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No.  
IN THE  
SUPREME COURT OF CALIFORNIA

HAROLD ROSE AND KIMBERLY LANE,  
individually and on behalf of all others similarly  
situated,

Plaintiffs/Appellants and Petitioners

vs.

BANK OF AMERICA, N.A. an individual and DOES  
1 through 100, inclusive,

Defendant/Respondent.

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After A Decision By The Court of Appeal,  
Second Appellate District, Division Two, Case No. B230859.  
On Appeal From The Superior Court For Los Angeles County,  
Case No. BC 433460, The Honorable Jane L. Johnson

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**PETITION FOR REVIEW**

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Unfair Competition Law Case (Cal. Bus. & Prof. Code § 17209)

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SUPREME COURT  
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## PETITION FOR REVIEW

To the Honorable Chief Justice and the Honorable Associate Justices of the California Supreme Court:

Plaintiffs-Appellants Harold Rose and Kimberly Lane, (“Plaintiffs”) respectfully petition for review of the Opinion by the Court of Appeal, Second Appellate District, Division Two (Boren, P.J., with Doi Todd, J. and Chavez, J. concurring.) The Court of Appeal Opinion, published at *Rose v. Bank of America, N.A.* No. B230859 (2011) 200 Cal.App.4th 1441, 1454 (“*Rose*”) affirms the Superior Court’s order sustaining a demurrer to the complaint and judgment of dismissal in favor of Defendant-Respondent Bank of America, N.A. (“Defendant”). A copy of the Opinion is appended to this Petition. Plaintiffs petitioned for rehearing with the Court of Appeal which was denied on December 8, 2011. A copy of the order denying rehearing is also attached

### I. ISSUES PRESENTED FOR REVIEW

This case presents the following issues for review:

1. Does repeal by Congress of a federal statute’s private right of action prohibit UCL claims based on violations of the federal statute’s requirements where the federal statute’s preemption clause explicitly preserves claims under state laws enforcing consistent state standards and Congress has not indicated an intent to bar the preserved state claims? (No)



2. Does California law require giving effect to explicit federal preemption clauses which preserve state claims where no specific provision of the federal law bars the claim or immunizes the conduct in violation of the federal act? (Yes)

## II. INTRODUCTION

Pursuant to Cal. Rules of Court, rule 8.500(b) Plaintiffs ask this Court to grant review of the Court of Appeal's published Opinion to secure uniformity of decision and to settle important rules of law. The opinion is wrong, breaking new ground eviscerating California law on the relationship between federal preemption and the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.* ("UCL") and untethering California jurisprudence from a full analysis of all a federal statute's provisions and Congress' actions and intent.

The Court of Appeal holds that the repeal of the federal private right of action for violations of the Truth in Savings Act, 12 U.S.C. § 430 *et seq.* ("TISA") results in the preemption of a state cause of action under the UCL enforcing state law requirements that are identical to TISA's requirements despite a preemption savings clause that specifically preserves a state's enforcement of its laws "to the extent that such state law requires" compliance with the disclosure requirements of TISA unless the state's laws are "inconsistent" with the requirements of that federal law and where there is no statement of Congressional intent to bar state claims. The opinion can point to no language or legislative history of TISA suggesting that Congress intended total preemption of TISA-related private causes of action founded on requirements contained in state law. Rather,

TISA's savings clause (12 U.S.C. § 4312) explicitly saves the UCL claims from preemption, clearly and unmistakably evincing Congress's intent to authorize states to enforce their consistent TISA-related laws with state remedies such as the UCL. Here, the UCL is not inconsistent with TISA. The UCL incorporates and adopts TISA disclosure requirements and makes their violation a violation of California laws. The California and TISA bank disclosure requirements to consumers are not inconsistent as they are identical.

The Court of Appeal decision announces unprecedented California law on preemption of UCL claims based on violations of federal law. The Court bars the California UCL claims here without mentioning or analyzing in its Opinion the federal act's preemption clause or analyzing its effect in saving the consistent state claims authorized by the clause. This decision raises important issues under this Court's decisions in *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4<sup>th</sup> 553 ("*Stop Youth Addiction*") and *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel.* (1999) 20 Cal.4<sup>th</sup> 163 ("*Cel-Tech*"). Here, despite these cases, the Court of Appeal has wrongly barred causes of action which are based on conduct that is specifically prohibited by the federal statute and not permitted by any provision of any federal act. The decision does not rely on contemporaneous legislative history or specific statutory language. In failing to cite or discuss the preemption clause, the decision, in effect, holds that federal preemption clauses are irrelevant in determining the availability of UCL relief.

The Court of Appeal's ruling that repeal of a federal private cause of action supersedes the clear provision of state enforcement under the federal preemption clause

raises serious issues of California and federal jurisprudence. Here both the First Circuit Court of Appeals and the California Court of Appeal have directly held that state unfair competition claims were available for violations of TISA. The repealing Sunset Amendment merely prospectively repealed only the provided federal private right of action. Congress did not consider or legislate in the Sunset Amendment as to the existing state causes of action. Congress maintained the preemption clause that was originally enacted.

The Court of Appeal, unable to point to contemporary legislative history and without discussion of the preemption clause, held that the Sunset Amendment itself evidences an intent to bar all state causes of action. The Court of Appeal also relied on an unenacted amendment proposed decades after the original adoption of TISA and years after adoption of the Sunset Amendment as probative of Congress's intent in barring state enforcement by enacting the Sunset Amendment. This decision does not discuss or cite this Court's consistent jurisprudence as exemplified by *Grupe Development Co. v. Superior Court* (1993) 4 Cal.4th 911 ("*Grupe*") and the United States Supreme Court's similar injunction in *Jones v. United States* (1999) 526 U.S. 227, 238, 119 S.Ct. 1215, 1221, 143 L.Ed.2d 311, 323 ("*Jones*") that using unenacted later legislation "is a hazardous basis for inferring the intent of an earlier Congress." Nor does it discuss or analyze the preemption clause. The effect of the court's opinion is to untether preemption analysis from both concrete legal facts and existing jurisprudence. The decision, thus, creates important issues relating to the proper analysis of federal preemption of California's UCL.

Granting review will present an ideal opportunity for the Court to clarify crucial issues that consistently arise in California actions under the UCL involving violations of federal law as the bases for UCL actions and to make clear both the prescriptive effect of federal preemption clauses saving these claims and the proper analysis to be undertaken when determining Congressional intent.

### **III. WHY REVIEW SHOULD BE GRANTED**

The legal issues posed by this Petition are vitally important to California's UCL jurisprudence.

Plaintiffs allege that Defendant Bank of America did not properly notify in advance Plaintiffs and other class members, its customers, about specific pricing changes to fees applicable to each particular deposit account held at Defendant as required by TISA and its implementing Regulation DD, 12 C.F.R. 230 *et seq.* Plaintiffs allege that Defendant violated both the "unlawful" and "unfair" prongs of the UCL by violating their rights (and those of the Class) delineated in TISA and Regulation DD and adopted into the UCL. The Plaintiffs' claims are specifically permitted by TISA's preemption clause which saves state actions requiring "the disclosure ... of terms for accounts, except to the extent those laws are inconsistent" with TISA's requirements.<sup>1</sup> Plaintiffs' case seeks to enforce disclosures identical to those imposed by TISA.

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<sup>1</sup> The savings clause of TISA and Regulation DD state plainly and unambiguously:

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

Defendant countered by demurrer arguing that Congress years after TISA's adoption provided a Sunset Amendment to TISA by which the federal private right of action section of TISA (*i.e.*, former 12 U.S.C. § 4310) was repealed effective September 30, 2001, thereby prohibiting a federal private right of action to enforce TISA. The Court of Appeal ruled that "[w]hen Congress repealed the statutory right of consumers to enforce TISA [*i.e.*, the Sunset Amendment], it intended to bar *all* private actions alleging TISA violations, including indirect enforcement suits brought under California's [UCL]. The UCL may not be deployed to redress TISA violations." *Rose*, 200 Cal.App.4<sup>th</sup> at 1446. The Court of Appeal did not discuss the preemption provision in its opinion. Nor did the Court of Appeal reply on evidence of Congressional intent contemporaneous with the adoption of either TISA or the Sunset Amendment.

The Sunset Amendment does not immunize conduct violating TISA's disclosure requirements or bar a state's enforcement of its consistent laws. TISA itself, through the preemption provision, specifically permits state enforcement. The effect of the Court of Appeal's ruling is to bar California's citizens from enforcing bank disclosure

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to the extent that those laws are inconsistent with the provisions of this chapter, and then only to the extent of the inconsistency. The Bureau may determine whether such inconsistencies exist.

12 U.S.C. § 4312.

(d) Effect on state laws. State law requirements that are inconsistent with the requirements of the act and this part are preempted to the extent of the inconsistency. Additional information on inconsistent state laws are the procedures for requesting a preemption determination from the Board are set forth in appendix C of this part.

12 C.F.R. 230.1(d).

requirements adopted into California's law through enforcement of California's own laws. This is a sea change in preemption law in general and California's jurisprudence as to the applicability of the UCL in particular.

The Court of Appeal's opinion will have a profound influence on the availability of state UCL actions premised on violations of federal laws. The legal landscape prior to the TISA amendment sunsetting the private federal direct cause of action was clear: private rights of action based on the UCL and its equivalents in other states were available and not preempted. They were specifically allowed under TISA's preemption clause authorizing the enforcement by unfair competition laws so long as those state laws were not inconsistent with TISA. The United States Court of Appeals and the California Court of Appeal so held. *Barnes v. Fleet Nat'l Bank* (1<sup>st</sup> Cir. 2004) 370 F.3d 164, 175-76; *Smith v. Wells Fargo Bank* (2005) 135 Cal.App.4<sup>th</sup> 1463, 1480-85. TISA's narrow preemption clause was enacted to save from preemption the state causes of action at issue here; significantly, it was not altered by the Sunset Amendment.

The Opinion errs in judicially creating "an exception to the UCL" in violation of the command in *Aron v. U-Haul Co. of Calif.* (2006) 143 Cal.App.4<sup>th</sup> 796, 804. It immunizes violations of TISA's disclosure requirements from redress through the UCL notwithstanding this Court's holding in *Cel-Tech* 20 Cal.4<sup>th</sup> 163 that only clear, legislatively conferred immunity or a statute barring state relief is sufficient to bar UCL relief. *Id.* at 182. Congress did neither.

Second, this Court's review is necessary to secure uniformity of decision.

Prior to *Rose*, California courts held that a “borrowed” law does not need to contain a private right of action in order to serve as a predicate for a UCL claim. *Stop Youth Addiction* 17 Cal.4<sup>th</sup> at 565; *Kasky v. Nike, Inc.* (2002) 27 Cal.4<sup>th</sup> 939, 950. Whether a private right of action is implied under the borrowed statute is immaterial. *Stop Youth Addiction*, 17 Cal.4<sup>th</sup> at 562. This Court has held that the relevant inquiry is not whether the underlying statute (such as TISA) can be enforced directly, or administratively, but whether the legislative body expressly intended to displace the UCL. *Stop Youth Addiction*, 17 Cal.4<sup>th</sup> at 562 n.5, 656; *Cel-Tech*, 20 Cal.4<sup>th</sup> at 182-83. Without finding any language of TISA or the Congress to support its finding, the Court of Appeal wrongly concludes that mere withdrawal of a private remedy from a federal statute (*i.e.*, the Sunset Amendment) is enough to prohibit the UCL from furnishing its remedies for enforcing that predicate statute. *Rose*, 200 Cal.App.4<sup>th</sup> at 1452. This holding, thus, creates new law, dispensing with this Court’s requirements that California actions can be only barred by explicit federal commands. The Court of Appeal’s further reliance on a later unenacted proposed amendment ignores this Court’s and federal jurisprudence to the contrary and will produce confusion if allowed to stand.

The Court of Appeal also mints law at odds with California precedent in stating that legislative intent to ban UCL enforcement of a statute may be implied from an administrative scheme in that statute. *Rose*, 200 Cal.App.4<sup>th</sup> at 1450. This Court and other California courts have previously held that the UCL applies unless the legislative body has expressly provided otherwise. *State of Calif. v. Altus Finance* (2005) 36 Cal.4<sup>th</sup> 1284, 1303 (“*Altus*”).

In the area of consumer protection, California courts have appreciated the scarce resources available for public enforcement of the law, and have espoused private enforcement as a necessary adjunct of public protection. “That public prosecutors can ... sue is of limited solace, given the significant role [the California Supreme Court has] recognized private consumer enforcement plays for many categories of unfair business practices.” *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4<sup>th</sup> 310, 330. In *Rose* the Court of Appeal abandons this principal.

The radical holding in *Rose* stands in opposition to the holdings of this Court and other Court of Appeal decisions and creates harmful new rules. If these rules become part of California jurisprudence, *Rose* will undermine the strong consumer protections of the UCL, and will deprive California consumers not only of any remedy against banks who fail to satisfy disclosure requirements to consumers about charges to their deposit accounts but also of any ability to remedy violations of federal laws in general.

#### **IV. STATEMENT OF THE CASE**

##### **A. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

Plaintiffs allege that in or about April 2009 Defendant did not properly notify in advance Plaintiffs and other Class members about specific pricing changes applicable to their particular deposit accounts held at Defendant in violation of TISA and Regulation DD. *Rose*, 200 Cal.App.4<sup>th</sup> at 1446; Comp. ¶ 1, 1 AAA 00002. Defendant violated the “unlawful” and “unfair” prongs of the UCL by violating the rights of Plaintiffs and Class



members delineated in TISA and Regulation DD. *Rose*, 200 Cal.App.4<sup>th</sup> at 1446; Comp. ¶¶ 27-31; 1 AA 00010-AA00011.

These violations occurred when Bank of America did not clearly and conspicuously (in advance in writing) (1) disclose the categories of fees (and their amounts) for account services which were changing applicable to the particular deposit accounts of Plaintiffs and other class members; (2) direct Plaintiffs' and Class members' attention to the particular changes for their accounts; and (3) inform Plaintiffs and other class members the precise date when changes to the fees on their accounts would occur. Comp. ¶¶22-26, 1 AA00007-AA00009. Materials furnished by Defendant to Plaintiffs and the class were deficient in that those materials did not clearly and conspicuously differentiate the proposed specific changes in fees among the accounts held by Plaintiffs and other Class members. *Id.*; *Rose*, 200 Cal.App.4<sup>th</sup> at 1446.<sup>2</sup>

Plaintiffs and the Class seek relief as provided under Cal. Bus. & Prof. Code § 17203 including restitution of all money improperly deducted for increased service fees taken by Defendant from the personal bank accounts of each Plaintiff and Class member,

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<sup>2</sup> The "FACTS" of the Complaint are inaccurately and incompletely stated in the opinion. "Upcoming price changes" as to each Plaintiffs' and Class member's particular account were not "detailed" in advance of the fees increases. *Rose*, 200 Cal.App.4<sup>th</sup> at 1446. Although Plaintiffs and other accountholders were referred to a "brochure" and "website", these did not furnish the mandated advance disclosure requirements unique to each accountholder required by TISA. Comp. ¶¶ 22-23, 1 AA00007-AA00009. They were not accountholder specific; they were composed of a list of all fee changes for all of the different accounts, but did not notify each accountholder which fee changes applied to that consumer's individual account. These short-comings in the Opinion were highlighted for the court in Plaintiff's Petition for Rehearing, but the Court declined to make any corrections to its opinion. Cal. Rules of Court, rule 8.500(c)(2).

and an injunction stopping and correcting Defendant's misconduct. *Rose*, 200 Cal.App.4<sup>th</sup> at 1446; Comp. ¶¶ 2, 34, 1 AA00002, AA00011-AA00012.

Plaintiffs filed the Complaint against Defendant on March 9, 2010. 1 AA00001-AA00014. As summarized by the Superior Court, "Defendant [demurred] to putative class action complaint on the sole basis that the Truth in Savings Act, which the § 17200 cause of action is based, does not allow for a private right of action." Order at 4, 2 AA00356. The Superior Court, in sustaining the demurrer, agreed with Defendant: "[B]ecause the repeal of the private cause of action [in TISA] reflects an intent to absolutely bar a private cause of action, [the UCL] could not be used to 'plead around' an 'absolute bar to relief' simply 'by recasting the cause of action as one for unfair competition.'" (Citation.)" Order at 8. 2 AA00360; *Rose*, 200 Cal.App.4<sup>th</sup> at 1446-1447. The Superior Court granted Plaintiffs leave to amend "to articulate some basis for the [UCL] claim other than a statute which bars a private right of action." Order at 9, 2 AA00361.

"Plaintiffs did not file an amended pleading." *Rose*, 200 Cal.App.4<sup>th</sup> at 1447. The Superior Court entered its Order of Dismissal and Judgment in favor of Defendant. *Id.* Plaintiffs timely appealed. *Id.*

## **B. COURT OF APPEAL'S OPINION**

The Court of Appeal affirmed the judgment of the Superior Court on November 21, 2011. The court acknowledges that "[t]he goal [of TISA] 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 disclosures. (Citation).” *Rose*, 200 Cal.App.4<sup>th</sup> at 1447. The court further notes that “[a] bank can be liable either for a violation of TISA itself or for a violation of Regulation DD.” *Id.* 1447. In the court’s view “[t]he question is whether an indirect suit to enforce TISA survives the sunset clause repealing [former 12 U.S.C. § 4310].” *Id.* 1451.<sup>3</sup> The court answers this question holding that “[w]hen Congress repealed the statutory right of consumers to enforce TISA, it intended to bar all

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<sup>3</sup> Former 12 U.S.C “Section 4310 entitled ‘civil liability’ stated that if any depository institution failed to comply with TISA, it is liable to accountholders for actual and statutory damages... Jurisdiction over TISA private enforcement actions was conferred concurrently on federal and state courts.” *Rose*, 200 Cal.App.4<sup>th</sup> at 1448, n2. Former 12 U.S.C. 4310(a) stated:

(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 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.

“In 1996, Congress amended section 4310, adding a ‘sunset clause’ [ ]” (*Rose*, 200 Cal.App.4<sup>th</sup> at 1448) which stated: “Effective as of the end of the 5-year period beginning on the date of enactment of this act [*i.e.*, September 30 2001], section 271 of [TISA] (12 U.S.C. §4310) is repealed.”

private actions alleging TISA violations, including indirect enforcement suits brought under California’s [UCL]. (Citation).” *Id.* at 1446. In reaching this result the court finds congressional intent to bar the UCL action only from the Sunset Amendment itself and the subsequent “rebuffed legislation to reinstate the civil liability suit against noncompliant banks.” *Id.* at 1452. The court reasons that “even if the law does not expressly say ‘No civil action,’ the courts may imply a legislative intent to bar private civil actions to indirectly enforce the statute by providing a comprehensive administrative remedy.” *Id.* at 1450.

The opinion also addresses the UCL’s “unfair prong” holding that the complaint failed to state a claim under any of those formulae developed in the case law. *Rose*, 200 Cal.App.4<sup>th</sup> at 1452-1454. “Plaintiffs’ complaint fails the first test, because their fairness claim cannot be tethered to TISA,... 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..” *Ibid.* at 1453. “Finally, the pleading fails the third test because plaintiffs could have reasonably avoided the imposition of high fees in successive months . . . .” *Ibid.* at 1453-1454.<sup>4</sup>

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<sup>4</sup> Again, the Court of Appeal misstates the Complaint’s factual allegations. Plaintiffs and Class members were not properly warned beforehand about price changes. Comp. ¶¶ 22-23, 1 AA00007-AA00009. As alleged, the injuries are substantial and not outweighed by any countervailing benefits. Comp. ¶¶ 1, 22-26, 30, 1 AA00002, AA00007, AA00010-AA00011. By having failed to disclose in advance specific pricing changes, Plaintiff and the Class could not have reasonably avoided their injuries. *Id.* Despite Plaintiffs’ Petition for Rehearing, the court did not correct its opinion. The court ignored the rule that whether a practice is unfair calls for a balancing of policy interests which needs a complete factual record. *Motors, Inc. v. Times Mirror Co.* (1980) 102 Cal.App.3d 735, 740.

Plaintiffs' Petition for Rehearing was denied on December 8, 2011.

## V. LEGAL DISCUSSION

### A. THE ISSUES ARE OF STATEWIDE IMPORTANCE.

#### 1. The Court Of Appeal Misconstrues The Relationship Between TISA And Regulation DD And The California UCL.

The Court of Appeal's decision errs in according preclusive, preemptive effect to the Sunset Amendment. That amendment neither alters the preemption clause nor indicates a congressional "intent" to bar state causes of action such as the UCL here. The opinion errs in not acknowledging the preemption clause both as a specific statement by Congress that state causes of action are not preempted and as a clear indication of Congressional intent preserving state enforcement.

Whether TISA and Regulation DD provide a federal direct private right of action is not dispositive. The issue here is whether TISA and Regulation DD can serve as predicates for an UCL claim in this state proceeding. A private right of action under the predicate statute is not necessary in order to state a cause of action under the UCL for violation based on that statute. *Stop Youth Addiction*, 17 Cal.4th at 565; *Kasky*, 27 Cal.4th at 950.

The relationship between TISA and state laws is set forth in the Act. As originally enacted, TISA (and Regulation DD) contained a broad savings clause which has never changed. 12 U.S.C. § 4312, 12 C.F.R. 230.1(d). TISA and Regulation DD specifically contemplate that consumers may seek redress concerning their depository accounts

against banks through state laws (not inconsistent with TISA). Those state laws encompass state consumer protection statutes such as the UCL. TISA is silent about proscribing the range of available remedies states might permit for the violation of state laws. TISA, then, authorizes state remedies through a private UCL action.

States may create their own TISA-related causes of action. In California, the UCL is designed to remedy violations of other laws, both state and federal. The UCL establishes a state private right of action to remedy three varieties of unfair competition: the unlawful, the unfair and the fraudulent. *See People ex rel. Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 515. Thus, California statutorily established a cause of action to redress TISA and Regulation DD violations. The UCL permits Plaintiffs and the Class here to seek restitution and injunctive relief caused by Defendant's business practices which TISA and Regulation DD make unlawful and unfair. "This claim, despite its reference to [the predicate law], arises under California and not federal law." *Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, 1207.

Originally, if a depository institution violated TISA, enforcement occurred in three alternative forms: (a) a federal direct private cause of action for actual damages or civil penalties brought by an account holder in federal or state court (former 12 U.S.C. § 4310(a), (e)); (b) state actions under state laws including consumer protection actions (not inconsistent with TISA) where violation of protections described in TISA also qualified as a state unfair business practice (12 U.S.C. § 4312, 12 C.F.R. 230.1(d)); and (c) a cease and desist order or similar administrative remedy sought by a regulator. 12 U.S.C. § 4309.

On September 30, 2001 federal ‘civil liability’ for TISA violations ended. *Rose*, 200 Cal.App.4<sup>th</sup> at 1448, n2. By repealing 12 U.S.C. § 4310 Congress eliminated only the standing of a private person to prosecute directly a federal TISA lawsuit for the federal TISA remedies. Congress did not repeal or alter consumers’ existing rights to enforce those protections described in TISA and Regulation DD through state law in state courts as underscored in the unchanged, limited preemption provisions of 12 U.S.C. § 4312 and 12 C.F.R. 230.1(d). *Barnes*, 370 F.3d at 175-76 (holding violation of TISA as per se violation of the Massachusetts consumer protection statute which is similar to California’s UCL); *Smith*, 135 Cal.App.4<sup>th</sup> at 1480-85 (treating violation of TISA regulations as UCL violation). The Sunset Amendment is completely silent both as to preemption of state causes of action and Congressional intent as to state enforcement.

The operative language of Cal. Bus. & Prof. Code § 17200 has remained substantially as enacted in the 1933 amendment to former Cal. Civ. Code § 3369. *Stop Youth Addiction*, 17 Cal.4<sup>th</sup> at 569-70 (“In 1933, the Legislature created the modern UCL by expanding Section 3369 exception for nuisance cases to include unfair competition cases.”) Congress, in turn, is deemed to have been aware of existing state laws (such as the California UCL) when it enacted TISA in 1991 and passed the Sunset Amendment in 1996. *See People v. Harrison* (1989) 48 Cal.3d 321, 329 (Legislature “is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof”).<sup>5</sup>

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<sup>5</sup> After the TISA Sunset Amendment took effect in 2001, an advisory letter promulgated by the Office of the Comptroller of the Currency in 2002 warned national banks of the

TISA neither expressly nor impliedly preempts state law with respect to Plaintiffs' UCL claim. There is no conflict between the UCL and TISA. In her Order sustaining Defendant's demurrer, the Superior Court noted that "Defendant does not argue that TISA preempts California law." Order at 8. n.2, 2AA00360.

The ability of California consumers to enforce TISA protections under long existing California law survives the Sunset Amendment. The Court of Appeal's opinion misreads TISA's savings preemption clause and coins a new erroneous rule.

## **2. The Court Of Appeal Misapplies The Effect Of The Sunset Amendment On California Law.**

In asserting their UCL claim, Plaintiffs and the Class plead a California state, not a federal, cause of action. TISA and Regulation DD are used by Plaintiffs and the Class to define the contours of their UCL claim.

This Court appreciates "the significant role ... private consumer enforcement plays for many categories of unfair business practices." *Kwikset Corp.*, 51 Cal.4th at 330. The UCL is intended as a means to prevent unfair competition which is a goal separate from that of the underlying violation of the predicate law. *See Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 179. The UCL creates a right of action independent of and cumulative to any claim available directly for violation

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risks in engaging in lending and marketing practices that may constitute unfair or deceptive acts or practices under federal and state law: "A number of state laws prohibit unfair or deceptive acts or practices, and such laws may be applicable to insured depository institutions. *See, e.g.,* Cal. Bus. & Prof. Code 17200 *et seq.* and 17500 *et seq.*" OCC Advisory Ltr. 2002-03 (Mar. 22, 2002) at p.3, n.2. 2 AA00326.



of the predicate law. A UCL cause of action has its own standing standards (Cal. Bus. & Prof. Code § 17204) and remedies. *Id.* §§ 17203, 17205.

By repealing 12 U.S.C. §4310 Congress eliminated only the standing of a private person to prosecute directly a TISA lawsuit and seek TISA remedies. It is immaterial to this present UCL action that standing and damages are no longer available for direct TISA and Regulation DD violations to private consumers. *Stop Youth Addiction*, 17 Cal.4th at 562 (“[W]hether a private right of action should be implied’ under [the predicate statute] ... is immaterial since any unlawful business practice ... may be redressed by a private action charging unfair competition...”).

Withdrawing a private remedy from a federal statute is not the same as prohibiting the UCL to furnish its remedies for that predicate statute. The UCL permits distinct remedies from those potentially available under the borrowed law. *See Farmers Ins. Exch. v. Superior Court* (1992) 2 Cal.4th 377, 382-83.<sup>6</sup> Absence of a private federal remedy in TISA does not ban the UCL claim here.

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<sup>6</sup> Former 12 U.S.C. § 4310(a)(1), (2)(A) awarded an account holder actual damages, statutory damages of not less than \$100 or more than \$1,000, costs and attorney fees. A class action recovery was restricted to the lesser of \$500,000 or one percent of the depository institution’s net worth. *Id.* Section 4310(a)(2)(B). Injunctive relief was not included in those private remedies. Plaintiffs’ UCL cause of action seeks restitution and injunction, not damages. *Rose*, 200 Cal.App.4<sup>th</sup> at 1446. Damages are not available under Cal. Bus. & Prof. Code § 17203. *Bank of the West v. Superior Court* (1992) 2 Cal.4<sup>th</sup> 1254, 1266.

### **3. The Opinion Fails To Pinpoint In TISA Or The Legislative History Preceding The Sunset Amendment Any Express Or Implied Intent To Bar State Enforcement of Consistent Requirements.**

Again, the Court of Appeal concludes that “[w]hen 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 unfair competition law (UCL).” *Rose*, 200 Cal.App.4<sup>th</sup> at 1446. Neither the text of TISA nor the Sunset Amendment supports this observation. There is not a single word in either expressing any intent other than to allow state enforcement of consistent State law.

The Court of Appeal’s conclusion mirrors Lucky Stores’ unsuccessful, flawed argument in *Stop Youth Addiction*, 17 Cal.4<sup>th</sup> at 561: a private party “should not be permitted to use the UCL to obtain relief, indirectly, for violation of an underlying statute [ ] that [it] is not authorized to enforce directly. According to Lucky, the only reasonable construction of the UCL is that its remedies are not available to private parties if the Legislature did not include an express private right of action in the enforcement scheme for the underlying law.” This Court rejected that argument. *Id.* at 562, n.5, 565-66.

This Court has explained that in evaluating unlawful or unfair practices underlying an UCL claim, courts should be conscious of any specific legislative immunity. *Cel-Tech*, 20 Cal.4<sup>th</sup> at 182. This Court also sharply circumscribed the rule: “To forestall an action under the unfair competition law, another provision must actually ‘bar the action or clearly permit the conduct.’” *Ibid.* at 183. This Court is clear that “[t]hat other provision must actually bar it, ... and not merely fail to allow it.” *Ibid.* at 184 (emphasis added). Furthermore, only the legislative branch has the power to “create and define an

exception to the UCL ... Courts thus may not create ‘implied safe harbor[s].’  
(Citation).” *Aron*, 143 Cal.App.4th at 804.

These narrow limitations do not prevent Plaintiffs’ UCL claim. No statutory provision excuses Defendant from failing to communicate to Plaintiff and the Class the required disclosures about fee changes mandated by TISA and Regulation DD. Nothing in the Sunset Amendment (or any other TISA provision) indicates that violation of TISA and Regulation DD disclosure requirements can not serve as a predicate unlawful business practice for a UCL claim.

The Court of Appeal, though, finds Congressional intent to bar the UCL action only from the Sunset Amendment itself and the subsequent “rebuffed legislation to reinstate the civil liability suit against noncompliant banks.” *Rose*, 200 Cal.App.4<sup>th</sup> at 1452. This is a dramatic misapplication of California law.

First, this Court instructs that California courts should identify not whether a right of action is recognized by TISA, but whether an independent UCL action is expressly barred by TISA. *Stop Youth Addiction*, 17 Cal.4th at 562 n.5, 565-66; *Cel-Tech*, 20 Cal.4th at 182-83. “The term expressly means in an express manner; in direct or unmistakable terms; explicitly; definitely; directly (Citation).” *Stop Youth Addiction*, 17 Cal.4th at 573 (internal quotations omitted).

The Sunset Amendment ended the federal civil remedy. It did not repeal any consumer rights or change TISA’s savings preemption clause allowing enforcement through state consumer protection statutes. Despite the Sunset Amendment, consumers retain their rights under TISA and Regulation DD and their state law causes of action to

protect those rights. State laws are not altered, annulled or affected by TISA except to the extent that state laws are inconsistent with TISA and Regulation DD. 12 U.S.C. § 4312; 12 C.F.R. 230.1(d). A California UCL action predicated on TISA and Regulation DD is congruent with TISA. *See Smith*, 135 Cal.App.4th at 1482.

TISA's limited preemption provision expresses Congress's intent not to bar state consumer protection laws (like the UCL) to enforce TISA rights. When Congress passed the Sunset Amendment it could have revisited the scope of TISA preemption and revised 12 U.S.C. § 4312. It could have expressly precluded TISA-related actions under state laws then known to Congress such as the UCL to enforce TISA protections. It could have concluded that TISA afforded exclusive remedies prohibiting state remedies. Congress elected not to do so.

The Court of Appeal errs in disregarding TISA's narrow preemption provision as a key part of the context of TISA's whole statutory scheme. California courts should "examine the entire substance of the statute in order to determine the scope and purpose of the provision, construing its words in context and harmonizing its various parts." *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1040. Moreover, courts should "read every statute "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." *Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1065 (quoting *People v. Pieters* (1991) 52 Cal.3d 894, 898-899). The court's opinion never mentions the preemption clause or analyzes its effect in saving the California consistent causes of action at issue from preemption. The opinion fails to "harmonize" the statute's provisions.

The Court of Appeal also deviates from this Court's precedent when it bars the instant suit yet fails to find in TISA (and especially the Sunset Amendment) any explicit language barring this UCL action. The lack of federal standing and remedies does not impose an express, absolute bar in TISA impeding California consumers' enforcement of TISA protections via California's independent UCL. Indeed, courts "are not authorized to insert qualifying provisions not included, and may not rewrite the statute to conform to an assumed intention which does not appear from its language." *Stop Youth Addiction*, 17 Cal.4th at 573.

The Court of Appeal wrongly rules that the 2005 failed amendment is probative of Congress' intent. Congressional inaction in repealing the Sunset Amendment is irrelevant in construing TISA. In construing a statute the court must "ascertain the Legislature's intent at the date of enactment." *People v. Williams* (2001) 26 Cal.4th 779, 785. Rather than present legislative history preceding and resulting in the Sunset Amendment as part of that deliberative process to explain its scope, Defendant proffered merely a subsequent, unpassed bill. *Rose*, 200 Cal.App.4th at 1448, 1452. This bill, offered over 4 years after the Sunset Amendment and decades after TISA's enactment, is not part of TISA's or the Sunset Amendment's legislative history. "California courts have frequently noted, however, the very limited guidance that can generally be drawn from the fact that the Legislature has not enacted a particular proposed amendment to an existing statutory scheme." *Grupe* 4 Cal.4th at 922-23. Consequently, "[u]npassed bills, as evidences of legislative intent, have little value." [Citation]." *Ibid*. The United States Supreme Court has repeatedly emphasized that such subsequent legislative history "is a

hazardous basis for inferring the intent of an earlier Congress.” *Jones* 526 U.S. at 238 (quoting *Pension Benefit Guar. Corp. v. LTV Corp.* (1990) 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579) (internal quotation marks omitted).<sup>7</sup>

The unpassed bill demonstrates no congressional findings as to the intent of TISA as previously enacted. It is silent about TISA preemption and did not purport to have any effect on existing state laws which already allowed TISA-related causes of action with state remedies. The court should not have depended on an unpassed bill for its ruling in *Rose*.

The Court of Appeal’s citation to *Almond Hill School v. US Dept. of Agriculture*, (9<sup>th</sup> Cir. 1985) 768 F.2d 1030, 1036-1038 (“*Almond Hill*”) is erroneous for several reasons. The case involved a federal statute where Congress explicitly considered and rejected private enforcement at the time the statute was enacted. Thus, Congress did not enact a preemption clause like TISA’s saving state causes of action. The court detailed the extensive federal enforcement scheme, noting that the federal agency wanted to retain the ability not to enforce the statute if it determined that violations were harmless, *i.e.*, if use of the pesticides at issue “is not inconsistent with the purposes of the Act.” *Id.* at 1038. The Ninth Circuit found preemption. Here, there is no similar basis to claim that California laws are preempted. *Almond Hill* is not relevant to this case.

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<sup>7</sup> The Court of Appeal’s citation to *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 88-89 is not controlling here. See *Rose*, 200 Cal.App.4<sup>th</sup> at 1452. In *City of Santa Cruz*, this Court reviewed the procedure for a criminal defendant to obtain discovery under Cal. Evid. Code § 1043. This Court looked at the history leading to passage of that statute, not attempts after its passage to amend it.

**B. THE OPINION CREATES A CONFLICT WITH ESTABLISHED CASE LAW ON MATTERS REQUIRING UNIFORMITY.**

This Court of Appeal “believe[s] that California consumers can [not] seek injunctive relief and restitution against a bank for ‘unlawful’ conduct when Congress has clearly rejected a private right to enforce TISA.” *Rose*, 200 Cal.App.4<sup>th</sup> at 1452. This belief is pure speculation, based neither on relevant legislative history nor explicit provisions of federal law. By removing the federal private remedy from TISA the Court of Appeal errs in holding that state private rights of action are no longer available. The Sunset Amendment did not reject state private rights of action. These had already been authorized by TISA’s preemption clause. The California UCL allows a private remedy even if the borrowed statute confers no private right of action. *Stop Youth Addiction*, 17 Cal.4th at 561-67. The court’s belief contravenes established California precedent that “[t]he ‘unlawful’ practices prohibited by section 17200 are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court made.” *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 838-39; *see, e.g., McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1486 (permitting UCL to enforce federal law regulating home loan transactions based on unlawful omissions or disclosures); *Washington Mut. Bank, FA v. Superior Court* (1999) 75 Cal.App.4<sup>th</sup> 773, 783 (RESPA and Regulation X).

The Court of Appeal errs in finding that TISA creates a comprehensive regulatory regime that places enforcement exclusively in the federal government. The court is

mistaken as a matter of law in stating “[o]nly federal authorities have standing to enforce bank compliance with TISA.” *Rose*, 200 Cal.App.4<sup>th</sup> at 1452.

According to this Court “even though a specific statutory enforcement scheme exists, a parallel action for unfair competition is proper pursuant to applicable provisions of the [UCL]. (Citation).” *Stop Youth Addiction*, 17 Cal.4<sup>th</sup> at 572. An administrative enforcement scheme does not preclude a UCL claim because the UCL remedies are cumulative to those imposed under the other law. *See Fremont Life Ins.*, 104 Cal.App.4<sup>th</sup> at 515. *See, e.g., People v. McKale* (1979) 25 Cal.3d 626, 631-33 (Supreme Court considered and rejected the contention that allowing a UCL claim would circumvent the “specific statutory enforcement scheme provided by the Act.”); *Blue Cross of Calif., Inc. v. Superior Court* (2009) 180 Cal.App.4<sup>th</sup> 1237, 1249-51 (recognizing UCL suit for violation of Knox-Keene Act where that statute did not declare administrative enforcement as exclusive remedy) and; *Washington Mut. Bank*, 75 Cal.App.4<sup>th</sup> at 785 (permitting UCL action where the underlying statute could only be enforced by government regulators).

It is an incorrect statement of California law that “even if the law does not expressly say ‘No civil action,’ the courts may imply a legislative intent to bar private civil actions to indirectly enforce the statute by providing a comprehensive administrative remedy.” *Rose*, 200 Cal.App.4<sup>th</sup> at 1450. Instead, “the statute itself [must] provide [] that the [administrative] remedy is to be exclusive.” *Altus Finance*, 36 Cal.4<sup>th</sup> at 1303; *accord Blue Cross of Calif.*, 180 Cal.App.4<sup>th</sup> at 1249.



In sum, the Court of Appeal's decision imperils California's citizens' rights to remedy violations of federal law through the UCL. The decision further untethers preemption analysis from specific statutory language and Congressional history, creating both conflicts with this Court's prior decisions and confusion in California jurisprudence. This Court should grant review and reverse.

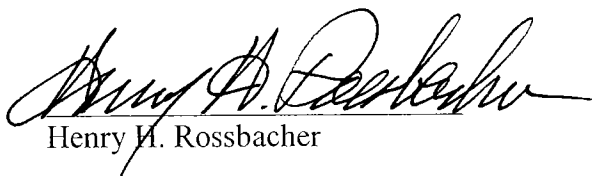
**VI. CONCLUSION**

For the foregoing reasons, this Court should grant review of this Petition and reverse the published Opinion of the Court of Appeal in *Rose v. Bank of America, N.A.*, *supra*.

DATED: December 29 2011

RESPECTFULLY SUBMITTED,

**THE ROSSBACHER FIRM**



Henry H. Rossbacher

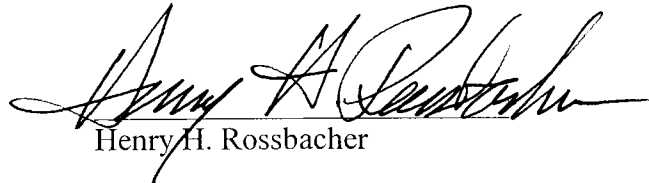
Attorneys for Plaintiffs/Appellants  
and Petitioners

**CERTIFICATE OF COMPLIANCE**

Undersigned counsel hereby certifies that pursuant to Cal. Rules of Court, rule 8.504(a)(1), the foregoing Petition for Review is proportionally spaced (i.e., type size no smaller than 13 point) and contains 7,053 words, including footnotes, (but excluding title page, tables, and this Certification) which is less than the 8,400 words permitted by the foregoing rule. Undersigned counsel relied on the word count feature of the computer program used to prepare this brief.

DATED: December 29 2011

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, appearing to read "Henry H. Rossbacher", written in a cursive style.

Henry H. Rossbacher

The Rossbacher Firm

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Citation: **200 calapp4th 1441**

*200 Cal. App. 4th 1441, \*; 2011 Cal. App. LEXIS 1454, \*\**

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

B230859

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO

200 Cal. App. 4th 1441; 2011 Cal. App. LEXIS 1454

November 21, 2011, Filed

**PRIOR HISTORY: [\*\*1]**

APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC433460, Jane L. Johnson, Judge.

**DISPOSITION:** Affirmed.



**CASE SUMMARY**

**PROCEDURAL POSTURE:** Plaintiff customers appealed a judgment of the Los Angeles County Superior Court, California, dismissing their California unfair competition law (UCL), Bus. & Prof. Code, § 17200 et seq., action that claimed that defendant bank's practices were unlawful and unfair. Plaintiffs alleged the bank violated the federal Truth in Savings Act (TISA), 12 U.S.C. § 4301 et seq., by failing to properly disclose fee increases on personal bank accounts.



**OVERVIEW:** The court observed that 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 the UCL. The UCL could not be deployed to redress TISA violations. Accordingly, plaintiffs' UCL action—based on technical violations of TISA—was properly dismissed. As to plaintiffs' claim of unfair business practices, the pleading did not sufficiently allege grave harm to the victim or immoral, unethical, oppressive, and unscrupulous conduct by the bank. Plaintiffs were warned beforehand, and had an opportunity to change banks before the increases took effect. 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—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. The complaint was inadequate and was properly dismissed after plaintiffs elected to not to amend.

**OUTCOME:** The court affirmed the judgment.




**CORE TERMS:** consumer, "unfair", unfair competition law, private right of action, cause of action, lawsuit, legislative intent, amend, private action, repeal, business practice, injunctive relief, civil actions", deposit accounts, restitution, repealed, federal law, legislative history, private parties, suit to enforce, sunset clause, disclosure, Savings Act TISA, unfair business practices, standing to bring, legislative body, civil liability, depository institutions, unethical, indirect

**LEXISNEXIS® HEADNOTES** **Hide**[Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Demurrers](#) [Civil Procedure > Dismissals > Involuntary Dismissals > Appellate Review](#) 



**HN1** ↓ Appeal lies from a dismissal order after a trial court sustained demurrers and plaintiffs were unable to amend the pleading. Code Civ. Proc., §§ 581d, 904.1, subd. (a)(1). An appellate court reviews de novo the ruling on the demurrer, exercising its independent judgment to determine whether a cause of action has been stated as a matter of law. [More Like This Headnote](#)

[Antitrust & Trade Law > Trade Practices & Unfair Competition > State Regulation > Coverage](#) [Torts > Business Torts > Unfair Business Practices > General Overview](#) 



**HN2** ↓ California's unfair competition law (UCL), Bus. & Prof. Code, § 17200 et seq., prohibits any unlawful, unfair or fraudulent business act or practice. § 17200. The UCL's coverage is broad, embracing anything that can properly be called a business practice and that at the same time is forbidden by law. 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. Recovery is limited to injunctive relief and restitution. Bus. & Prof. Code, § 17203. Successful plaintiffs may not receive damages or attorney fees. [More Like This Headnote](#)


[Antitrust & Trade Law > Private Actions > Standing > Requirements](#) [Antitrust & Trade Law > Trade Practices & Unfair Competition > State Regulation > Coverage](#) [Torts > Business Torts > Unfair Business Practices > General Overview](#) 

**HN3** ↓ California's unfair competition law (UCL), Bus. & Prof. Code, § 17200 et seq., borrows violations from other laws, making them independently actionable as unfair competitive practices. Federal law can serve as a predicate for a UCL claim. A statute that is silent about direct enforcement of its provisions may underlie a lawsuit brought under the UCL. 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. 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. 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. [More Like This Headnote](#)


[Antitrust & Trade Law > Private Actions > Standing > General Overview](#) [Antitrust & Trade Law > Trade Practices & Unfair Competition > State Regulation > Coverage](#) [Governments > Legislation > Interpretation](#) [Torts > Business Torts > Unfair Business Practices > General Overview](#) 

**HN4** ↓ To forestall a California unfair competition law (UCL), Bus. & Prof. Code, § 17200 et seq., action, another law must actually bar the action. Often, the absolute bar to relief under the UCL comes in the form of a privilege. The bar to a UCL action is sometimes implicit in the legislative scheme. A legislative intent to deny standing to bring a private action is determined from the text of the statute or legislative history. 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. [More Like This Headnote](#)


[Antitrust & Trade Law > Private Actions > Standing > General Overview](#) [Antitrust & Trade Law > Trade Practices & Unfair Competition > State Regulation > Coverage](#) 

Torts > Business Torts > Unfair Business Practices > General Overview 


**HN5** 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). In that instance, no private right of action under California's unfair competition law, Bus. & Prof. Code, § 17200 et seq., can be asserted. 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. 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. More Like This Headnote

Banking Law > Consumer Protection > Truth in Savings 


**HN6** The repeal of 12 U.S.C. § 4310 has not only withdrawn the jurisdiction of federal district courts to hear private federal Truth in Savings Act (TISA), 12 U.S.C. § 4301 et seq., enforcement actions, but has 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. Congress intended that private parties may no longer sue for violations of TISA. This forecloses a direct suit to enforce TISA. More Like This Headnote


Constitutional Law > The Judiciary > Case or Controversy > Standing > Particular Parties 


Governments > Federal Government > Claims By & Against 


Governments > Legislation > Interpretation 

**HN7** 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. 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. Private rights of action to enforce federal law must be created by Congress. 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. Statutory intent on this latter point is determinative. 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. More Like This Headnote

Antitrust & Trade Law > Private Actions > Standing > General Overview 


Antitrust & Trade Law > Trade Practices & Unfair Competition > State Regulation > Claims 

Banking Law > Consumer Protection > Truth in Savings 


Torts > Business Torts > Unfair Business Practices > General Overview 

**HN8** California consumers cannot seek injunctive relief and restitution against a bank for "unlawful" conduct when Congress has clearly rejected a private right to enforce the federal Truth in Savings Act (TISA), 12 U.S.C. § 4301 et seq. 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, courts need not speculate about legislative intent. Only federal authorities have standing to enforce bank compliance with TISA. Allowing private plaintiffs to recover on a California unfair competition law, Bus. & Prof. Code, § 17200 et seq., claim based solely on TISA violations would constitute an end run around the limits on enforcement set by Congress. More Like This Headnote

Antitrust & Trade Law > Trade Practices & Unfair Competition > State Regulation > Claims 

Torts > Business Torts > Unfair Business Practices > Elements 

**HN9** ↓ A business practice may violate California's unfair competition law, Bus. & Prof. Code, § 17200 et seq., if it is unfair, even if not unlawful. Courts may not impose their own notions of the day as to what is fair or unfair. The California 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. 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. 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. More Like This Headnote

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview 

**HN10** ↓ When a plaintiff declines to amend, a reviewing court must presume that the challenged pleading states the plaintiff's strongest possible case. More Like This Headnote

## HEADNOTES / SYLLABUS

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### SUMMARY:

#### CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court dismissed plaintiff customers' action for violation of California's unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.) that claimed that their bank's practices were unlawful and unfair. Plaintiffs alleged that the bank violated the federal Truth in Savings Act (TISA) (12 U.S.C. § 4301 et seq.) by failing to properly disclose fee increases on personal bank accounts. (Superior Court of Los Angeles County, No. BC433460, Jane L. Johnson, Judge.)

The Court of Appeal affirmed the judgment. The court observed that 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 the UCL. The UCL may not be deployed to redress TISA violations. Accordingly, plaintiffs' UCL action—based on technical violations of TISA—was properly dismissed. As to plaintiffs' claim of unfair business practices, the pleading did not sufficiently allege grave harm to the victim or immoral, unethical, oppressive, and unscrupulous conduct by the bank. Plaintiffs were warned beforehand, and had an opportunity to change banks before the increases took effect. 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. The complaint was inadequate and was properly dismissed after plaintiffs elected to not to amend. (Opinion by Boren, P. J., with Doi Todd and Chavez, JJ., concurring.) [\*1442]

### HEADNOTES

#### CALIFORNIA OFFICIAL REPORTS HEADNOTES

**CA(1)** ↓ **(1) Unfair Competition § 1—Coverage—Standing—Remedies.**—California's unfair competition law (UCL) prohibits any unlawful, unfair or fraudulent business act or practice (Bus. & Prof. Code, § 17200). The UCL's coverage is broad, embracing anything that can properly be called a business practice and that at the same time is forbidden by law. 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).

Recovery is limited to injunctive relief and restitution (Bus. & Prof. Code, § 17203). Successful plaintiffs may not receive damages or attorney fees.

**CA(2) §(2) Unfair Competition § 1—Borrowing of Violations—Limitations—Legislative Intent.—**

California's unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.) borrows violations from other laws by making them independently actionable as unfair competitive practices. Federal law can serve as a predicate for a UCL claim. A statute that is silent about direct enforcement of its provisions may underlie a lawsuit brought under the UCL. 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. 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. 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.

**CA(3) §(3) Unfair Competition § 1—Standing—Legislative Intent.—**To forestall a California unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.) action, another law must actually bar the action. Often, the absolute bar to relief under the UCL comes in the form of a privilege. The bar to a UCL action is sometimes implicit in the legislative scheme. A legislative intent to deny standing to bring a private action is determined from the text of the statute or legislative history. 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. 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).) In that instance, no private right of action under the UCL can be asserted. Alternatively, even if the law does not expressly say "No civil actions," [\*1443] the courts may imply a legislative intent to bar private civil actions to indirectly enforce the statute by providing a comprehensive administrative remedy. 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.

**CA(4) §(4) Banks and Banking § 2—Federal Truth in Savings Act—Private Right of Action.—**The repeal of 12 U.S.C. § 4310 has not only withdrawn the jurisdiction of federal district courts to hear private federal Truth in Savings Act (TISA) (12 U.S.C. § 4301 et seq.) enforcement actions, but has 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. Congress intended that private parties may no longer sue for violations of TISA. This forecloses a direct suit to enforce TISA.

**CA(5) §(5) Parties § 1.2—Standing—Private Actions for Violations of Federal Law—Role of Judiciary.—**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. 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. Private rights of action to enforce federal law must be created by Congress. 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. Statutory intent on this latter point is determinative. 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.

**CA(6) §(6) Unfair Competition § 8—Private Right of Action—Enforcement of Federal Truth in Savings Act—Standing.—**California consumers cannot seek injunctive relief and restitution against a bank for "unlawful" conduct when Congress has clearly rejected a private right to enforce the federal Truth in Savings Act (TISA) (12 U.S.C. § 4301 et seq.). 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, courts need not speculate about legislative intent. Only federal authorities have standing to enforce bank compliance with TISA. Allowing private plaintiffs to recover on a California unfair competition [\*1444] [\*1445] law (UCL) (Bus. & Prof. Code, § 17200 et seq.) claim based solely on TISA violations would constitute an end run around the limits on enforcement set by Congress. Accordingly, bank customers' UCL action against the bank—based on technical violations of TISA—was properly dismissed.

[Cal. Forms of Pleading and Practice (2011) ch. 565, Unfair Competition, § 565.155; Levy et al., Cal. Torts (2011) ch. 40, § 40.150; Simon et al., Matthew Bender Practice Guide: Cal. Unfair Competition and Business

Torts (2011) § 2.38.]

**CA(7) §(7) Unfair Competition § 1—Tests for Unfair Business Practices.**—A business practice may violate California's unfair competition law (Bus. & Prof. Code, § 17200 et seq.) if it is unfair, even if not unlawful. Courts may not impose their own notions of the day as to what is fair or unfair. The California 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. 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. A third test employs the definition of "unfair" from the Federal Trade Commission Act (15 U.S.C. § 41 et seq.), 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.

**CA(8) §(8) Pleading § 81—Failure to Amend—Effect.**—When a plaintiff declines to amend, a reviewing court must presume that the challenged pleading states the plaintiff's strongest possible case.

**COUNSEL:** The Rossbacher Firm, Henry H. Rossbacher ✓✓, James S. Cahill ▼ and Talin K. Tenley ▼ for Plaintiffs and Appellants.

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

**JUDGES:** Opinion by Boren, P. J., with Doi Todd ▼ and Chavez ▼, JJ., concurring.

**OPINION BY:** Boren [\*1446]

## OPINION

**BOREN, P. J.**—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.)<sup>1</sup> 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.

## FOOTNOTES

<sup>1</sup> All undesignated statutory references in this opinion are to title 12 of the United States Code. References to section 4310 are to former section 4310, which 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 **[\*\*2]** 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 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, **[\*\*3]** 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 [**\*1447**] 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

**HN1** 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); [**\*\*4**] *Serra Canyon Co. v. California Coastal Com.* (2004) 120 Cal.App.4th 663, 667 [16 Cal. Rptr. 3d 110]; *Tanen v. Southwest Airlines Co.* (2010) 187 Cal.App.4th 1156, 1162 [114 Cal. Rptr. 3d 743].) 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 [55 Cal. Rptr. 2d 276].)

### 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 (1992); 57 Fed. Reg. 43376 (Sept. 21, 1992), amended by 74 Fed. Reg. 5593 (Jan. 29, 2009).) A bank [**\*\*5**] 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. ( [**\*1448**] *Schnall v. Amboy Nat. Bank* (3d Cir. 2002) 279 F.3d 205, 209, fn. 2, 217.)<sup>2</sup> 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, N.A., supra*, 370 F.3d at pp. 175-176 [**\*\*6**] [applying Massachusetts unfair competition law in a case to which § 4310 applied].)

## FOOTNOTES

<sup>2</sup> 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 **[\*\*7]** the first session of the 107th Cong., in Mar. 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 Office of the Comptroller of the Currency—may enforce bank compliance with TISA. (§§ 1818(b)(1), 4309; Pub.L. No. 111-203 (July 21, 2010) tit. 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.) **[\*1449]**

## The Unfair Competition Law

**HN2 CA(1) (1)** The UCL prohibits "any unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code, § 17200.) Its coverage **[\*\*8]** 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 [17 Cal. Rptr. 2d 828, 847 P.2d 1044].) 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 [46 Cal. Rptr. 3d 57, 138 P.3d 207].) 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 [83 Cal. Rptr. 2d 548, 973 P.2d 527] (*Cel-Tech*)).

**HN3 CA(2) (2)** The UCL "borrows" violations from other laws by making them independently actionable as unfair competitive practices." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143 [131 Cal. Rptr. 2d 29, 63 P.3d 937]; see *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 [38 Cal. Rptr. 3d 653].) 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 [71 Cal. Rptr. 2d 731, 950 P.2d 1086].)

There **[\*\*9]** 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; see *Manufacturer's Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 283 [41 Cal. Rptr.2d 220, 895 P.2d 56].) "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.)

**HN4 CA(3) (3)** 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 **[\*\*10]** privilege **[\*1450]** of Civil Code section 47 provided absolute immunity for the defendants' conduct, which did not evaporate when the 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 [32 Cal. Rptr. 3d 498, 116 P.3d 1175].)

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 [250 Cal. Rptr. 116, 758 P.2d 58], the legislative history showed that insurance legislation contemplated only administrative enforcement, not private enforcement, which "is a strong **[\*\*11]** 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 [265 Cal. Rptr. 585].)

**HN5** 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., Sept. 22, 2009, No. CIV S-08-1518 LKK EFB PS) 2009 WL 3073925, pp. \*5-\*6.)<sup>3</sup> 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 example, the administrative enforcement scheme laid out in the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. § 136 et seq.) prevents concerned individuals from pursuing a private remedy under the auspices of either the UCL or title 42 United States Code section 1983, **[\*\*12]** 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., Nov. 2, 2007, Civil No. 06CV2705 JAH(CAB)) 2007 U.S. Dist. Lexis 81686.)

## FOOTNOTES

<sup>3</sup> 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 [41 Cal. Rptr. 3d 108]; Cal. Rules of Court, rule 8.1115 (a).)

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 **[\*\*13]** at issue here under California law survives the sunset amendment" of section 4310.

**CA(4)** **(4)** 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 **HN6** 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.

**HN7** **CA(5)** **(5)** 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) 563 U.S. \_\_\_, \_\_\_ [179 L.Ed.2d 457, 131 S.Ct. 1342, 1348] **[\*\*14]** [rejecting a county's attempt to enforce the Public Health Service Act (42 U.S.C. § 201 et seq.) 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. \_\_\_-\_\_\_ [131 S.Ct. 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. \_\_\_, fn. 4 [131 S.Ct. at p. 1348, fn. 4].) **[\*\*1452]**

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 [149 L. Ed. 2d 517, 121 S. Ct. 1511]; **[\*\*15]** see also *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 576–577 [119 L. Ed. 2d 351, 112 S. Ct. 2130] [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.)

**HNB** ~~CA(6)~~ **(6)** We do not believe that California consumers can seek injunctive relief and restitution against a bank for "unlawful" conduct **[\*\*16]** 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 [260 Cal. Rptr. 520, 776 P.2d 222].) 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," **[\*1453]** offended public policy, and caused substantial injury because the Bank deducted money for the fees from plaintiffs' accounts. In addition, **[\*\*17]** 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.

**HNB** ~~CA(7)~~ **(7)** 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 [106 Cal. Rptr. 3d 46].) 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 **[\*\*18]** Act (15 U.S.C. § 41 et seq.), 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 [101 Cal. Rptr. 3d 697].)

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 Web site 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. **[\*\*19]** 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 **[\*1454]** *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].)

**CA(8)** ¶(8) Plaintiffs declined the opportunity to amend their pleading to allege additional facts or theories. **HN10**  
¶When a plaintiff declines to amend, we must presume that the challenged pleading states the plaintiff's strongest possible case. (*Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 252 [85 Cal. Rptr. 3d 371].) 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 [88 Cal. Rptr. 2d 184].)

**DISPOSITION**

The judgment is affirmed.

Doi Todd ▼, J., and **[\*\*20]** Chavez ▼, J., concurred.

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT

DIVISION 2

December 08, 2011

Henry H. Rossbacher  
The Rossbacher Firm  
811 Wilshire Blvd.  
Suite 1650  
Los Angeles, CA 90017-2666

HAROLD ROSE, Individually and as Personal Representative, etc. et al.,  
Plaintiffs and Appellants,  
v.  
BANK OF AMERICA, N.A.,  
Defendant and Respondent.

B230859  
Los Angeles County No. BC433460

THE COURT:

Petition for rehearing is denied.

cc: All Counsel  
File

**PROOF OF SERVICE**  
**(1013a, 2015.5 C.C.P.)**

STATE OF CALIFORNIA    )  
  ) ss.  
COUNTY OF LOS ANGELES )

I am employed in the County of Los Angeles, State of California.

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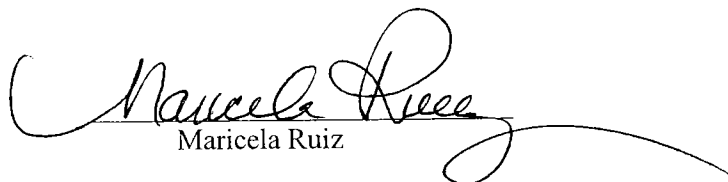
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Maricela Ruiz