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William Brutocao on

A Guide to Federal Preemption of Business & Professions Code Section 17200

2009 Emerging Issues 4213

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It has become standard practice in business litigation to include a cause of action for violation of California Business & Professions Code § 17200, known as the Unfair Competition Law (UCL). The sweep of section 17200 is very broad:

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

1. The Unlawful Prong Can Be Based on Violation of Virtually Any Other Law

Cases interpreting the UCL have made clear that a violation of any¹ other law can be the predicate for a violation of the "unlawful" prong of the UCL.

As explained in *Saunders v. Superior Court*, [27 Cal.App.4th 832, 838-39](#), 33 Cal.Rptr.2d 438 (1994):

The "unlawful" practices prohibited by section 17200 are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made. ([People v. McKale \(1979\) 25 Cal.3d 626, 632, 159 Cal.Rptr. 811, 602 P.2d 731.](#)) It is not necessary that the predicate law provide for private civil enforcement. ([Samura v. Kaiser Foundation Health Plan, Inc. \(1993\) 17 Cal.App.4th 1284, 1299, 22 Cal.Rptr.2d 20.](#)) As our Supreme Court put it, section 17200 "borrows" violations of other laws and treats them as unlawful practices independently actionable

1. As will appear, there are a few statutes which cannot be the predicate for a UCL violation. A more accurate statement is: "[V]irtually any state, federal or local law can serve as the predicate for an action under [section 17200.](#)" *People ex rel. Bill Lockyer v. Fremont Life Ins. Co.*, [104 Cal.App.4th 508, 515](#), 128 Cal.Rptr.2d 463, 469 (2002) quoting *Podolsky v. First Healthcare Corp.*, [50 Cal.App.4th 632, 647](#), 58 Cal.Rptr.2d 89 (1996); emphasis added.

TOTAL SOLUTIONS

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LexisNexis® Emerging Issues Analysis

William Brutocao on

A Guide to Federal Preemption of Business & Professions Code Section 17200

under section 17200, et seq. ([Farmers Ins. Exchange v. Superior Court \(1992\) 2 Cal.4th 377, 383, 6 Cal.Rptr.2d 487, 826 P.2d 730.](#))

Examples of a violation of a criminal statute supporting a 17200 claim include *Viva! International Voice For Animals v. Adidas Promotional Retail Operations, Inc.*, [41 Cal. 4th 929](#), 63 Cal. Rptr. 3d 50 (2007) [Importation of shoes made from kangaroo leather in violation of Penal Code § 653o was predicate for UCL claim]; and *Stop Youth Addiction, Inc. v. Lucky Stores*, [17 Cal.4th 553](#), 71 Cal.Rptr.2d 731 (1998) [Selling cigarettes to minors in violation of Penal Code §308 was predicate for 17200 claim].

The claim under 17200 can be identical to the claim to be made pursuant to the predicate statute. For example, an unfair competition claim and trademark infringement can be based on the same set of facts. *Tveter v. AB Turn-O-Matic*, [633 F.2d 831](#) (9th Cir. 1980). It does not matter whether the underlying statute also provides for a private cause of action; section 17200 can form the basis for a private cause of action even if the predicate statute does not. *Chabner v. United of Omaha Life Ins. Co.*, [225 F.3d 1042, 1048 \(9th Cir. 2000\)](#).

The reasons why a plaintiff would bring the identical claim under 17200 as under the underlying statute are to get the benefit of a longer statute of limitations and potential additional remedies. The statute of limitations for a 17200 claim is four years. Bus. & Prof. Code § 17208. When a shorter statute of limitations under the predicate statute has expired, a claim can still be pursued under 17200. *Cortez v. Purolator Air Filtration Products Co.*, [23 Cal.4th 163, 178-79](#), 96 Cal.Rptr.2d 518, 529 (2000). Although a plaintiff may be procedurally barred from bringing a claim based on the underlying statute, the independent UCL claim nevertheless may proceed if the procedural requirements of the UCL are satisfied. *Tomlinson v. Indymac Bank, F.S.B.*, [359 F.Supp.2d 898, 900](#) (C.D. Cal. 2005).

The remedies under 17200 are cumulative. ([Bus. & Prof. Code § 17205; Manufacturers Life Ins. Co. v. Superior Court, 10 Cal.4th 257, 263, 41 Cal.Rptr.2d 220](#) (1995); [Stop Youth Addiction, 17 Cal.4th 553, at pp. 565, 567-573.](#))

Only equitable remedies are available under the UCL. As a consequence there is no right to jury trial. *Hodge v. Superior Court*, [145 Cal.App.4th 278](#), 51 Cal.Rptr.3d 519 (2006). The principal remedies are injunction and restitution. *Krause v. Trinity Management Services, Inc.*, [23 Cal.4th 116](#), 96 Cal.Rptr.2d 485 (2000). The restitution remedy,

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[Legal](#) [Academic](#) [Risk & Information Analytics](#) [Corporate & Professional](#) [Government](#)



LexisNexis® Emerging Issues Analysis

William Brutocao on

A Guide to Federal Preemption of Business & Professions Code Section 17200

however, may in some cases allow a plaintiff a monetary recovery that could be the same as damages under a different theory. [See *Cortez v. Purolator*, supra.](#)

2. Prop 64 Limited Standing

Prior to 2004, standing to sue under 17200 was very broad. A plaintiff did not have to establish that he or she was actually affected by the alleged unlawful practice. This led to abuses. It seemed that lawyers created plaintiffs to pursue 17200 claims as bounty hunters, and courts were powerless to stop them. ([See *Stop Youth Addiction*, supra at 559](#) ["only the sufficiency of the plaintiff's complaint, not the seemliness of its litigation strategy or its counsel's motives, is properly before us."])

As a backlash to such abuses, in 2004 the voters passed Proposition 64 to limit the standing for potential plaintiffs. Prior to the passage of Prop 64, anyone could sue in a representative capacity to attack practices that allegedly were unlawful. Now, only a person who has suffered "injury in fact" and "lost money or property" as a result of the allegedly wrongful conduct has standing to sue. Bus. & Prof. Code § 17204. To sue in a representative capacity the case must qualify as a class action. Bus & Prof Code § 17203. Many cases have been dismissed because the plaintiff could not satisfy the new requirements.²

Although standing has now been restricted, the broad sweep of the statute has not been changed. If the plaintiff can establish the required injury in fact³, he or she can still attack a broad array of practices as unlawful.

3. Defenses to 17200 Claims

There are a few related theories that the defense can argue to defeat a UCL claim. First, there can be no UCL claim if the conduct that is alleged to be unlawful is specifi-

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2. See *Animal Legal Defense Fund v. Mendes*, [160 Cal.App.4th 136](#), 72 Cal.Rptr.3d 553 (2008); *Medina v. Safe-Guard Products, Internat., Inc.*, [164 Cal.App.4th 105](#), 78 Cal.Rptr.3d 672 (2008); *Trujillo v. First American Registry, Inc.*, [157 Cal.App.4th 628](#), 68 Cal.Rptr.3d 732 (2007); *Peterson v. Cellco Partnership*, [164 Cal.App.4th 1583](#), 80 Cal.Rptr. 3d 316 (2008); *Hall v. Time, Inc.*, [158 Cal.App.4th 847](#), 70 Cal.Rptr.3d 466 (2008); *Buckland v. Threshold Enterprises, Ltd.*, [155 Cal.App.4th 798](#), 66 Cal.Rptr.3d 543 (2007).
 3. Cases have found standing based on relatively small, minor or intangible losses. See *Aron v. U-Haul Co. of California*, [143 Cal.App.4th 796](#), 49 Cal.Rptr.3d 555 (2006) (buying more gasoline than necessary to refuel rented trucks amounted to lost money or property.); *Lozano v. AT&T Wireless Servs.*, [504 F.3d 718](#) (9th Cir. 2007) (the lost property consisted of losing minutes included in a cellular telephone service plan); *Overstock.com, Inc. v. Gradient Analytics, Inc.*, [151 Cal.App.4th 688](#), 61 Cal.Rptr.3d 29 (2007) (lost money or property was diminution in value of assets and decline in market capitalization).

TOTAL SOLUTIONS

[Legal](#) [Academic](#) [Risk & Information Analytics](#) [Corporate & Professional](#) [Government](#)



LexisNexis® Emerging Issues Analysis

William Brutocao on

A Guide to Federal Preemption of Business & Professions Code Section 17200

cally permitted by law. For example, in *Shvartz v. Budget Group, Inc.*, [81 Cal.App.4th 1153](#), 97 Cal.Rptr.2d 722 (2000), the rental car industry's practice of allegedly charging unfairly high prices for refueling returned cars was held to be expressly permitted by Civil Code § 1936(m)(2) and so a 17200 claim challenging the practice could not proceed. (Compare *Schnall v. Hertz Corp.*, [78 Cal.App.4th 1144](#), 93 Cal.Rptr.2d 439 (2000) [the manner in which Hertz induces customers to incur the refueling charge can be attacked under the UCL as being deceptive.])

Similarly, in *Lazar v. Hertz Corp.*, [69 Cal.App.4th 1494](#), 82 Cal.Rptr.2d 368 (1999), plaintiff alleged that the practice of refusing to rent cars to persons under age 25 or charging higher rates for younger drivers constituted age discrimination under the Unruh Act and was therefore an unlawful practice. The UCL claim failed, however, because the Legislature specifically approved the practice of establishing a minimum age for drivers of rental cars in Civil Code § 1936. Another example is the case of *Community Assistance Recovery, Inc. v. Aegis Security Insurance Co.*, [92 Cal.App.4th 886](#), 112 Cal.Rptr.2d 304 (2001), in which the method of calculating insured property losses was challenged under the UCL. The court held that specific Insurance Code statutes (§§ 2070 and 2071) permit alternative methods for calculating such losses, so the UCL claim failed.

Second, there can be no claim under the UCL if the underlying law specifically bars a claim. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, [20 Cal.4th 163, 184](#), 83 Cal.Rptr.2d 548 (1999) ("We thus conclude that a plaintiff may not bring an action under the unfair competition law if some other provision bars it. That other provision must actually bar it, however, and not merely fail to allow it.")

An illustration is the case of *Safeco Ins. Co. v Superior Court*, [216 Cal.App.3d 1491](#), 265 Cal.Rptr. 585 (1990), holding that an alleged violation of Insurance Code §790.03(h) cannot be the predicate for a 17200 claim because that would circumvent the Supreme Court's holding in *Moradi-Shalal v. Fireman's Fund Insurance Companies.*, [46 Cal.3d 287](#), 250 Cal.Rptr. 116 (1988), which bars direct actions against insurers for such claims. In *Rubin v. Green*, [4 Cal.4th 1187](#), 17 Cal.Rptr.2d 828 (1993), the alleged unlawful practice was privileged under Civil Code §47, and defendants were therefore immune from tort liability. Plaintiffs could not avoid the bar of § 47 by recasting their claim as unfair competition under 17200. Similarly, in *People ex rel. Gallegos v. Pacific-Lumber, Co.*, [158 Cal.App.4th 950](#), 70 Cal.Rptr.3d 501 (2008), the state sued a lumber company under 17200 for allegedly submitting false information to an administrative agency in connection with an environmental impact determination under CEQA.

TOTAL SOLUTIONS

[Legal](#) [Academic](#) [Risk & Information Analytics](#) [Corporate & Professional](#) [Government](#)



LexisNexis® Emerging Issues Analysis

William Brutocao on

A Guide to Federal Preemption of Business & Professions Code Section 17200

The court held these communications were privileged and therefore the 17200 claim was barred.

Third, certain types of claims might simply not be cognizable under the UCL. In *Bowen v. Ziasun Technologies Inc.*, [116 Cal.App.4th 777](#), 11 Cal.Rptr.3d 522 (2004), the court held that alleged violations of the federal securities laws cannot be attacked under the UCL. This was not an issue of preemption, but rather the court held that 17200 is California's "little FTC Act" and since the federal FTC Act has been held not to apply to securities transactions, 17200 does not apply either. In *People for the Ethical Treatment of Animals, Inc. v. California Milk Producers Advisory Board*, [125 Cal.App.4th 871](#), 22 Cal.Rptr.3d 900 (2005), PETA alleged that the Board's "happy cows" campaign constituted false advertising. The court held the Board is not a "person" within the meaning of the UCL and therefore could not be sued under 17200.

These arguments arise occasionally, but because they depend on defendant's ability to point to a specific provision of law either permitting the defendant's conduct or specifically barring a claim based on that conduct, such defenses are infrequent.

4. Preemption of 17200

A much more common defense argument, which is somewhat related to the above arguments, is that the UCL claim is preempted by federal law. This issue arises frequently in 17200 cases, and will continue to do so, because the preemption issue is complex and yields differing results.

It can be difficult to predict whether a specific 17200 claim will be preempted. The California Supreme Court reversed itself on the issue with respect to claims against tobacco companies allegedly targeting minors with their advertising. In 1994, in *Mangini v. R.J. Reynolds Tobacco Co.*, [7 Cal.4th 1057](#), 31 Cal.Rptr.2d 358 (1994), the Supreme Court held that such a claim was not preempted by the Federal Cigarette Labeling and Advertising Act. Thirteen years later in *In re Tobacco Cases II*, [41 Cal.4th 1257](#), 63 Cal.Rptr.3d 418 (2007), the court overruled *Mangini* and held that such claims are preempted by that federal law.

Initially, it is necessary to identify what type of preemption is involved in a particular case. Preemption arises under the Supremacy Clause. Preemption is either express or implied. Implied preemption is either field preemption or conflict preemption. Conflict preemption is separately broken down into preemption based on impossibility to comply

TOTAL SOLUTIONS

[Legal](#) [Academic](#) [Risk & Information Analytics](#) [Corporate & Professional](#) [Government](#)



LexisNexis® Emerging Issues Analysis

William Brutocao on

A Guide to Federal Preemption of Business & Professions Code Section 17200

with both state and federal law, and obstacle preemption, i.e., the state law stands as an obstacle to the federal law.

In *Harris v. [Investor's Business Daily, Inc.](#)*, [138 Cal.App.4th 28, 33](#), 41 Cal.Rptr.3d 108 (2006), the court summarized the types of preemption:

The supremacy clause of the United States Constitution requires courts to find federal preemption of state law where it is clear that Congress, in exercising its constitutional power, intended to eclipse the historic police powers of the state. ([U.S. Const., art. VI, cl. 2](#); [Gibbons v. Ogden \(1824\) 22 U.S.\(9 Wheat\) 1, 9, 6 L.Ed. 23](#); [Crosby v. National Foreign Trade Council \(2000\) 530 U.S. 363, 372, 120 S.Ct. 2288, 147 L.Ed.2d 352.](#)) There are three generally recognized types of preemption. Express preemption occurs where Congress expressly defines the extent to which a federal provision preempts state law. (See [Crosby v. National Foreign Trade Council, supra, at p. 372, 120 S.Ct. 2288.](#)) Courts also find preemption when federal regulation of an area is so broad and pervasive that it appears Congress intended federal law to occupy the field. ([United States v. Locke \(2000\) 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d 69.](#)) Finally, conflict preemption occurs: (1) where it is impossible for a private party to comply with both a state and federal requirement, or (2) the state law stands as an obstacle to the accomplishment of the congressional objectives. ([Freightliner Corp. v. Myrick \(1995\) 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385.](#))

Preemption will not be found without a clear federal basis. There always exists an assumption that the historic police powers of the States were not to be superseded by federal law unless that was the clear and manifest purpose of Congress. *Watters v. Wachovia Bank, N.A.*, [550 U.S. 1, 32](#), 127 S.Ct. 1559, 1579 (2007).

(A) Preemption in Relation to Copyright, Patent and Trademark Cases

The starting point is whether Congress has spoken specifically to the issue. For example, Congress established exclusive federal court jurisdiction over patent and copyright claims:

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection,

TOTAL SOLUTIONS

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LexisNexis® Emerging Issues Analysis

William Brutocao on

A Guide to Federal Preemption of Business & Professions Code Section 17200

copyrights and trademarks. *Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.* [28 U.S.C § 1338\(a\)](#); emphasis added.

By stating that federal jurisdiction is exclusive in patent and copyright cases, but not trademark cases, Congress in effect has provided that state and federal courts have concurrent jurisdiction over trademark cases, and so where patent and copyright claims will be preempted, trademark claims are not.⁴

In *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, [489 U.S. 141](#), 109 S.Ct. 971 (1989), the Supreme Court held that state laws that attempt to provide patent-like protection are preempted. The sweep of patent preemption might be even broader. In *Holiday Matinee Inc. v. Rambus Inc.*, [118 Cal.App.4th 1413](#), 13 Cal.Rptr.3d 766 (2004), plaintiff sued for alleged antitrust and UCL violations with respect to the defendant's alleged conduct in a standard setting body to obtain standards that conformed to defendant's patents. The court held that these claims arise under the patent laws of the United States as to which exclusive jurisdiction is in the federal courts and affirmed the lower court's dismissal on demurrer.

An illustration of copyright preemption is found in the case of *Laws v. Sony Music Entm't Inc.*, [448 F.3d 1134](#) (9th Cir. 2006), where the Ninth Circuit held that certain types of claims under [California Civil Code § 3344](#) (wrongful appropriation of identity, likeness, etc.) will be preempted by the Copyright Act. There will not be preemption as long as the claims are qualitatively different from a copyright claim.

Because of the clear, express preemption of state law for claims that provide rights equivalent to copyright protection, a 17200 claim cannot be predicated on a violation of the Copyright Act. *Penpower Technology Ltd. v. S.P.C. Technology*, No. 07-3621 SC, 2008 WL 2468486, at *6 (N.D. Cal. June 17, 2008). Although a 17200 claim cannot be predicated on copyright or patent infringement, it can be predicated on trademark infringement. *Lanard Toys Ltd. v. Novelty Inc.*, [511 F.Supp.2d 1020](#) (C.D. Cal. 2007).

4. State and federal courts have concurrent jurisdiction over trademark infringement actions. *Duggan's Funeral Service, Inc. v. Duggan's Serra*, [80 Cal.App.4th 151, 157](#), 95 Cal.Rptr.2d 253, 257 (2000); *Shores v. Chip Steak Co.*, [130 Cal.App.2d 620, 625](#), 279 P.2d 591 (1955).

TOTAL SOLUTIONS

[Legal](#) [Academic](#) [Risk & Information Analytics](#) [Corporate & Professional](#) [Government](#)



William Brutocao on

A Guide to Federal Preemption of Business & Professions Code Section 17200

If one were to survey federal court filings, it would be very rare to see a 17200 claim included in a complaint for patent infringement or copyright infringement, and quite common in a trademark infringement case.

(B) Variations in Express Preemption Clauses

When Congress has enacted an explicit preemption clause, usually the scope of preemption is spelled out in that clause, *i.e.*, if not expressly preempted, the state law applies. The Supreme Court has stated "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted." *Cipollone v. Liggett Group, Inc.*, [505 U.S. 504, 517](#), 112 S.Ct. 2608 (1992). It is nonetheless possible that an argument could be made in a particular case that there is both express *and* implied preemption. It would be a rare case where that argument could succeed, but it is theoretically possible.⁵

Explicit preemption clauses vary. For example, in some cases Congress only preempts state law to the extent that the state law differs from the federal law. In such a situation, a state law claim can proceed in state court under the applicable state law, even though it is in all material respects identical to what the claim would be under federal law. This was the situation in *In re Farm Raised Salmon Cases*, [42 Cal.4th 1077](#), 72 Cal.Rptr.3d 112 (2008). The Nutrition Labeling and Education Act (NLEA) prohibits states from enacting any laws or regulations that are not identical to the requirements of the Federal Food Drug and Cosmetics Act (FDCA). Therefore, to the extent that state laws establish requirements that differ from the FDCA requirements, the state laws will be preempted. But state requirements that are identical to federal requirements are not preempted.

In other areas of law, Congress has done exactly the opposite and preempted any state laws that are equivalent to the federal law, but has not preempted state laws that provide rights which are different than the federal law. This is the type of preemption under the Copyright Act and the Visual Artists Rights Act of 1990 (VARA). [17 U.S.C. § 301](#). The VARA preemption clause illustrates the point:

5. See *In re Farm Raised Salmon Cases*, [42 Cal.4th 1077, 1092](#), 72 Cal.Rptr.3d 112, 123 (2008); internal quotations and citations omitted: "An express definition of the pre-emptive reach of a statute 'implies'- *i.e.*, supports a reasonable inference-that Congress did not intend to pre-empt other matters. While an express clause does not foreclose an inquiry into implied conflict preemption in all cases, deference should be paid to Congress's detailed attempt to clearly define the scope of preemption."

LexisNexis® Emerging Issues Analysis

William Brutocao on

A Guide to Federal Preemption of Business & Professions Code Section 17200

- (1) On or after the effective date . . . of [VARA], all legal or equitable rights that are equivalent to any of the rights conferred by [VARA] with respect to works of visual art to which the rights conferred by [VARA] apply are governed exclusively by [VARA]. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.
- (2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to –
 - a. any cause of action from undertakings commenced before the effective date of [VARA];
 - b. activities violating legal or equitable rights that are not equivalent to any of the rights conferred by [VARA] with respect to works of visual art; or
 - c. activities violating legal or equitable rights which extend beyond the life of the author.

[17 U.S.C. § 301\(f\)](#).

Thus, if a claim is made based on mutilation, etc., of a work of art that qualifies as a work of visual art to which VARA applies, VARA will preempt any state law that provides rights equivalent to VARA. But if the particular work of art does not qualify as a work of visual art to which VARA applies, then there is no preemption. The art at issue might not be covered by VARA for a variety of reasons: first, VARA does not apply to works created before its effective date (June 1, 1991) unless title to the works had not been transferred by the artist prior to that date. California law provides a cause of action for damage to qualifying artwork regardless of when it was created.⁶ Thus, claims under California law for preexisting works are not preempted by VARA. Second, any artwork that is a "work made for hire" under federal law is specifically excluded from the definition of a work of visual art. Thus, VARA does not apply to such a work, and other state laws applicable to such a work of art are not preempted by VARA.

6. [Cal. Civ. § 987\(j\)](#).

TOTAL SOLUTIONS

[Legal](#) [Academic](#) [Risk & Information Analytics](#) [Corporate & Professional](#) [Government](#)

LexisNexis® Emerging Issues Analysis

William Brutocao on

A Guide to Federal Preemption of Business & Professions Code Section 17200

Also, VARA does not preempt "post mortem" rights, i.e., the right to sue for damage to artwork by heirs of the artist after his or her death. California, for example, provides such post mortem rights⁷, and this part of the California law is plainly not preempted by VARA.

When considering preemption analysis under the Copyright Act or VARA, it is thus necessary to determine whether the state law claim provides equivalent rights to federal law. If so, the state law is preempted; otherwise, not. Under the Copyright Act, this is generally referred to as the "extra element" test. If the state law has an extra element, it is not preempted.⁸

(C) Preemption Related to Federally Chartered Financial Institutions

The issue of federal preemption of a 17200 claim arises frequently when the claim is asserted against a federally chartered financial institution. Frequently, the preemption argument is based on the National Bank Act (NBA) or the Home Owners Loan Act (HOLA). Generally, these cases proceed on a field preemption argument. That is to say, Congress arguably has preempted the field of regulating the lending practices of a federally chartered bank or other financial institution.

Depending on the nature of the claim asserted, a 17200 claim might or might not be preempted.

(1) UCL Claims Preempted By NBA, HOLA, or federal regulations. In *Rose v. Chase Bank USA, N.A.*, [513 F.3d 1032](#) (9th Cir. 2008), the alleged UCL violation was based on Civil Code 1748.9 regarding so-called "convenience checks" which are preprinted forms mailed to customers. The claim was preempted by the NBA and regulations.

In *In re Countrywide Financial Corp. Mortg. Marketing and Sales Practices Litigation*, [601 F.Supp.2d 1201](#) (S.D. Cal. 2009), the court held that certain claims related to advertising and alleged nondisclosure were preempted by the NBA and regulations.

In *Silvas v. E*Trade Mortg. Corp.*, [514 F.3d 1001](#) (9th Cir. 2008), a putative class action plaintiff alleged a violation of the UCL based on alleged failure by a federal savings and

7. Cal. Civ. § 987(g)(1).

8. *Altera Corp. v. Clear Logic, Inc.*, [424 F.3d 1079, 1089](#) (9th Cir. 2005).

TOTAL SOLUTIONS

[Legal](#) [Academic](#) [Risk & Information Analytics](#) [Corporate & Professional](#) [Government](#)



LexisNexis® Emerging Issues Analysis

William Brutocao on

A Guide to Federal Preemption of Business & Professions Code Section 17200

loan association to refund so-called "lock-in" fees, which by law are refundable under the federal Truth In Lending Act (TILA). The Court held these claims are preempted by HOLA and regulations thereunder because the claim pertains to loan fees and documents related thereto which are specifically governed by the regulations. Thus, an alleged violation of the TILA could not be the predicate for the UCL claim.

In *In re Washington Mutual Overdraft Protection Litigation*, [539 F.Supp.2d 1136](#) (C.D. Cal. 2008), the UCL claim challenged the "overdraft limit feature" of ATM and debit cards as violating laws having to do with the extension of credit, including the TILA. The Court ruled that ATM and debit cards are not credit cards, so there is no extension of credit. Therefore, the laws pertaining to the extension of credit do not apply, and the UCL claim was preempted. The court discussed field preemption by the regulations at length.

In *Augustine v. FIA Card Services, N.A.*, [485 F.Supp.2d 1172](#) (E.D. Cal. 2007), a challenge to the practice of retroactively increasing interest rates on credit cards was held preempted by the NBA and regulations, and a claim based on nondisclosure of the process used for retroactive rate increases was also preempted.

In *Lopez v. World Savings and Loan Assn.*, [105 Cal.App.4th 729](#), 130 Cal.Rptr.2d 42 (2003), the UCL claim challenged World's practice of charging a \$10 fee for transmission of a loan payoff statement by fax over and above the fee authorized by Civil Code § 2943. This claim was preempted by federal regulations.

In *Washington Mutual Bank v. Superior Court*, [95 Cal.App.4th 606](#), 115 Cal.Rptr.2d 765 (2002), a 17200 claim challenging the practice of charging interest on loans prior to closing of a real estate transaction was preempted by HOLA.

(2) 17200 Claim Not Preempted By HOLA or Regulations. In *Smith v. Wells Fargo Bank, N.A.*, [135 Cal.App.4th 1463](#), 38 Cal.Rptr.3d 653 (2006), the UCL claim was based on alleged nondisclosure of overdraft protection terms. This claim was not preempted by federal regulations. This is an example where the claim is based on nondisclosure, a form of misrepresentation, not a claim based on the lending function.

In *Hood v. Santa Barbara Bank & Trust*, [143 Cal.App.4th 526](#), 49 Cal.Rptr.3d 369 (2006), the UCL claim was based on the Bank's practices related to tax refund anticipation loans. The court held that the claim is not preempted by regulations promulgated by the Office of the Comptroller of the Currency.

TOTAL SOLUTIONS

[Legal](#) [Academic](#) [Risk & Information Analytics](#) [Corporate & Professional](#) [Government](#)



LexisNexis® Emerging Issues Analysis

William Brutocao on

A Guide to Federal Preemption of Business & Professions Code Section 17200

In *McKell v. Washington Mutual, Inc.*, [142 Cal.App.4th 1457](#), 49 Cal.Rptr.3d 227 (2006), the claim was based on alleged overcharging for underwriting, tax services and wire transfer fees in conjunction with home loans. The court held the claim is not preempted by the Real Estate Settlement Practices Act.

In *Hussey-Head v. World Sav. and Loan Ass'n*, [111 Cal.App.4th 773](#), 4 Cal.Rptr.3d 171 (2003), the UCL claim was based on the Bank's activities with respect to reports to credit reporting agencies. The court held the claim is not preempted by HOLA regulations.⁹

In *Gibson v. World Sav. and Loan Ass'n*, [103 Cal.App.4th 1291](#), 128 Cal.Rptr.2d 19 (2002), the UCL claim was based on the allegation that the lender obtained a borrower's required insurance at unreasonably high expense. The court held that this claim is not preempted.

In *Black v. Financial Freedom Senior Funding Corp.*, [92 Cal.App.4th 917](#), 112 Cal.Rptr.2d 445 (2001), the UCL claim was based on alleged deceptive practices regarding reverse mortgages offered to senior citizens. The court held this claim is not preempted by federal regulations.

In *Fenning v. Glenfed, Inc.*, [40 Cal.App.4th 1285](#), 47 Cal.Rptr.2d 715 (1995), the court held that a customer's claims against a securities broker based on alleged fraud and deceptive practices were not preempted by HOLA.

(3) 17200 Claim partly preempted by HOLA. Preemption depends on the nature of the claim. Thus, when the conduct alleged to violate the UCL pertains to the lending function, the claim will generally be preempted. When the conduct pertains to some other conduct, as for example, misrepresentations or false advertising, the claim generally will not be preempted.

This dichotomy is illustrated in the case of *Reyes v. Downey Savings & Loan Ass'n, F.A.*, [541 F.Supp.2d 1108](#) (C.D. Cal. 2008). The plaintiffs alleged a violation of the UCL because Downey promised borrowers a lower interest rate than actually delivered. This is basically a misrepresentation or false advertising claim. The court held that this claim was not preempted by HOLA because this claim does not pertain to lending activities.

9. In *Howard v. Blue Ridge Bank*, [371 F.Supp.2d 1139](#) (N.D. Cal. 2005), a similar claim was held preempted by the federal Fair Credit and Reporting Act.

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A Guide to Federal Preemption of Business & Professions Code Section 17200

On the other hand, a claim based on alleged violation of the federal Truth in Lending Act (TILA) was preempted.

D. Miscellaneous Cases Re Preemption of 17200

There are numerous federal laws which have been asserted as the basis to preempt a 17200 claim. Not surprisingly, sometimes the courts find the 17200 claim preempted, and sometimes not.

(1) Cases Holding the UCL Claim Preempted. In *Gentry v. eBay, Inc.*, [99 Cal.App.4th 816](#), 121 Cal.Rptr.2d 703 (2002), a claim against eBay based on allegations that auto-graphed sports memorabilia were being sold with forged certificates of authenticity was preempted by [47 U.S.C. § 230](#), which immunizes Internet service providers from claims attempting to equate them to publishers or other parties that otherwise might have liability in such a circumstance.

In *Flamingo Industries (USA) Ltd. v. U.S. Postal Service*, [302 F.3d 985](#) (9th Cir. 2002), a vendor to the Postal Service sued under 17200 on a theory that the Postal Service wrongly terminated its contract so that the Postal Service could obtain cheaper but inferior goods from Mexico. A federal antitrust claim was allowed to proceed but the 17200 claim was preempted. On certiorari, the Supreme Court reversed the holding as to antitrust. *U.S. Postal Service v. Flamingo Industries (USA) Ltd.*, [540 U.S. 736](#), 124 S.Ct. 1321 (2004).

In *Fitz-Gerald v. SkyWest Airlines, Inc.*, [155 Cal.App.4th 411](#), 65 Cal.Rptr.3d 913 (2007), claims by flight attendants under the UCL relating to unpaid wages, overtime and the like were preempted by the Railway Labor Act and the Airline Deregulation Act.

(2) Cases Holding the UCL Claim Not Preempted. In *Consumer Justice Center v. Olympian Labs, Inc.*, [99 Cal.App.4th 1056](#), 121 Cal.Rptr.2d 749 (2002), the court held that a claim of alleged deceptive advertising by distributors of over-the-counter dietary supplements was not preempted by the Federal Trade Commission Act or the Food, Drug and Cosmetic Act.

In *Harris v. Investor's Business Daily Inc.*, [138 Cal.App.4th 28](#), 41 Cal.Rptr.3d 108 (2006), a 17200 claim was not preempted by the Fair Labor Standards Act.

In *Viva! International Voice For Animals v. Adidas Promotional Retail Operations, Inc.*, [41 Cal. 4th 929](#), 63 Cal. Rptr. 3d 50 (2007), the UCL claim based on importation of

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A Guide to Federal Preemption of Business & Professions Code Section 17200

shoes made from kangaroo leather in violation of Penal Code § 6530 was not preempted by the Endangered Species Act.

Plaintiffs brought suit in *In re Farm Raised Salmon Cases*, [42 Cal.4th 1077](#), 72 Cal.Rptr.3d 112 (2008), asserting claims under §§17200 and 17500, among others, alleging that various grocery stores failed to disclose artificial coloring added to farmed salmon. The Supreme Court held these claims are not preempted by the Federal Food, Drug, and Cosmetic Act.

In *Takacs v. A.G. Edwards and Sons, Inc.*, [444 F.Supp.2d 1100](#) (S.D. Cal. 2006) the court held that a 17200 claim for overtime pay and related claims pertaining to employee benefits was not preempted by the Fair Labor Standards Act.

In *True v. American Honda Motor Co.*, [520 F.Supp.2d 1175](#) (C.D. Cal. 2007), the court held that claims under §§17200 and 17500 for allegedly misleading representations regarding the mileage and fuel efficiency of defendant's automobiles were not preempted by the Energy Policy and Conservation Act, [49 U.S.C. § 32901 et seq.](#)

Likewise, in *Paduano v. American Honda Motor Co.*, [169 Cal.App.4th 1453](#), 88 Cal.Rptr.3d 90 (2009), the court held that [49 U.S.C. § 32919\(a\)](#)(part of the Energy Policy and Conservation Act) did not preempt the plaintiff's UCL claim based on alleged deceptive advertising related to Honda's hybrid vehicles.

In *Roskind v. Morgan Stanley Dean Witter & Co.*, [80 Cal.App.4th 345](#), 95 Cal.Rptr.2d 258 (2000), the broker's practice of "trading ahead" for its own account was challenged by a customer who claimed losses on stock sales occasioned by the fact that the broker obtained a better price on its own account than the customer's account. The court held this claim is not preempted by federal law.

(3) Cases Holding Some Claims Preempted, Others Not. An example of the limited scope of preemption is *Ball v. GTE Mobilnet of California*, [81 Cal.App.4th 529](#), 96 Cal.Rptr.2d 801, which held that a UCL claim challenging the practice of "rounding up" cellular phone charges was preempted by [47 U.S.C. § 332\(c\)\(3\)\(A\)](#), which prohibits state regulation of rates charged by cellular telephone service providers. But other claims, based for example on alleged nondisclosure of the practice, are not preempted.

As noted above, in *Lanard Toys Ltd. v. Novelty, Inc.*, [511 F.Supp.2d 1020](#) (C.D. Cal. 2007), the court held that a claim for trade dress infringement under the Lanham Act

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William Brutocao on

A Guide to Federal Preemption of Business & Professions Code Section 17200

can be a predicate for a UCL claim, but a claim that is not qualitatively different from a copyright claim could not because it is preempted by the Copyright Act.

In *E. & J. Gallo Winery v. EnCana Corp.*, [503 F.3d 1027](#), (9th Cir. 2007), a complex case including antitrust and UCL claims alleging illegal practices in the setting of market-based rates for natural gas, in a lengthy opinion, the court explained that certain claims based on rates subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC) would be preempted under the Filed Rate Doctrine, but that claims based on rates not subject to FERC jurisdiction would not be preempted.

In *Day v. AT & T Corporation*, [63 Cal.App.4th 325](#), 74 Cal.Rptr.2d 55 (1998), the claim was based on alleged deceptive advertising practices about the rates to be charged for prepaid phone cards, particularly the failure to disclose that rates were "rounded up." The court held that the Filed Rate Doctrine does not preempt the claim with respect to the requested injunctive relief, but that the Filed Rate Doctrine foreclosed any monetary recovery.

Similarly, in *Solorzano v. Superior Court (Family Health Plan)*, [10 Cal.App.4th 1135](#), 13 Cal.Rptr.2d 161 (1992), senior citizens challenged alleged deceptive practices regarding HMO plans designed for Medicare recipients. The court held that regulations pertaining to Medicare-qualified HMO's did not preempt the claim for injunctive relief, but there would be no monetary recovery.

Conclusion

Business & Professions Code Section 17200 remains a potent weapon for a plaintiff challenging any type of business or advertising activity. The primary benefits of the statute are: (1) it allows a private party to sue for violation of a statute, regulation, ordinance or other law even when the underlying law does not provide for a private right of action; (2) it provides for a 4 year statute of limitations whereby a claim under a predicate statute can be made even if the underlying statute has a shorter statute of limitations; and (3) it provides remedies which might otherwise not be available.

There are a variety of different possible defenses to a 17200 claim. A common theme is that the 17200 claim might be preempted by federal law. There are numerous cases on the subject. It is hoped that this article can be a useful research tool for parties on both sides of the issue to help fashion their preemption arguments.

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