Filed 11/21/11

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| HAROLD ROSE et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>BANK OF AMERICA, N.A.,<br><br>Defendant and Respondent. | B230859<br><br>(Los Angeles County<br>Super. Ct. No. BC433460) |

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

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

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

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 The statutory provision allowing a private right of action was repealed in 2001.

When Congress repealed the statutory right of consumers to enforce TISA, it intended to bar *all* private actions alleging TISA violations, including indirect enforcement suits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

## FACTS

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

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

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

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

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

## DISCUSSION

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

## The Truth in Savings Act

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

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

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

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

made to retain a private right of action for the banking public. At the Bank's request, we take judicial notice of the proposed Truth in Savings Enhancement Act of 2001 (H.R. No. 1057, introduced during the first session of the 107th Congress, in March 2001). The proposed bill would have amended TISA to authorize state authorities to sue for injunctive relief to enforce TISA disclosure requirements, and would have reinstated civil liability lawsuits against noncompliant banks. Legislative efforts to prevent the repeal of section 4310 failed.

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

**The Unfair Competition Law**

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

The UCL "'borrows' violations from other laws, making them independently actionable as unfair competitive practices." (*Korea Supply Co. v. Lockheed Martin Corp.*

(2003) 29 Cal.4th 1134, 1143; *Cel-Tech, supra,* 20 Cal.4th at p. 180.) Federal law can serve as a predicate for a UCL claim. (*Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1480.) A statute that is silent about *direct* enforcement of its provisions may underlie a lawsuit brought under the UCL. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 565.)

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

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

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

A law itself may expressly address enforcement and say, "No civil actions" and "This section shall be enforced exclusively . . . by the Federal agencies and officials." (15 U.S.C. § 1681m(h)(8) [the Fair Credit Reporting Act].) In that instance, no private right of action under the UCL can be asserted. (*Banga v. Allstate Insurance Company* (E.D. Cal. 2009) 2009 WL 3073925, pp. 5-6.)[3] Alternatively, even if the law does not expressly say "No civil actions," the courts may imply a legislative intent to bar private civil actions to indirectly enforce the statute by providing a comprehensive administrative remedy. For example, the administrative enforcement scheme laid out in the Federal Insecticide, Fungicide and Rodenticide Act prevents concerned individuals from pursuing a private remedy under the auspices of either the UCL or title 42 of the United States Code section 1983, especially because Congress considered and rejected an amendment to permit citizen lawsuits. (*Almond Hill School v. U.S. Dept. of Agriculture* (9th Cir. 1985) 768 F.2d 1030, 1035-1038; *Hartless v. Clorox Co.* (S.D. Cal. 2007) 2007 U.S. Dist. LEXIS 81686.)

In sum, what the courts look for is some basis for concluding that the legislative body "intended to bar unfair competition causes of action based on" violations of the

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

underlying statute. (*Stop Youth Addiction v. Lucky Stores, Inc.*, *supra*, 17 Cal.4th at p. 565.)

**<u>UCL Actions to Enforce TISA Violations Cannot Be Maintained in State Court</u>**

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

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

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

We are cautioned that "private rights of action to enforce federal law must be created by Congress. [Citation.] The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. [Citation.] Statutory intent on this latter point is determinative. [Citations.] Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." (*Alexander v. Sandoval* (2001) 532 U.S. 275, 286-287. See also *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 576-577 [there is no individual right to enforce federal environmental law in the public interest: only the executive branch has standing to enforce the law].)

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

We do not believe that California consumers can seek injunctive relief and restitution against a bank for "unlawful" conduct when Congress has clearly rejected a private right to enforce TISA. Congress indicated its intent in 1996, when it enacted a sunset clause that expressly repealed the statute allowing individuals to enforce TISA. It reconfirmed that intent when, in 2001, it rebuffed legislation to reinstate civil liability suits against noncompliant banks. When the legislative history shows that legislators expressly considered and *rejected* specific legislation, we need not speculate about legislative intent. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 88-89.)

Only federal authorities have standing to enforce bank compliance with TISA. Allowing private plaintiffs to recover on a UCL claim based solely on TISA violations would constitute an "end run" around the limits on enforcement set by Congress. (*Gunther v. Capital One, N.A.*, *supra*, 703 F.Supp.2d at pp. 270-271.)

**<u>Plaintiffs' Claim of "Unfair" Business Practices</u>**

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

A business practice may violate the UCL if it is "unfair" even if not "unlawful." (*Cel-Tech*, *supra*, 20 Cal.4th at p. 180.) Courts may not "impose their own notions of the day as to what is fair or unfair." (*Id.* at p. 182.) Our Supreme Court has not announced a definitive test for unfair business practices in consumer cases, and the intermediate appellate courts have devised a variety of tests. One test requires that the consumer action be "'tethered to specific constitutional, statutory, or regulatory provisions.'" (*Drum v. San Fernando Valley Bar Assn.* (2010) 182 Cal.App.4th 247, 256.) A second test asks whether the alleged business practice "'is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers and requires the court to weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim.'" (*Id*. at p. 257.) A third test employs the definition of "unfair" from the Federal Trade Commission Act, and requires (1) a substantial consumer injury; (2) that is not outweighed by any countervailing benefits to consumers; and (3) causes an injury that consumers could not reasonably have avoided. (*Ibid.* Accord: *Davis v. Ford Motor Credit Co. LLC* (2009) 179 Cal.App.4th 581, 594-597)

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

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

## DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.