action under this section for a violation of this chapter if the violation has resulted in--

**(1)** an interest payment to the account holder in an amount greater than the amount determined under any disclosed rate of interest applicable with respect to such payment; or

**(2)** a charge to the consumer in an amount less than the amount determined under the disclosed charge or fee schedule applicable with respect to such charge.

**(e) Jurisdiction**

Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within 1 year after the date of the occurrence of the violation involved.

**(f) Reliance on Board rulings**

No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any regulation or order, or any interpretation of any regulation or order, of the Board, or in conformity with any interpretation or approval by an official or employee of the Board duly authorized by the Board to issue such interpretation or approval under procedures prescribed by the Board, notwithstanding, the fact that after such act or omission has occurred, such regulation, order, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

**(g) Notification of and adjustment for errors**

A depository institution shall not be liable under this section or section 4309 of this title for any failure to comply with any requirement imposed under this chapter with respect to any account if--

**(1)** before--

**(A)** the end of the 60-day period beginning on the date on which the depository institution discovered the failure to comply;

**(B)** any action is instituted against the depository institution by the account holder under this section with respect to such failure to comply; and

**(C)** any written notice of such failure to comply is received by the depository institution from the account holder, the depository institution notifies the account holder of the failure of such institution to comply with such requirement; and

**(2)** the depository institution makes such adjustments as may be necessary with respect to such account to ensure that--

**(A)** the account holder will not be liable for any amount in excess of the amount actually disclosed with respect to any fee or charge;

**(B)** the account holder will not be liable for any fee or charge imposed under any condition not actually disclosed; and

**(C)** interest on amounts in such account will accrue at the annual percentage yield, and under the conditions, actually disclosed (and credit will be provided for interest already accrued at a different annual percentage yield and under different conditions than the yield or conditions disclosed).

**(h) Multiple interests in 1 account**

If more than 1 person holds an interest in any account--

**(1)** the minimum and maximum amounts of liability under subsection (a)(2)(A) of this section for any failure to comply with the requirements of this chapter shall apply with respect to such account; and

**(2)** the court shall determine the manner in which the amount of any such liability with respect to such account shall be distributed among such persons.

**(i) Continuing failure to disclose**

**(1) Certain continuing failures treated as 1 violation**

Except as provided in paragraph (2), the continuing failure of any depository institution to disclose any particular term required to be disclosed under this chapter with respect to a particular account shall be treated as a single violation for purposes of determining the amount of any liability of such institution under subsection (a) of this section for such failure to disclose.

**(2) Subsequent failure to disclose**

The continuing failure of any depository institution to disclose any particular term required to be disclosed under this chapter with respect to a particular account after judgment has been rendered in favor of the account holder in connection with a prior failure to disclose such term with respect to such account shall be treated as a subsequent violation for purposes of determining liability under subsection (a) of this section.

**(3) Coordination with section 4309 of this title**

This subsection shall not limit or otherwise affect the enforcement power under section 4309 of this title of any agency referred to in subsection (a) of such section.