No. S199074
IN THE
SUPREME COURT OF CALIFORNIA

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HAROLD ROSE, et al.

Plaintiffs and Appellants

vs.

BANK OF AMERICA, N.A.,

Defendant and Respondent.

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

OPENING BRIEF ON THE MERITS OF PLAINTIFFS AND APPELLANTS HAROLD ROSE, ET AL.

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

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I. ISSUE PRESENTED

Can a cause of action under the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 *et seq.*) be predicated on an alleged violation of the Truth in Savings Act (TISA) (12 U.S.C. § 4301 *et seq.*) despite Congress's repeal of the private right of action initially provided for under that Act?

II. INTRODUCTION

In 2009, without proper or timely notification, respondent Bank of America (the Bank) charged Harold C. Rose $3.00 to have checks enclosed with his bank statement, charged Kimberly Lane an extra $3.00 on her monthly fee, and similarly hiked the fees of other Bank customers throughout California (collectively, the Customers).

The Customers brought a class action suit against the Bank for violation of California's Unfair Competition Law (UCL) and "borrowed" the rules of the federal Truth in Savings Act (TISA) to show that the bank had committed an "unlawful" and an "unfair" business practice. The Bank says this suit is prohibited because TISA preempts it. The Court of Appeal below agrees because Congress repealed a section of the law that created a federal private remedy. The Customers contend that TISA's preemption clause explicitly saves State enforcement of its consistent State laws and permits causes of action under the UCL.

The Customers come before this Court, not to discuss the federal provision Congress repealed, but to discuss what Congress retained: a section of TISA which plainly says its "effect on state laws" is only to "supersede" those state laws which are inconsistent with TISA. Congress recently reenacted the section to vest power in the newly-created Consumer Finance Protection Bureau (the Consumer Bureau) which may decide whether or not a state law is consistent with TISA.

This is a case, then, which has been centered around the wrong section, or lack thereof, of TISA. It is not a case about whether California courts may hear a federal TISA action brought by customers. It is a case about whether California courts may hear a California Unfair Competition Law suit that borrows TISA's banking rules. In the former, the repealed section may have a role to play. In the latter, the important section of TISA is the one that deals directly with state laws, the one that permits consistent lawsuits, the one that is written in clear ordinary language, and the one we shall refer to as the Preemption Clause.

III. STATEMENT OF THE CASE

Around April of 2009, the Bank enclosed a brochure about "upcoming pricing changes to some deposit accounts" along with plaintiff Harold C. Rose's bank statement. Complaint ¶ 22.[1] Neither the bank statement nor the

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[1]The Complaint may be found in the Vol. 1 of the Appellants' Appendix, 1 AA 1-13.

enclosure gave any specific information about which, if any, new fees were to apply to Mr. Rose' account. *Id*. Nor was there any mention in the documents of the date when charges for any such changes would be added. *Id*. In the same way, the Bank did not personally notify plaintiff Kimberly Lane, nor the rest of the Customers, about any new or changed account charges or when such charges would apply. *Id*.

Around June of 2009, the bank sent statements to Mr. Rose, Ms. Lane, and the rest of the Customers. Mr. Rose was charged a new fee of $3.00 for enclosed checks. Compl. ¶ 24. Ms. Lane's monthly service charge went up $3.00. Complaint ¶ 26. The rest of the Customers had the same type of fee hikes. *Id*.

The Customers brought suit on March 9, 2010, based on the Bank's failure to properly or timely notify them of their newly increased fees under California's Unfair Competition Law (UCL), Bus. & Prof. Code § 17200 *et seq*. See First Cause of Action, Compl. ¶¶ 27-34. The Customers claimed the Bank's insufficient and untimely account fee increase notices were "unlawful" under the federal Truth in Savings Act, 12 U.S.C. § 4301 *et seq*. and its implementing regulations 12 C.F.R. § 230 *et seq*. Complaint ¶ 29. In addition, the Customers claimed the Bank's notification process, or lack there of, was "unfair" under the UCL. Complaint ¶ 30. The Customers sought restitution of the improperly deducted fees, with interest, and an

injunction to keep the Bank from continuing its illegal notification policies. Prayer for Relief, Complaint at 1 AA 12.

The Bank demurred and the Superior Court sustained on the ground that the 1996 repeal of TISA's private right of action, the former 12 U.S.C. § 4310, was an "absolute bar to relief." 2 AA 360. The Customers argued that their claims were not preempted. The Superior Court granted the Customers leave to amend, but they did not do so. The case was dismissed and judgment rendered for the Bank.

The Customers appealed. They argued that their claims were not preempted. The Court of Appeal affirmed the judgment of the trial court. The Court of Appeal found that no state claims were possible due to the absence of a federal private right of action and the repeal of the federal right. *Rose v. Bank of America*, 200 Cal. App. 4th 1441 (2011). The Court of Appeal denied rehearing.

The Customers petitioned this Court for review and it was granted.

IV. ARGUMENT

For over forty years, federal bank disclosure regulations have been enforceable under consistent state laws. In both the Truth in Lending Act (TILA), passed in 1968, and its extension, the Truth in Savings Act (TISA), passed in 1991, Congress enacted a so-called "preemption" or "savings" clause which explicitly provided, in ordinary language, that the federal bank regulatory scheme would not supersede state laws so long as those

laws were consistent with federal regulation. In addition, Congress gave power to the Federal Reserve Board, now granted to the Consumer Finance Protection Bureau, to make determinations as to whether or not a state law was consistent with the federal law.

Both the United States and California Supreme Courts, in numerous decisions, have held that such a clause evidencing Congress' intent to preserve the role of state courts must be given the highest degree of deference. There is, the cases say, a "strong presumption against displacement of state law."[2] Neither legislative history nor a balance of federal and state interests may be part of the analysis.[3] All doubts where there are "equally plausible" interpretations of the clause must be resolved in favor of the "reading that disfavors pre-emption".[4] And the proponent of preemption bears the burden of "demonstrating a 'clear and manifest' congressional intent to preempt."[5]

The decision of the Court of Appeal below did not address TISA's Preemption Clause which has been in the statute since its inception, and was reenacted in 2010. Instead, the court looked backward to 1996, when

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[2] *Brown v Mortensen*, 51 Cal. 4th 1052, 1064 (2011) (citing *Farm Raised Salmon Cases*, 42 Cal. 4th 1077, 1088 (2008)).
[3] *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1980, 1983 (2011).
[4] *Brown* at 1064 (citing *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).
[5] *Id.* at 1065 (citing *Bronco Wine Co. v Jolly*, 33 Cal. 4th 943, 956-57 (2004)).

Congress, as part of a huge omnibus bill,[6] repealed a part of TISA, Section 4310,[7] that provided a complex bank liability scheme that set damages for federal individual and class action suits, provided banks a defenses for *bona fide* errors and good faith reliance on regulatory interpretations, allowed banks a 60 day adjustment period, addressed continuing bank failures to disclose, and gave jurisdiction, subject to a one-year statute of limitations, to United States District Courts and "any other court of competent jurisdiction."

The court below, assuming that Section 4310 provided the sole non-administrative, individual right of action for TISA, interpreted its repeal as proof that Congress intended to deprive states of all rights to bring an action under consistent state law. This interpretation makes no sense in light of Congress' enactment, and reenactment, of the explicit language of Section 4312. One must ask what would be the Consumer Bureau's role in making state law consistency calls if, as a result of the repeal of Section 4310, there were no longer any state suits? And even if this Court were to deem the Bank's repeal argument to be plausible, when compared to the Customers' interpretation that Congress kept and reenacted Section 4312 because it wanted to keep consistent state enforcement of TISA, it would

[6]The Economic Growth and Regulatory Paperwork Reduction Act of 1996, contained in the Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009.

[7]The full text of former 12 U.S.C. § 4310, now repealed, may be found at 2 AA 217-221.

have to resolve the conflict toward the one that does not preempt state law in a traditional area of state interest.

A. The Truth in Savings Act was modeled on the Truth in Lending Act.

The Truth in Savings Act (TISA), Pub. L. 102-242, Subtitle F, 105 Stat. 2334 (1991), was signed into law by President George Herbert Walker Bush on December 29, 1991. The Federal Reserve Board published regulations, know as Regulation DD, later the next year.

Three decades of consumer credit law preceded TISA. 2 Barkley & Barbara Clark, *The Law of Bank Deposits, Collections and Credit Cards* 19-8 (Rev. ed. 2011). As early as 1963, Professor Richard Morse of Kansas State University, appeared with others before Congress to discuss the truth in savings concept. *Id.* Although no truth in savings law was enacted at that time, by 1968, Congress had enacted the Truth in Lending Act (TILA) as Title I of the Consumer Credit Protection Act, Pub. L. 90-321, 82 Stat. 146 (1968), in many ways the legislative father of TISA.

TISA was written by California's Rep. Richard Lehman, introduced in 1984, passed the House in 1986, was shelved and then revived in 1987. Clark & Clark at 19-9. Consumers who appeared before Congress complained about a specific method banks were using to calculate interest which they likened to a "butcher's thumb on the scale." *Id.* A few years later, after a shuttlecock of bank regulation volleyed between House and

Senate, the truth in saving law we now know as TISA passed as Subtitle F of the FDIC Improvement Act of 1991, Pub. L. 102-242, 105 Stat. 2334. See Clark & Clark at 19-9.

At heart, TISA is a disclosure law. Clark & Clark at 19-12. Its purpose, "is to encourage comparative shopping for deposit products."[8] *Id*. Some of the items a bank must disclose to consumers are the interest rates it gives for various types of accounts as well as pertinent information about compounding, credit, balances, withdrawal and, relevant for our purposes here, service fees. *Id.* TISA requires a bank to inform a customer not only of the fees, *inter alia*, that apply to a deposit account but also of a "change in terms". *Id.* As a general rule, these notices must be sent 30 days in advance to account holders *whenever ... a service fee is increased*.

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[8]Congress set forth the consumer-oriented comparison shopping goal of TISA in Section 262 of the FDIC Act, codified at 12 U.S.C. § 4301, entitled "Findings and purpose":

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

(b) Purpose. It is the purpose of this subtitle to *require the clear and uniform disclosure of* – (1) the rates of interest which are payable on deposit accounts by depository institutions; and *(2) the fees that are assessable* against deposit accounts, so that *consumers can make a meaningful comparison* between the competing claims of depository institutions with regard to deposit accounts. (Emphasis added.)

While TISA contains stiff penalties for noncompliance, the "good news" for banks, according to the seemingly bank-oriented Clarks, is that it also gives a number of defenses including good faith errors and reliance on Regulation DD and Federal Reserve Board interpretations of the same.[9] *Id* at 19-13. "All of this enforcement machinery is closely modeled after TILA," which has successfully been running, as noted above, since 1968. *Id*.

A significant aspect of TILA's success has been state enforcement actions brought by bank customers. These actions include suits brought by Californians under the Unfair Competition Law (UCL) to enforce TILA's requirements as incorporated into California state law by the UCL. These are effective in enforcing TILA because the law is well settled that TILA does not preempt the enforcement of TILA's standards through the UCL and other state consumer protection statutes. *Black v. Fin. Freedom Senior Funding Corp.,* 92 Cal. App. 4th 917, 936-938 (2001). The TILA cases are in accord with the First Circuit's decision in *Barnes v. Fleet Nat'l Bank,* 370 F.3d 164, 175-76 (1st Cir. 2004) and the California Court of Appeal's decision in *Smith v. Wells Fargo Bank, N.A.,* 153 Cal. App. 4th 1463, 1475-1483 (2006) upholding private state law enforcement of TISA standards

[9]These interpretations are now the responsibility of the the Consumer Financial Protection Bureau (consumer Bureau). Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 § 1100B, 124 Stat. 1376 (2010).

through suits under state consumer protection laws including, in *Smith,* the UCL.

One of the important regulations for the present case was, in fact, modeled upon TILA and its implementing Regulation Z. Clark & Clark at 19-129. Under TILA, then, a consumer must be given 15 days advance notice of changes to the terms of a specific account that *could be adverse to the consumer*. 12 C.F.R. 226.9(c)(1)-(2). Similarly, under TISA and Regulation DD, a consumer who may be harmed by a fee increase must be given 30 days advance notice of changes to any fees which were required in the initial account schedule.[10] Some fee changes may benefit the consumer so, looking at the phrase "may ... adversely affect", the Clarks interpret Regulation DD to require advance notice "if there is *any possibility* that the change could have a negative impact on the consumer." Clark & Clark at 19-133 (emphasis added).

B. TILA and TISA's Similar Enforcement Schemes

With respect to enforcing the statute, TILA gave an individual or class plaintiff the right to bring suit as a "private attorney general." Clark &

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[10] 12 U.S.C. § 4305(c) provides: Distribution of notice of certain changes. *If* – (1) *any change is made* in any term or condition which is required to be disclosed in the schedule required under section 264(a) [12 U.S.C. § 4303(a)] with respect to any account; *and* (2) *the change may ... adversely affect any holder* of the account, all account holders who may be affected by such change *shall be notified* and provided with a description of the change by mail *at least 30 days before* the change takes effect. (Emphasis added.)

Clark at 19-150. This led to a boom in Truth in Lending litigation during the 1970s, primarily over technical violations, which suddenly decreased around 1980 due to several amendments to TILA which (1) limited the number of violations subject to penalties, (2) expanded bank defenses such as good faith errors, and (3) placed a ceiling on class action damages. *Id.* Around the same time, the Federal Reserve developed an official commentary on TILA to avoid the problem that had been created by inconsistent official and unofficial interpretations. *Id.* In addition, the United States Supreme Court made sure courts would strictly defer to agency interpretations. See *Ford Motor Credit Co. v Milhollin,* 444 U.S. 555(1980).

When TISA was enacted, over two decades after the TILA boom, it followed the former statutes' amended scheme. The new law paralleled TILA's preemption provisions, empowering state enforcement of consistent disclosure requirements.

In 1995 Congress amended TISA and eliminated the federal private right of action, reducing federal enforcement to an "administrative remedial enforcement scheme".[11] Congress enacted the repeal of TISA's federal private enforcement provision, 12 U.S.C. § 4310, which was scheduled to

[11]Senate Report 104-185, Report of the Committee on Banking, Housing & Urban Affairs, (Dec 14, 1995).

be dropped from the law in September 2001. Act of Sept 30, 1996, Pub L 104-208, § 2604(a), codified at 12 U.S.C. § 4310.

Congress, however, did not disturb the parallel authority of the states to enforce consistent state requirements.

What remained in the statute after the repeal, was state enforcement under TISA's Preemption Clause and Regulation, 12 U.S.C. § 4312 and 12 C.F.R. 230.1(d). These preserve parallel state enforcement of TISA's provisions. In fact, the Federal Reserve Board has determined that at least one state's enforcement of its more demanding requirements was not inconsistent with TISA under the Preemption Clause.[12]

The issue at hand is whether, under the Supremacy Clause of the United States Constitution, TISA preempts California's statutes creating causes of action enforcing identical requirements to TISA's. Also before this Court is the issue of whether TISA preempts all California enforcement of its dictates. These laws will be referred to in this brief as the "Preemption Clause", the "Preemption Regulation", or lumped together as the "Preemption Clauses".

C. The Preemption Clauses and Strict Judicial Deference to the Ordinary Language

Like TILA before it, Congress inserted the Preemption Clause, 12 U.S.C. § 4312, into TISA to ensure parallel enforcement by the states. The

[12]See Kenneth M. Lapine, 7 Banking Law § 151-7[1] at 151-86.

language of the statute is clear and neatly tracks the language used earlier in TILA[13]:

> § 4312. Effect on State law
>
> The provisions of [TISA] *do not supersede any provisions of the law of any State* relating to the disclosure of yields payable or terms for accounts to the extent such State law requires the disclosure of such yields or terms for accounts, *except to the extent that those laws are inconsistent* with the provisions [TISA], and then *only to the extent of the inconsistency*. The Bureau may determine whether such inconsistencies exist. (Emphasis added.)

Under the ordinary language of this Preemption Clause, Congress contemplated that States may enforce banking disclosure laws consistent with TISA and explicitly decreed that such laws will *not* be superseded — that is to say, state administrative and civil cases will be allowed to go forward and not be preempted by the act. To understand that the continued existence of the Preemption Clause after the repeal of Section 4310 was by design and not an accident, it is important to note that as recently as 2010 Congress amended the Preemption Clause to change the word "Board" to "Bureau" so that determinations of state law inconsistencies would

[13]Enacted in 1968, TILA's preemption clause, codified at 15 U.S.C. § 1610, is entitled "Effect on other laws" and provides, in relation to credit transaction information disclosures, TILA does not "annul, alter, or affect … the laws of any State … except to the extent that those laws are inconsistent" with TILA "and then only to the extent of the inconsistency." The statute, as recently amended, also provides for the Consumer Bureau to make inconsistency determinations. TILA, as copied by TISA, also has a state preemption regulation, codified at 12 C.F.R. § 226.28.

thereafter be made by the Consumer Bureau, the recently created agency that is now responsible for administrative enforcement of TISA.[14]

Logically, Congress could not have shifted power from the Federal Reserve Board to the Consumer Bureau to make determinations of inconsistent state laws in 2010[15] had enforcement of all such laws been preempted by Congress' repeal of Section 4310 back in 1996.

D. The United States Supreme Court Strictly Defers to the Ordinary Language in Preemption Clauses

When there is a preemption clause in a law enacted by Congress, the United States Supreme Court has held consistently that the "ordinary language" of the clause takes precedence over any other tool of interpretation, such as looking to the legislative history or balancing federal and state interests.

1. Whiting *and the Authority of Statutory Text.*

Several rules of statutory construction were recently set down by the Court in *Chamber of Commerce v. Whiting*, 131 S. Ct 1968 (2011), which upheld an Arizona law to revoke the state business licenses of any company that knowingly or intentionally employs an illegal alien. *Id*. at 1973-75. The law at issue, the Legal Arizona Workers Act of 2007, uses the federal E-Verify system, run under the Immigration Reform and Control Act

[14] See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 1100B(1), 124 Stat. 1376 (2010).
[15] The change from "Board" to "Bureau" became effective on July 21, 2011.

(IRCA),[16] to identify illegal aliens and all state employers are required to run an E-Verify check after each employee is hired. *Id.* at 1976-77. So long as the company does a successful background check, it will be protected by a "rebuttable presumption" that it did not knowingly hire an illegal alien. *Id.*

In the preemption clause at issue in *Whiting*, IRCA expressly preempted states from imposing civil or criminal penalties on companies that hire illegal aliens "other than through licensing and similar laws" *Id*. at 1977-78 (quoting 8 U.S.C. § 1324a(h)(2)). So, to address the problem at hand, Arizona enacted what it believed to be a licensing law. Arizona has a broad definition of "license" which may include a company's articles of incorporation and its partnership papers. *Id*. at 1978.[17] Consequently, the maximum state penalty may be severe enough to close down a business, or as the Chamber of Commerce so colorfully referred to it, give it the "business death penalty". *Id*. at 1971.

In response to the Chamber of Commerce and the federal government's[18] arguments that, in view of the history of IRCA, the Arizona

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[16] IRCA is the law that created the ever-present I-9 employment forms. See *Whiting* at 1974-75. In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), piloted the E-Verify system to complement the I-9 system. *Id*.

[17] The minority did not think this was a licensing law under the preemption clause because Arizona's statutory definition, which includes corporate charters, is "overly broad". *Whiting* at 1987-88 (Breyer, J., dissenting).

[18] The United States apparently filed an *amicus* brief. See *Whiting* at 1979.

law was not a licensing law and went against Congress' grand immigration design, Chief Justice Roberts sternly replied:

> The Chamber argues that its textual and structural arguments are bolstered by IRCA's legislative history. We have already concluded that Arizona's law falls within the plain text of IRCA's savings clause. And, as we have said before, *Congress's "authoritative statement is the statutory text, not the legislative history.*"

(Emphasis added.) *Whiting* at 1980, citing *Exxon Mobil Corp. v. Allapattah Services, Inc.,* 545 U.S. 546, 568 (2005).

The Chamber also argued the Arizona law was "impliedly preempted" because Congress intended to create an exclusive federal system. *Whiting* at 1981. Relying on the explicit language in the preemption clause, the Court rejected the argument, saying,

> But Arizona's procedures *simply implement the sanctions that Congress expressly allowed Arizona to pursue* through licensing laws. Given that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority.

Id. (emphasis added). The Court then detailed the many ways that Arizona "went the extra mile in ensuring that its law closely tracks IRCA's provisions in all material respects." *Id*.

Another argument advanced by the Chamber was that the law should be preempted because Arizona's harsh penalties may upset Congress' delicate balance of immigration policy considerations including burdens on employers, employee privacy, and employment discrimination. *Id*. at 1983. In rejecting this argument, the Court noticed that all the Chamber's

authorities were based on "uniquely federal areas of regulation" such as foreign policy, foreign affairs, and maritime vessels. *Id*. Using licensing laws to regulate state businesses, on the other hand, has never been "an area of dominant federal concern". *Id*. "Furthermore, those cases," observed the Court, "all concern state actions that directly *interfered* with the operation of the federal program." *Id*. (emphasis added). Arizona's employer law, on the other hand, does not interfere with ICRA, which continues to operate "unimpeded by the state law." *Id*.

The Court then turned, once again, to the express language of the preemption clause:

> As with any piece of legislation, Congress did indeed seek to strike a balance among a variety of interests when it enacted IRCA. Part of that balance, however, involved allocating authority between the Federal Government and the States. The principle that Congress adopted in doing so was not that the Federal Government can impose large sanctions, and the States only small ones. IRCA instead preserved state authority *over a particular category of sanctions* — those imposed "through licensing and similar laws."

Id. at 1984 (emphasis added).

Chief Justice Roberts concluded his analysis of implied preemption by unequivocally emphasizing the primacy of Congress, and the statutory language it uses, over the courts in determining the scope of preemption:

> Implied preemption analysis does not justify a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives"; such an endeavor "would undercut the principle that *it is Congress rather than the courts that preempts state law*." Our precedents "establish that a *high threshold* must be met if a state law

> is to be pre-empted for conflicting with the purposes of a federal Act." That threshold is not met here.

Id. at 1985 (emphasis added, citations omitted).

Whiting stands for strict judicial deference to the precise wording of a preemption clause. If that language is clear, then no argument based on legislative history, Congress' implied intent, or a balance of interests will survive.

In the present case, the Court of Appeal was in error under *Whiting* on three separate counts. First, because the Court did not consider the explicit language of the preemption clause even though the issue was briefed extensively by Mr. Rose in three separate briefs.[19] See *Rose v. Bank of America,* 200 Cal. App. 4th 1441 (2011) (no citation to either Preemption Clause or Regulation). Second, because it determined Congress' implied intent from the fact that it repealed another section of the statute. *Id*. at 1452 ("Congress has clearly rejected a private right to enforce TISA"). And third, because it bolstered its intent argument with legislative history. *Id*. ("When the legislative history shows that legislators expressly considered and *rejected* specific legislation, we need not speculate about legislative intent.") (emphasis in original).

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[19] See Appellants' Opening Brief at 3, 7, 17, *Rose v. Bank of America*, No. B230859 (2d Dist, Cal.App. Apr. 29, 2011) (citing the Preemption Clauses 12 U.S.C. § 4312 and 12 C.F.R. 230.1(d)), Appellants' Reply Brief at 3, 4, 6 (July 27, 2001) (same), and Appellants' Petition for Rehearing at 8, 9, 15 (Dec. 2, 2011) (same). The Customers also briefed the Preemption Clauses in the Superior Court. See AA at 203, 210.

2. Bates *and "Parallel" State Requirements.*

The United States Supreme Court decision in *Bates v. Dow Agrosciences,* 544 U.S. 431 (2005), a case where peanut farmers, whose crops had been damaged by a mislabeled pesticide, brought suit under Texas' consumer law, is directly applicable to the case at hand in two ways. First, the Texas law at issue, the Texas Deceptive Trade Practices — Consumer Protection Act, is similar to California's Unfair Competition Law. Second, the language of the federal preemption clauses is similar because neither clause operates to preempt state common law that is consistent with the federal statute.

The clause at issue in *Bates* was part of the federal pesticide act known as FIFRA[20] which states that a subject state "shall not impose or continue in effect any requirements for labeling or packaging *in addition to or different from* those required" under FIFRA. See *Bates* at 443 (quoting 7 U.S.C. § 136v(b)) (emphasis added). Compare that with the clause here which says that TISA's disclosure requirements do not "supersede" state law "except to the extent that those laws are inconsistent" with TISA. 12 U.S.C. § 4312.[21]

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[20] Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C § 136 *et seq*.

[21] TISA's implementing regulation, 12 C.F.R. 230.1(d), uses different wording to achieve the same effect. There, "[s]tate law requirements that are inconsistent" with TISA "are preempted to the extent of the inconsistency". Under the statute and regulation, it is clear that *consistent* state laws will survive any federal preemption challenge.

The clear language in both of these preemption clauses allows state actions to enforce consistent requirements.

Analyzing the language in the FIFRA clause, the *Bates* Court ruled:

> … § 136v(b) prohibits only state-law labeling and packaging requirements that are "in addition to or different from" the labeling and packaging requirements under FIFRA. Thus, a state-law labeling requirement is not pre-empted by § 136v(b) if it is *equivalent to, and fully consistent with,* FIFRA's misbranding provisions.

Bates at 447 (emphasis added).

In addition, the Court held, "state law need not *explicitly* incorporate FIFRA's standards as an element of a cause of action in order to survive pre-emption." *Id.* (emphasis added). Thus, it is not necessary that a state litigant specifically borrow the federal standards, just that the state court not rule in an inconsistent manner.[22]

Even though a state suit may provide an injured party with significant monetary damages, under the rule in *Bates*, that fact does not create an inconsistency with federal law. Consistency analysis only applies to requirements, that is to say the dictates of the federal statute, not to remedies:

> The "parallel requirements" reading of [FIFRA's] *§ 136v(b)* that we adopt today finds strong support in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). In addressing a similarly worded pre-emption provision in a statute regulating medical devices, we found that "[n]othing in

[22] While this is not an issue with Mr. Rose's UCL cause of action insofar as it relates to "unlawful" business practices which are listed as TISA violations, it may be relevant to his "unfair" claims. See Complaint ¶¶ 29, 30 at AA 10-11.

> *[21 U.S.C.] § 360k* denies Florida the right to provide a *traditional damages remedy* for violations of common-law duties when those duties *parallel federal requirements*." *Id.* at 495. As Justice O'Connor explained in her separate opinion, *a state cause of action that seeks to enforce a federal requirement "does not impose a requirement that is 'different from, or in addition to,' requirements under federal law*. To be sure, the threat of a damages remedy will give manufacturers an additional cause to comply, but the requirements imposed on them under state and federal law do not differ. Section 360k *does not preclude States from imposing different or additional remedies*, but only different or additional *requirements*." *Id.* at 513 (opinion concurring in part and dissenting in part).

Bates at 447-48 (footnote omitted, emphasis added).

In his concurrence, Justice Breyer emphasized federal agencies might have an important role in determining preemption:

> [S]tate-law requirements must "be measured against" relevant [agency] regulations. … [A]n administrative agency … [has] the legal authority within ordinary administrative constraints to promulgate agency rules and to determine the pre-emptive effect of those rules in light of the agency's special understanding of "whether (or the extent to which) state requirements may interfere with federal objectives."

Bates at 454 (Breyer, J., concurring) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 506 (1996)).[23]

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[23] Under TISA and its regulations, such an agency determination about whether California's UCL conflicts with federal requirements may be made by the Consumer Bureau. See 12 U.S.C. § 4312, 12 C.F.R. 230.1(d). Under the regulation, this is significantly referred to as "a preemption determination". *Id*. Neither party has requested a Consumer Bureau ruling, though, so the issue is not before this Court. More importantly, however, the specific grant of power given to the Consumer Bureau in 2010 to make an evaluation of state law consistency clearly points to Congress' recently renewed interest in allowing state common law claims despite that august

Under *Bates*, there is all the more reason the Customers' case should go forward because — by borrowing TISA and its regulations — it applies the *exact same* requirements as the federal law, not just parallel or consistent ones. That the type of remedy provided by state law, restitution and injunctive relief, Bus. & Prof. Code § 17203, differs from the administrative one provided by TISA is not relevant.

3. A District Court dismisses a TISA action while remanding a state consumer fraud action.

In *Hirschbach v NVE Bank*, 496 F. Supp. 2d 451 (D.N.J. 2007), Bank customers brought a New Jersey consumer fraud suit against a bank which had failed to properly disclose interest rates on certificates of deposit. *Id*. at 452. The bank removed to federal court, claiming the suit arose under federal law. In response, the customers added a federal TISA cause of action. *Id*. at 453.

The district court dismissed the federal TISA claim, with little analysis, because Congress had repealed the private right of action. *Id*. at 453. As for the state consumer fraud claim, the court observed that the complaint did not mention TISA, then held that the suit did not involve a federal law just because it was based upon one. *Id*. at 455-56 ("Predicating the Consumer Fraud Act claim on conduct which may run afoul of TISA does not bring federal law to the forefront of the action.").

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body's 1996 vote to repeal the federal private TISA claim procedures which were once contained in Section 4310.

The bank tried to argue that TISA preempted the state consumer law, but the district court countered, "Only where a federal cause of action *completely* preempts a state cause of action may the Court conclude that a complaint's facial state law claim really 'arises under' federal law." Id. at 457 (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 24 (1983)) (emphasis in original).

Although *Hirschbach* is primarily a case about removal to federal court, it is instructive, and directly applicable here, because the district court ruled that even though a direct federal TISA claim was unavailable to the Customers because the private right of action had been repealed, the state action based on truth in lending issues remained because Congress had not *completely* preempted New Jersey law.

Isn't this the heart of the matter? Congress not only left the preemption or savings clause Section 4312 in TISA when it repealed the federal private right of action, it also *reenacted* the clause in 2010, a decade after repeal, allowing for consistent state actions and determinations of such consistency by the Consumer Bureau. Complete preemption of TISA cannot be squared with the recent enactment. Congress, by its explicit and ordinary language, chose to delegate power to determine the consistency of "*any provisions* of the law of any state" regarding disclosure of bank account yields and terms. 12 U.S.C. § 4312 (emphasis added).

The *Hirschbach* court realized this and ruled accordingly to remand a common law disclosure action to state court at the same moment that it threw out the federal TISA claim.

The Court of Appeals reading of the repeal in the present case could only make sense were the court to ignore Section 4312 in its reasoning. And that is precisely what the Court of Appeals did in error.

E. The California Supreme Court Also Strictly Construes Preemption Clauses.

1. Preemption principles in **Brown** *as applied to complex or unclear preemption clauses.*

Fairly recently, this Court considered the preemption doctrine in *Brown v. Mortensen*, 51 Cal. 4th 1052 (2011), where, in an attempt to collect on a debt, a credit reporting agency divulged privileged medical and personal information about a dental patient. These illegal disclosures of private information were protected under both California's Confidentiality of Medical Information Act (Confidentiality Act), Civ. Code § 56 *et seq*, and the United States' Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq*.

Much like the United States Supreme Court in *Whiting*, this Court analyzed the extent to which FCRA preempted the Confidentiality Act by looking to the "plain wording" of FCRA's express preemption clause, even though the Court acknowledged the existence of three other "implied" preemption doctrines: conflict, obstacle, and field. See *Brown* at 1059-60.

This Court also examined the structure and purpose of FCRA and asked whether California had traditionally occupied the regulatory field. See *id*. at 1060.

These factors — plain language, statutory purpose, and state tradition — must be weighed in light of a substantial presumption against preemption. *Id*. As the Court observed, when looking at an area of traditional state lawmaking, "we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress'" Id. (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)) (emphasis added). This anti-preemption presumption is "sufficiently powerful to impose upon courts a *'duty to accept the reading that disfavors pre-emption'* as among equally plausible interpretations of an express preemption clause. *Brown* at 1064 (quoting *Bates v. Dow Agrosciences,* 544 U.S. 431 (2005) (discussed in detail above) (emphasis added).

The Congressional preemption clause at issue in *Brown* was much more complex than the one at issue here. Though FCRA's original preemption clause was similar to the one in TISA, FCRA was amended in 1996 to keep states from imposing on a new federal scheme to set accuracy rules for persons who furnish personal information to consumer credit rating agencies such as Experian and Equifax. See *id.* at 1058, 1062. This Court found an ambiguity as to whether the federal rules were narrowly limited to

specific accuracy procedures for information furnishers or could be broadly interpreted to encompass *all* furnisher activities. See *id.* at 1063. Since the case involved the unnecessary disclosure of medical information, this Court was concerned that a broad reading of FCRA might give too much immunity to furnishers by preempting California's medical privacy laws. See *id.* at 1064-65.

Because the FCRA preemption clause had been enacted one month after the passage of the medical record confidentiality legislation known as HIPAA,[24] and because the legislative purpose behind the FCRA clause was to create efficient federal procedural standards for the credit industry that "do not harm consumers", this Court concluded FCRA's newly amended preemption clause only related to an information furnisher's duty to provide accurate information and didn't speak to the furnisher's duty to preserve medical confidentiality. See *id*. at 1067-70. As California's Confidentiality Act dealt with keeping medical information private rather than accurate, *id*. at 1071, this Court justly ruled that FCRA did not preempt it.

The case at docket is markedly simpler than *Brown*, and the Customers contend it may be determined simply by the Court examining the plain text of the relevant preemption clause. Employing the strong presumption

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[24] Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d *et seq*.

against TISA preempting this case, this Court should uphold UCL claims to enforce Tisa's standards "borrowed" into the UCL under California law.

The Court of Appeal did not analyze or even mention the Preemption Clause but rather looked outside the plain text to find "Congressional intent." This Court will no doubt weigh the lower court's logic, so it may be relevant to apply the *Brown* factors to this case. TISA is a procedural statute that sets forth rules for accurate, properly noticed, and timely bank disclosures. The federal private right of action, now repealed, had limited damages and provided defenses related solely to cases brought to make banks follow TISA's proper disclosure rules. In that sense, prior to the repeal a privately-brought federal TISA case — whether filed in federal or state court — would only have dealt with procedural compliance and have asked for limited damages.

This case, although premised on the Bank's failure to disclose subject fee hikes to Customers, is brought under California's Unfair Competition Law — in fields that California has traditionally occupied: the business of banking and consumer protection[25] — because Customers seek restitution because they were harmed when, without proper Bank notice, they were charged increased fees by the Bank's failure to notify them of fee hikes and thereby kept from shopping for a bank without such fees, or at least for a

[25] See discussion of California's Truth in Lending Law, Fin. Code §§ 855, 865-865.10, below.

bank with lower fees. The Customers' suit also asks that the Bank be ordered to follow TISA by providing proper notice of fee hikes to others in the future. TISA may set the procedure, but only the UCL will provide Customers with restitution and injunctive relief.

2. Bank Disclosures and Their Relation to Unfair Competition are Traditional Areas of California Law.

One important factor cited by this Court in *Brown* is whether Congress "legislated in a field which the States have traditionally occupied." *Brown* at 1060 (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). In such fields, a state law may not be superseded unless that is the "clear and manifest purpose of Congress." *Id*. This "presumption against preemption" assures us that the delicate balance of federal and state interests will not be disturbed by an unintentional act of Congress or an unnecessary court ruling. *Id*.

At bar, we have two areas of California's traditional interest: unfair competition in general and, more specifically, bank disclosures. A comprehensive history of the first interest, unfair competition, was delineated by Justice Kennard in her concurrence and dissent in *Cel-Tech Communications, Inc. v. Los Angeles Cellular*, 20 Cal. 4th 163, 192-95 (1999).

California's interest in unfair competition began in the nineteenth century as a common law tort. *Id*. at 192. At its heart was deceptive

business conduct. *Id.* at 193. The first unfair competition statute, former Civ. Code § 3369, was enacted in 1933. *Id.* at 194. The law provided injunctive relief for "unfair or fraudulent" business practices and "unfair, untrue or misleading" advertising that could be sought by the Attorney General, district attorneys, as well as private persons. *Id.* This Court construed the statute to regulate "unfair competition" as it had been interpreted under common law. *Id.* As a result, it did not cover business practices that violated other business regulation statutes. *Id.*

To correct this problem in 1963, California added the word "unlawful" to the statute so that a business that violated a statute could be enjoined from its unlawful practice especially in cases where the underlying statute did not provide an equitable remedy. *Id.* at 195 (citing *Barquis v. Merchants Collection Assn.*, 7 Cal. 3d 94, 112-13 (1972)). In 1977, the law was reenacted at Bus. & Prof. Code § 17200, *et seq.*, and in 1992, it was expanded to cover business *acts*, that is to say a single wrongful act, as opposed to an ongoing practice, would be enough to trigger the statute's protection. *Cel-Tech* at 195.

California's related interest in truthful bank disclosures began in 1975-76 when it passed Financial Code Sections 855, see 1975 Cal. Stats. ch. 837 § 1, and Sections 865 through 865.10, see 1976 Cal. Stats. ch. 1279 § 1, entitled "Disclosure of Consumer Bank Account Charges." A violation of

this statute was actionable under the "unlawful" wing of the Unfair Competition Law.

After Congress passed TISA, however, California repealed Sections 855 and 865-865.10. 1993 Cal. Stats. ch. 107. Section 3 of the repealing legislation sets forth in detail the reason for the repeal and expresses California's continued interest in the subject matter:

> The federal deposit disclosure laws largely cover the subject matter of the California deposit disclosure laws. Although the federal deposit disclosure laws differ in many respects from the California deposit disclosure laws, the differences are mainly in points of detail, and the federal deposit disclosure laws provide adequate safeguards for consumers.
>
> Subdivision (g) of Section 865.6 of the Financial Code provides that banks shall not be liable for any failure to comply with the disclosure law to the extent that its provisions are *inconsistent* with federal statutes or regulations. Because of the many differences between state and federal disclosure laws, several provisions of the California deposit disclosure laws were repealed on a *de facto* basis with the enactment of the federal deposit disclosure laws.
>
> *It would not be in the public interest to continue to require banks to comply with, and regulatory agencies to enforce, both the California deposit disclosure laws and the federal deposit disclosure laws.*
>
> Considering all the relevant circumstances, it is appropriate that the California deposit disclosure laws be repealed.

Id. (emphasis added).

There are many important take-aways from this repealing legislation. First, California has had a longtime public interest in truthful banking disclosures. Second, in 1976, California enacted a specific section of the law to make sure its laws were consistent with federal law. This shows that for over 30 years California took pains to make sure its banking disclosure

laws would not be preempted. Third, soon after Congress passed TISA, the Legislature reviewed the federal law including, we may reasonably assume, its preemption clause, and determined that the best method for preserving California's interest was to repeal its often inconsistent scheme and rely on TISA’s standards. Fourth, after the repeal of TISA's Section 4310, the Legislature did not seek to reenact the state scheme, presumably because it felt that California's continued public interest in enjoining improper bank disclosures would be vindicated by TISA as enforced through the Unfair Competition Law both by public prosecutors and private citizens.

California acted in reliance on the joint state and federal scheme as set forth in the Preemption Clauses. The repealing language of the California law makes it clear that the state has a public interest in using a single federal regulatory scheme, even though before the repeal California had a similar scheme. Consistent law was not sufficient. The Legislature wanted the same law.

It would be a perverse state of affairs, indeed, if by its ruling on this action, California's Supreme Court were to take away the power of state courts to adjudicate cases in the realm of such an important and traditional state public interest without finding that Congress had a "clear and manifest purpose" to do so. Let's be precise about the Customers’ conception of what would be "clear and manifest". When Congress repealed Section 4310, it also had the power to repeal Section 4312, but did not. The Customers

concede that an amendment of Section 4312 could have preempted state enforcement of TISA. Not only did Congress not repeal Section 4312, it reenacted it in 2010 and made a significant change to its terms by substituting the Consumer Bureau for the Federal Reserve. On December 21, 2011, the Consumer Bureau, now in charge of TISA, republished all of TISA's Regulation DD in The Federal Register, according to the summary of the new rules with minor tweaks but no "new substantive obligations." [26] Of course, the newly published regulation still contains Appendix C which sets forth the procedure for obtaining a Consumer Bureau determination of whether a state law may be inconsistent with TISA.[27] There is simply no evidence that Congress intended to bar State causes of action enforcing California’s requirement that banks obey TISA’s requirements.

3. A Statute Without a Private Right of Action May Be Borrowed by The Unfair Competition Law.

The Court of Appeal below correctly interpreted the repeal of 12 U.S.C. § 4310 as "foreclos[ing] a *direct* suit" to enforce TISA. *Rose v. Bank of America*, 200 Cal. App. 4th 1441, 1451 (2011) (emphasis in original). The only issue, therefore, before the court was whether a suit to enforce TISA's

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[26] "The interim final rule substantially duplicates the Board's Regulation DD as the Bureau's new Regulation DD, 12 C.F.R. part 1030, making only certain non-substantive, technical, formatting, and stylistic changes." Truth in Savings (Regulation DD), see II(A) Summary of the Interim Final Rule, The Federal Register, 76 Fed. Reg. 79276 (Dec. 21, 2011). The summary is appended as Attachment A.
[27] 76 Fed. Reg. 79297 (Dec. 21, 2011) is appended as Attachment B.

requirements as incorporated in the UCL was preempted. *Id.* (emphasis added). Where the court took a wrong turn was when it went straight to legislative history and skipped over the first step of looking to the post-repeal language and structure of TISA. Textual analysis — under all the United States and California Supreme Courts cases mentioned above — is the gateway to federal preemption.

Looking at TISA as a whole we have a bank disclosure law with a Section 4312 preemption clause and no Section 4310 liability, bank defense, or jurisdiction rules. What the statute currently lacks, in the Court of Appeal's words, and in the issue as framed by this Court, is a "private right of action".[28]

If the issue is thus framed, based on the text of TISA: "May a UCL cause of action be brought under a borrowed law that doesn't have a private right of action," then the answer is clear. This Court has held consistently that a predicate statute does not need to have a private right of action. *Kasky v Nike, Inc.*, 27 Cal. 4th 939, 949 (2002) (UCL suit for fraud borrowing Civ. Code § 1572 and for deceit borrowing Civ. Code §§ 1709-10); *Stop*

[28] The Customers would like to emphasize that the repeal of Section 4312 is somewhat mischaracterized by simply calling it the repeal of TISA's "private right of action." It was more than a standing and jurisdictional law. Also repealed were clauses including individual and class action damages and limits, §§ 4310 (a)-(b), bank defenses for bona fide errors, § 4310(c), no bank liability for overpayments, § 4310(d), and mitigation of bank damages through timely adjustment of errors, § 4310(g). See 2 AA 217-221.

Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553, 565, 579 (1998) (UCL suit for selling cigarettes to minors borrowing Pen. Code § 308 and Bus. & Prof. Code, § 22950 *et seq)*.

In *Kasky*, this Court simplified the rule set forth in *Stop Youth Addiction* to hold, "a private plaintiff may bring a UCL action even when 'the conduct alleged to constitute unfair competition *violates a statute for the direct enforcement of which there is no private right of action*.'" *Kasky* at 950 (emphasis added). Applying this rule to the text of TISA, we see that for the purposes of the Customers' UCL case, the repeal of Section 4310 was the repeal of an immaterial part of TISA for borrowing purposes. See also, *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 210-11 (1983).

Skipping over the necessary textual analysis, the court below took an unusual jump and analyzed legislative history that took place after Section 4310's repeal to imply a Congressional intent. See *Rose* at 1448. The court took judicial notice of a "proposed" 2001 bill, the Truth in Savings Enhancement Act, H.R. 1057 (introduced March 15, 2001).[29] The court used the failure to pass the bill, which in part would have reenacted TISA's Section 4310, as evidence that Congress intended to prohibit all private rights of action.

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[29] The text of H.R. 1057, 107th Cong. (2001) is appended to this brief as Attachment C.

The Court of Appeal wrongly ruled that the failed amendment is probative of Congress' intent. Congressional inaction in reenacting Section 4310 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* 26 Cal.4th 779, 785 (2001). Rather than present legislative history preceding and resulting in either TISA or the repeal of Section 4310, the Bank proffered merely a subsequent, unpassed bill. *Rose,* 200 Cal. App. 4th at 1448, 1452. This bill, offered over four years after the repeal of Section 4310 and decades after TISAs enactment, is not part of TISAs or the repeal'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 Development Co. v. Superior Court,* 4 Cal.4th 911, 922-23 (1993). Consequently, "'[u]npassed bills, as evidences of legislative intent, have little value.'" *Id.* (citation omitted). 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 v. United States,* 526 U.S. 227, 238 (1999) (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).

The unpassed bill demonstrates no congressional findings as to the intent of TISA as first 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*.

Interestingly enough, even if one looks closely at the proposed legislation, it actually shows that the writers of the bill explicitly acknowledged the existence and continued effect of state law under the Preemption Clause, Section 4312. From the proposed H.R. 1057, here is a clause to be added to the end of 12 U.S.C. § 4309, which is entitled "Administrative Remedies":

> (d) State Action for Violations. —
>
> > (1) Authority of the States. — In addition to *such other remedies as are provided under State law*, if …

H.R. 1057 § 2 (emphasis added).

While the Customers don't really believe this Court should involve itself in speculative legislative history, in view of the clear text of the Preemption Clause, it may be interesting for this Court to note that this proposed law — because the failure to pass H.R. 1057 was a vital part the appellate court's reasoning — shows that members of Congress acknowledged there were still "other" state remedies. And where else would such remedies be authorized if not in the Preemption Clause?

Continuing this line of thought, the failed bill also sought to amend the Preemption Clause itself by adding this sentence to the end of 12 U.S.C. § 4312:

> The Board *may not determine that any State law is inconsistent* with any provision of this subtitle if the Board determines that the protection such State law affords any consumer is *greater than the protection* provided by this subtitle.

H.R. 1057 § 4. Here you have members of Congress trying to permit states to provide stricter depository disclosure laws than TISA. Again, this is evidence that several members of Congress understood — five years after the repealing legislation of TISA's private right of action — that the Preemption Clause was still operational and that state law had not been preempted.

This interpretation was clearly understood by the Comptroller of the Currency. After the repeal took effect in 2001, an advisory letter promulgated by the Office of the Comptroller of the Currency in 2002 warned national banks of the 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 (March 22, 2002) at p. 3, n.2 2 AA 326. The Comptroller knew that California's UCL is a law prohibiting national

banks from forbidden "unfair or deceptive acts or practices" and constitutes, in the language of § 4312, "a state law require[ing] the disclosure[s]" mandated by TISA. According to Congress, TISA's purpose was to require Banks to make full and fair disclosures so that Customers could make informed decisions and would not be misled or mistreated by banks.

4. *As a Policy Matter, Strict Judicial Deference to Federal Preemption Clauses is Reasonable and Prudent.*

The argument directly above, based on some disputed points of legislative history and interpretation, shows exactly why the United States and California Supreme Courts in *Whiting* and *Brown*, were reasonable and prudent to rule that courts, when faced with an explicit preemption clause, should refrain from looking to legislative history and doctrines such as implied preemption.[30]

The legislative history in this case alone is scant and inconclusive. While there is some evidence, a single paragraph, from a committee report about the repeal of Section 4310, there was no discussion of Section 4312, that was neither being amended nor repealed.

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[30] Note that in *Brown*, this Court looked to legislative history to resolve a statutory ambiguity, but it was not an ambiguity that existed in the preemption clause itself. *Brown*'s preemption clause clearly preempted state law "with respect to any subject matter regulated under [the section of FCRA] relating to the responsibilities of" information furnishers. *Brown v. Mortensen*, 51 Cal.4th 1052, 1062 (2011). It was the language and purpose of the information furnishers section, in light of a recently enacted federal medical information privacy rule, that this Court resolved in the case. See id. at 1066-68.

Perhaps the banking industry wanted Congress to amend or repeal Section 4312 as well but the votes weren't there. Or perhaps the issue was never addressed. Whatever the reason, this type of legislative speculation is not helpful to the issue before us. And it is not a proper inquiry, especially when federal preemption of a traditional state law is at risk, for a court that is presented with, and fully capable of analyzing, ordinary statutory text.

Congress knows how to preempt all states from having a say in its federal statutory schemes. Congress, should it desire in the future to preempt all state oversight of TISA, may amend Section 4312 to say: "The provisions of this title supersede all state laws relating to the subject matter contained herein." Congress did no such thing.

5. *The* **Washington Mutual Bank** *decision may be called into question by the decision below.*

Washington Mutual Bank v. Superior Court, 75 Cal. App. 4th 773 (2nd Dist. 1999), is an example of the type of case that would be overturned if this Court were to affirm the Court of Appeal. In *Washington Mutual*, the bank failed to tell home buyers about grossly inflated closing charges for such items as credit reports, deed recording, tax services, flood certifications, and wire transfers. *Id*. at 776-78. Similar to this case, these types of home buying disclosures were regulated by a federal law and regulation, The Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq*. (RESPA), and RESPA's Regulation X, 24 C.F.R. § 3500.1 *et*

seq. (Reg X), that were administratively enforced at the federal level did not provide a private right of action for disclosure violations.[31] *Id*. at 776, 779-80.

Just like TILA and TISA, both RESPA and Reg X had preemption clauses that allowed for suits based upon consistent state laws.[32] Both clauses, as here, also allowed for agency determinations of consistency. As here, the Second District had before it the sole question of whether the lack of a private cause of action killed the state causes of action, including one under the UCL enforcing RESPA's requirements. *Washington Mutual* at 776-77.

In holding that California law was not inconsistent with RESPA or Reg X and that the federal laws do not "expressly preempt private rights of action under state laws for violations of their provisions", the court looked to three key United States Supreme Court preemption decisions. *Id.* at 781-

---

[31] RESPA did, however, provide a private right of action for kickbacks and referral fees. *Washington Mutual* at 780 n.8.

[32] RESPA's preemption clause, 12 USC § 2616, provides: This Act does not annul, alter, or affect, or exempt any person subject to the provisions of this Act from complying with, the laws of any State with respect to settlement practices, *except to the extent that those laws are inconsistent with any provision of this Act, and then only to the extent of the inconsistency. The Bureau is authorized to determine whether such inconsistencies exist.* The Bureau may not determine that any State law is inconsistent with any provision of this Act if the Bureau determines that such law gives greater protection to the consumer. In making these determinations the Bureau shall consult with the appropriate Federal agencies. (Emphasis added.)

Reg X's preemption clause, 24 C.F.R. § 3500.13(a), provides essentially the same rule as RESPA but with more detail about how to get a consistency determination.

83, 788. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), *California Federal S. & L. Assn. v Guerra*, 479 U.S. 272 (1987). The court further made a consistency determination: "We find that private state causes of action are not inconsistent with the federal disclosure requirements, but rather are complementary to the federal requirements and in fact will promote full compliance with the disclosure law enacted by Congress." This is the same rationale exemplified by the *Black* decision, *supra* at p. 9, in relation to TILA.

The decision in *Washington Mutual* — based on a similar state action, federal disclosure laws, and preemption clauses — uses the exact same reasoning as urged here by the Customers and briefed before the Court of Appeal. Appellants Opening Brief at 13 n.3, *Rose v. Bank of America*, No. B 230859 (2nd Div. Cal.App. Apr. 29, 2011). The case falls in line with the later federal authorities cited above, *Whiting* and *Bates*, and it seems reasonable to conclude this is not only a better reading of the law than the one found in the decision of the court below, but that it is the only sustainable one under the preemption precedents well-stated and repeatedly set out by the United States and California Supreme Courts.

V. CONCLUSION

There is a dangerous, superficial appeal to the reasoning of the Court of Appeal: the court below speculated that Congress didn't like customers

suing banks, so it got rid of the Truth in Savings Act's state enforcement rights of action *sub silentio* and did so without regard to the specific provisions of the Preemption Clause. The Court below found an implied Congressional intent without feeling the necessity to consider or analyze the clear statement of Congressional intent enacted in the Preemption Clause. This decision is incorrect for the reasons delineated above.

Congress is a federal institution. And, owing to the structure of our government, Congress must always be mindful of the rights retained by the various states. Traditionally, states have made laws to regulate their savings institutions. So when Congress enacted federal truth in savings legislation, it also took pains to craft a clause that allowed states to retain the right to enforce consistent state requirements. It did so with the precedents of TILA and RESPA state litigation jurisprudence before it. The enacted Preemption Clause retained state power in an area of state interest that would not be in conflict with federal standards. Such an arrangement would also allow more effective actions to make sure that banks truly followed the federally crafted truth-in-savings standards.

What we are left with, after the repeal, is a law that has a clause that speaks to Congress' deliberate attempt — in this law as in many others — to balance legitimate state interests. We've called it a "preemption clause" in this brief, but it may also be thought of as a "savings clause" because it

delineates those rights saved for the states: enforcement of consistent laws and adjudication of consistent lawsuits.

When a federal law contains such a preemption clause, the United States Supreme Court looks at it with strict deference. That is to say, courts must apply a legislative parol evidence rule and look only to the four corners of the document. It is, says the Court, the ordinary text of the clause that rules the day. When the language of the statute may be easily understood, where there are no ambiguities, then *no* arguments based on legislative history, *no* speculation about Congress' "implied" intent, and *no* balancing of federal and state interests in the subject matter will play a role in the Court's reasoning and final decision. The interplay of the federal and states' roles in our federal system is inappropriate for judicial speculation.

The law of this Court has consistently followed the lead of the United States Supreme Court in this strict and confined textual analysis. In the main, all of California's Courts of Appeal have ruled the same way. Only one opinion in this state, that of the Court of Appeal below, has seen fit to go another way.

The text at issue here clearly says the Truth In Savings Act will not "supersede" state law unless that law is "inconsistent". Here, Mr. Rose, Ms. Lane, and other similarly injured Customers of Bank of America's services, under a California business and consumer protection statute, the Unfair Competition Law, seek to enforce price-increase notification rules that are

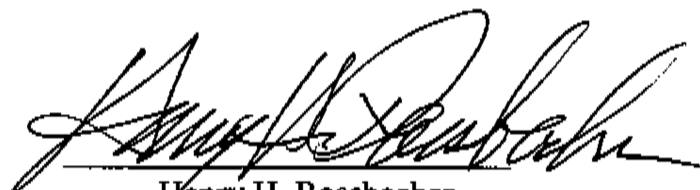
not only consistent with federal law, but actually track the law as written in the federal statute and its enforcing regulation.

Plaintiffs respectfully suggest that the decision of the Court of Appeal should be reversed.

DATED: May 14, 2012

RESPECTFULLY SUBMITTED,

THE ROSSBACHER FIRM



Henry H. Rossbacher
Jeffrey Alan Goldenberg

Attorneys for Plaintiffs and Petitioners Harold Rose and Kimberly Lane

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that pursuant to Cal. Rules of court, rule 8.520(c)(1), the foregoing Opening Brief on the Merits of Plaintiffs and Appellants Harold Rose, et al. is proportionally spaced (i.e., type size no smaller than 13 point) and contains 10,973 words, including footnotes, (but excluding title page, tables, and this Certification) which is less than the 14,000 words permitted by the foregoing rule. Undersigned counsel relied on the word count feature of the computer program used to prepare this brief.

DATED: May 14, 2012

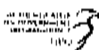
RESPECTFULLY SUBMITTED,

THE ROSSBACHER FIRM

Henry H. Rossbacher
Jeffrey Alan Goldenberg

Attorneys for Plaintiffs and Petitioners Harold Rose and Kimberly Lane

ATTACHMENT A



BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1030

[Docket No. CFPB–2011–0032]

RIN 3170–AA06

Truth in Savings (Regulation DD)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Interim final rule with request for public comment.

SUMMARY: Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) transferred rulemaking authority for a number of consumer financial protection laws from seven federal agencies to the Bureau of Consumer Financial Protection (Bureau) as of July 21, 2011. The Bureau is in the process of republishing the regulations implementing those laws with technical and conforming changes to reflect the transfer of authority and certain other changes made by the Dodd-Frank Act. In light of the transfer of the Board of Governors of the Federal Reserve System's (Board's) rulemaking authority for the Truth in Savings Act (TISA) to the Bureau, the Bureau is publishing for public comment an interim final rule establishing a new Regulation DD (Truth in Savings). This interim final rule does not impose any new substantive obligations on persons subject to the existing Regulation DD, previously published by the Board.

DATES: This interim final rule is effective December 30, 2011. Comments must be received on or before February 21, 2012.

ADDRESSES: You may submit comments, identified by *Docket No. CFPB–2011–0032* or *RIN 3170–AA06*, by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1500 Pennsylvania Avenue NW., (Attn: 1801 L Street), Washington, DC 20220.
- *Hand Delivery/Courier in Lieu of Mail:* Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20006.

All submissions must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. In general, all comments received will be posted without change to *http://www.regulations.gov.* In addition, comments will be available for public inspection and copying at 1700 G Street NW., Washington, DC 20006, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning (202) 435–7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as account numbers or social security numbers, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Krista Ayoub or Stephen Shin, Office of Regulations, at (202) 435–7700.

SUPPLEMENTARY INFORMATION:

I. Background

Congress enacted the Truth in Savings Act (TISA), 12 U.S.C. 4301 *et seq.*, based on findings that economic stability would be enhanced, competition between depository institutions would be improved, and consumers' ability to make informed decisions regarding deposit accounts would be strengthened if there was uniformity in the disclosure of interest rates and fees. The purpose of the act and regulation is to assist consumers in comparing deposit accounts offered by depository institutions, principally through the disclosure of fees, the annual percentage yield, the interest rate, and other account terms. Historically, TISA has been implemented in Regulation DD of the Board of Governors of the Federal Reserve System (Board), 12 CFR part 230, and, with respect to credit unions, by regulations of the National Credit Union Administration (NCUA), 12 CFR part 707. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) [1] amended a number of consumer financial protection laws, including TISA. In addition to various substantive amendments, the Dodd-Frank Act transferred the Board's rulemaking authority for TISA to the Bureau of Consumer Financial Protection (Bureau), effective July 21, 2011.[2] *See* sections 1061 and 1100B of the Dodd-Frank Act. Pursuant to the Dodd-Frank Act and TISA, as amended, the Bureau is publishing for public comment an interim final rule establishing a new Regulation DD (Truth in Savings), 12 CFR Part 1030, implementing TISA.

[1] Public Law 111–203, 124 Stat. 1376 (2010).

[2] Dodd-Frank section 1029 generally excludes from this transfer of authority, subject to certain exceptions, any rulemaking authority over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both. Further, Dodd-Frank section 1100B did not grant the Bureau TISA rulemaking authority over credit unions or repeal the NCUA's TISA rulemaking authority over credit unions under 12 U.S.C. 4311.

II. Summary of the Interim Final Rule

A. General

The interim final rule substantially duplicates the Board's Regulation DD as the Bureau's new Regulation DD, 12 CFR part 1030, making only certain non-substantive, technical, formatting, and stylistic changes. To minimize any potential confusion, the Bureau is preserving where possible past numbering systems by republishing regulations with Bureau part numbers that correspond to regulations in existence prior to the transfer of rulemaking authority. For example, while this interim final rule generally incorporates the Board's existing regulatory text, appendices (including model forms and clauses), and supplements, as amended,[3] the rule has been edited as necessary to reflect nomenclature and other technical amendments required by the Dodd-Frank Act. Notably, this interim final rule does not impose any new substantive obligations on regulated entities.

B. Specific Changes

In addition to the changes described above, the Bureau is making certain nomenclature and other non-substantive changes for clarity and consistency. For example, references to the Board and its administrative structure have been replaced with references to the Bureau. Conforming edits have been made to internal cross-references and addresses for filing applications and notices. In addition, edits to subheadings and numbering have been made for consistency and to fix typographical errors. Footnotes have been moved to the text of the regulation or commentary, as appropriate.

III. Legal Authority

A. Rulemaking Authority

The Bureau is issuing this interim final rule pursuant to its authority under TISA and the Dodd-Frank Act. Effective July 21, 2011, section 1061 of the Dodd-Frank Act transferred to the Bureau the "consumer financial protection functions" previously vested in certain other federal agencies. The term "consumer financial protection function" is defined to include "all authority to prescribe rules or issue

[3] *See* 76 FR 42020 (July 18, 2011).

ATTACHMENT B

Appendix C to Part 1030—Effect on State Laws

(a) Inconsistent Requirements

State law requirements that are inconsistent with the requirements of the act and this part are preempted to the extent of the inconsistency. A state law is inconsistent if it requires a depository institution to make disclosures or take actions that contradict the requirements of the federal law. A state law is also contradictory if it requires the use of the same term to represent a different amount or a different meaning than the federal law, requires the use of a term different from that required in the federal law to describe the same item, or permits a method of calculating interest on an account different from that required in the federal law.

(b) Preemption Determinations

A depository institution, state, or other interested party may request the Bureau to determine whether a state law requirement is inconsistent with the federal requirements. A request for a determination shall be in writing and addressed to the Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20006. Notice that the Bureau intends to make a determination (either on request or on its own motion) will be published in the **Federal Register**, with an opportunity for public comment unless the Bureau finds that notice and opportunity for comment would be impracticable, unnecessary, or contrary to the public interest and publishes its reasons for such decision. Notice of a final determination will be published in the **Federal Register** and furnished to the party who made the request and to the appropriate state official.

(c) Effect of Preemption Determinations

After the Bureau determines that a state law is inconsistent, a depository institution may not make disclosures using the inconsistent term or take actions relying on the inconsistent law.

(d) Reversal of Determination

The Bureau reserves the right to reverse a determination for any reason bearing on the coverage or effect of state or federal law. Notice of reversal of a determination will be published in the **Federal Register** and a copy furnished to the appropriate state official.

Appendix D to Part 1030—Issuance of Official Interpretations

Except in unusual circumstances, interpretations will not be issued separately but will be incorporated in an official commentary to this part, which will be amended periodically. No interpretations will be issued approving depository institutions' forms, statements, or calculation tools or methods.

Supplement I to Part 1030—Official Interpretations

Introduction

1. *Official status.* This commentary is the means by which the Bureau of Consumer Financial Protection issues official interpretations of Regulation DD.

Section 1030.1 Authority, purpose, coverage, and effect on state laws

(c) Coverage

1. *Foreign applicability.* Regulation DD applies to all depository institutions, except credit unions, that offer deposit accounts to residents (including resident aliens) of any state as defined in § 1030.2(r). Accounts held in an institution located in a state are covered, even if funds are transferred periodically to a location outside the United States. Accounts held in an institution located outside the United States are not covered, even if held by a U.S. resident.

2. *Persons who advertise accounts.* Persons who advertise accounts are subject to the advertising rules. For example, if a deposit broker places an advertisement offering consumers an interest in an account at a depository institution, the advertising rules apply to the advertisement, whether the account is to be held by the broker or directly by the consumer.

Section 1030.2—Definitions

(a) Account.

1. *Covered accounts.* Examples of accounts subject to the regulation are:

i. Interest-bearing and noninterest-bearing accounts.

ii. Deposit accounts opened as a condition of obtaining a credit card.

iii. Accounts denominated in a foreign currency.

iv. Individual retirement accounts (IRAs) and simplified employee pension (SEP) accounts.

v. Payable on death (POD) or "Totten trust" accounts.

2. *Other accounts.* Examples of accounts not subject to the regulation are:

i. Mortgage escrow accounts for collecting taxes and property insurance premiums.

ii. Accounts established to make periodic disbursements on construction loans.

iii. Trust accounts opened by a trustee pursuant to a formal written trust agreement (not merely declarations of trust on a signature card such as a "Totten trust," or an IRA and SEP account).

iv. Accounts opened by an executor in the name of a decedent's estate.

3. *Other investments.* The term "account" does not apply to all products of a depository institution. Examples of products not covered are:

i. Government securities.

ii. Mutual funds.

iii. Annuities.

iv. Securities or obligations of a depository institution.

v. Contractual arrangements such as repurchase agreements, interest rate swaps, and bankers acceptances.

(b) Advertisement.

1. *Covered messages.* Advertisements include commercial messages in visual, oral, or print media that invite, offer, or otherwise announce generally to prospective customers the availability of consumer accounts—such as:

i. Telephone solicitations.

ii. Messages on automated teller machine (ATM) screens.

iii. Messages on a computer screen in an institution's lobby (including any printout) other than a screen viewed solely by the institution's employee.

iv. Messages in a newspaper, magazine, or promotional flyer or on radio.

v. Messages that are provided along with information about the consumer's existing account and that promote another account at the institution.

2. *Other messages.* Examples of messages that are not advertisements are:

i. Rate sheets in a newspaper, periodical, or trade journal (unless the depository institution, or a deposit broker offering accounts at the institution, pays a fee for or otherwise controls publication).

ii. In-person discussions with consumers about the terms for a specific account.

iii. For purposes of § 1030.8(b) of this part through § 1030.8(e) of this part, information given to consumers about existing accounts, such as current rates recorded on a voice-response machine or notices for automatically renewable time account sent before renewal.

iv. Information about a particular transaction in an existing account.

v. Disclosures required by federal or other applicable law.

vi. A deposit account agreement.

(f) Bonus.

1. *Examples.* Bonuses include items of value, other than interest, offered as incentives to consumers, such as an offer to pay the final installment deposit for a holiday club account. Items that are not a bonus include discount coupons for goods or services at restaurants or stores.

2. *De minimis rule.* Items with a *de minimis* value of $10 or less are not bonuses. Institutions may rely on the valuation standard used by the Internal Revenue Service to determine if the value of the item is *de minimis*. Examples of items of *de minimis* value are:

i. Disability insurance premiums valued at an amount of $10 or less per year.

ii. Coffee mugs, T-shirts or other merchandise with a market value of $10 or less.

3. *Aggregation.* In determining if an item valued at $10 or less is a bonus, institutions must aggregate per account per calendar year items that may be given to consumers. In making this determination, institutions aggregate per account only the market value of items that may be given for a specific promotion. To illustrate, assume an institution offers in January to give consumers an item valued at $7 for each calendar quarter during the year that the average account balance in a negotiable order of withdrawal (NOW) account exceeds $10,000. The bonus rules are triggered, since consumers are eligible under the promotion to receive up to $28 during the year. However, the bonus rules are not triggered if an item valued at $7 is offered to consumers opening a NOW account during the month of January, even though in November the institution introduces a new promotion that includes, for example, an offer to existing NOW account holders for an item valued at $8 for maintaining an average balance of $5,000 for the month.

4. *Waiver or reduction of a fee or absorption of expenses.* Bonuses do not

ATTACHMENT C

I

107TH CONGRESS
1ST SESSION

H. R. 1057

To amend the Truth in Savings Act to enhance civil liability and other enforcement, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 15, 2001

Mr. LAFALCE (for himself, Mr. GUTIERREZ, Ms. LEE, Mrs. JONES of Ohio, Mr. CAPUANO, Mr. CLAY, Mr. HINCHEY, and Ms. SCHAKOWSKY) introduced the following bill; which was referred to the Committee on Financial Services

A BILL

To amend the Truth in Savings Act to enhance civil liability and other enforcement, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 **SECTION 1. SHORT TITLE.**
4 This Act may be cited as the "Truth in Savings En-
5 hancement Act of 2001".
6 **SEC. 2. IMPROVED ENFORCEMENT AUTHORITY.**
7 Section 270 of the Truth in Savings Act (12 U.S.C.
8 4309) is amended by adding at the end the following new
9 subsection:

1 "(d) STATE ACTION FOR VIOLATIONS.—
2 "(1) AUTHORITY OF THE STATES.—In addition
3 to such other remedies as are provided under State
4 law, if the attorney general of a State, or an officer
5 authorized by the State, has reason to believe that
6 any depository institution has violated or is violating
7 this subtitle, the State may—
8 "(A) bring an action on behalf of the resi-
9 dents of the State to enjoin such violation in
10 any appropriate United States district court or
11 in any other court of competent jurisdiction;
12 and
13 "(B) bring an action on behalf of the resi-
14 dents of the State to enforce compliance with
15 this subtitle, to obtain damages, restitution, or
16 other compensation on behalf of the residents of
17 such State, or to obtain such further and other
18 relief as the court may deem appropriate.
19 "(2) RIGHTS OF FEDERAL AGENCIES.—
20 "(A) NOTICE.—The State shall serve prior
21 written notice of any action commenced under
22 paragraph (1) with respect to any depository in-
23 stitution upon the Federal agency described in
24 subsection (a) with respect to such depository
25 institution and shall provide such agency with a

1 copy of the complaint unless such prior notice
2 is not feasible, in which case the State shall
3 serve such notice immediately upon instituting
4 such action.
5 "(B) INTERVENING ACTION.—Any agency
6 described in subsection (a) which receives a no-
7 tice from a State under subparagraph (A) with
8 respect to any action described in such subpara-
9 graph shall have the right—
10 "(i) to move to stay the action, pend-
11 ing the final disposition of a pending Fed-
12 eral matter as described in paragraph (4);
13 "(ii) to intervene in an action under
14 paragraph (1);
15 "(iii) upon so intervening, to be heard
16 on all matters arising therein;
17 "(iv) to remove the action to the ap-
18 propriate United States district court; and
19 "(v) to file petitions for appeal.
20 "(3) INVESTIGATORY POWERS.—For purposes
21 of bringing any action under this subsection, nothing
22 in this subsection shall prevent the attorney general,
23 or officers of such State who are authorized by such
24 State to bring such actions, from exercising the pow-
25 ers conferred on the attorney general or such offi-

1 cers by the laws of such State to conduct investiga-
2 tions or to administer oaths or affirmations or to
3 compel the attendance of witnesses or the production
4 of documentary and other evidence.
5 "(4) LIMITATION ON STATE ACTION WHILE
6 FEDERAL ACTION IS PENDING.—If any Federal
7 agency described in subsection (a) has instituted an
8 enforcement action for a violation of this subtitle, no
9 State may, during the pendency of such action,
10 bring an action under this subsection against any
11 depository institution named in the enforcement ac-
12 tion for any violation of this subtitle that is alleged
13 in that action.".

14 **SEC. 3. CIVIL LIABILITY PROVISIONS.**

15 (a) CIVIL LIABILITY PROVISION CONTINUED IN EF-
16 FECT.—
17 (1) IN GENERAL.—Subsection (a) of section
18 2604 of Public Law 104–208 (110 Stat. 3009—
19 470) is amended to read as follows:
20 "(a) [Repealed]".
21 (2) RULE OF CONSTRUCTION.—The enactment
22 of section 2604(a) of Public Law 104–208, as in ef-
23 fect prior to the repeal of such section by paragraph
24 (1) of this subsection) shall not be construed as af-
25 fecting the continued application of section 271 of

1 the Truth in Savings Act (12 U.S.C. 4310) after the
2 end of the 5-year period beginning on the date of the
3 enactment of Public Law 104–208.

4 (b) ADJUSTMENT OF CIVIL LIABILITY AMOUNTS FOR
5 INFLATION.—Paragraph (2) of section 271(a) of the
6 Truth in Savings Act (12 U.S.C. 4310(a)) is amended—

7 (1) in subparagraph (A)—

8 (A) by striking "$100" and inserting
9 "$200"; and

10 (B) by striking "$1,000" and inserting
11 "$5,000"; and

12 (2) in subparagraph (B)(ii), by striking "lesser
13 of $500,000 or 1 percent of the net worth of the de-
14 pository institution involved" and inserting "the
15 greater of—

16 "(I) the amount determined by
17 multiplying the maximum amount of
18 liability under subparagraph (A) for
19 such failure to comply in an individual
20 action by the number of members in
21 the certified class; or

22 "(II) the amount equal to 2 per-
23 cent of the net worth of the depository
24 institution.".

1 (c) STATUTE OF LIMITATIONS.—Subsection (f) of
2 section 271 of the Truth in Savings Act (12 U.S.C.
3 4310(e)) is amended by striking "within 1 year after the
4 date of the occurrence of the violation involved" and in-
5 serting "before the end of the 1-year period beginning on
6 the later of—

7 "(1) the date of the occurrence of the violation
8 involved; or

9 "(2) the date on which the customer first
10 learned, or reasonably should have learned, based on
11 all the facts and circumstances and information
12 available to the public, of the violation.".

13 (d) ACCESS TO COURT PROVISION.—Section 271 of
14 the Truth in Savings Act (12 U.S.C. 4310) is amended
15 by adding at the end the following new subsection:

16 "(j) AVAILABILITY OF STATUTORY REMEDIES.—

17 "(1) IN GENERAL.—No provision of any agree-
18 ment or contract between a consumer and any de-
19 pository institution, relating to a deposit account,
20 which requires binding arbitration or any other non-
21 judicial procedure to resolve any controversy or set-
22 tle any claim arising out of such contract or any
23 transaction covered by the contract, or the refusal to
24 perform the whole or any part of the transaction,
25 shall be enforceable to the extent that the construc-

1 tion or application of such provision with respect to
2 such controversy, claim, or refusal would deny the
3 consumer the right to bring any action under this
4 section or any other provision of this subtitle for any
5 liability of the depository institution to the consumer
6 under this subtitle.

7 "(2) RULE OF CONSTRUCTION.—Paragraph (1)
8 shall not be construed as creating any inference that
9 any provision of any contract or agreement described
10 in such paragraph could be construed so as to deny
11 any consumer the right to bring an action under this
12 subtitle absent this subsection.".

13 **SEC. 4. EFFECT ON STATE LAW.**

14 Section 273 of the Truth in Savings Act (12 U.S.C.
15 4312) is amended by adding at the end the following new
16 sentence: "The Board may not determine that any State
17 law is inconsistent with any provision of this subtitle if
18 the Board determines that the protection such State law
19 affords any consumer is greater than the protection pro-
20 vided by this subtitle.".

21 **SEC. 5. EFFECTIVE DATE.**

22 The amendments made by this Act to the Truth in
23 Savings Act shall take effect at the end of the 60-day pe-
24 riod beginning on the date of the enactment of this Act.

○

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.

I am over the age of 18 and not a party to the within action. My business address is: 811 Wilshire Blvd., Suite 1650, Los Angeles, California 90017-2666.

On May 14, 2012, I served the foregoing document described as **OPENING BRIEF ON THE MERITS OF PLAINTIFFS AND APPELLANTS HAROLD ROSE, ET AL.** on the interested parties in this action by placing [] the original [x] a true copy thereof enclosed in a sealed envelope addressed as follows:

Scott H. Jacobs, Esq.
REED SMITH LLP
355 South Grand Ave., Suite 2900
Los Angeles, CA 90071
Telephone: (213) 457-8000
Facsimile: (213) 457-8080
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Attorneys for Defendant
Bank of America, N.A.

Los Angeles Superior Court
The Honorable Jane L. Johnson
Department 308
600 So. Commonwealth Ave.
Los Angeles, CA 90005

California Second Appellate District
Division 2
300 S. Spring Street, 2nd Floor
Los Angeles, CA 90013

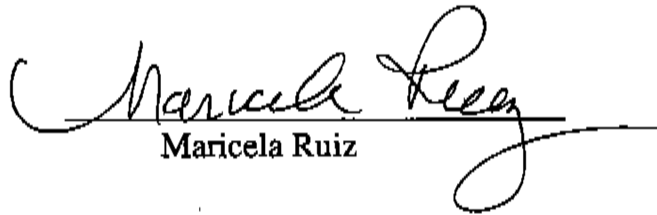
Los Angeles County
District Attorney's Office Hall of Records
320 West Temple St., 5th Fl., Room 540
Los Angeles, CA 90012
213/974-5911

Consumer Law Section of the
California Attorney General's Office
300 South Spring Street, Suite 1702
Los Angeles, California 90013
213/897-6027

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at

Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. Executed on May 14, 2012, at Los Angeles, California.



Maricela Ruiz