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Calif. Supreme Court Opens Up New Avenues For UCL

Law360, New York (August 13, 2013, 1:24 PM ET) -- In an opinion issued recently, the California Supreme Court interpreted the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq., to allow a UCL unlawfulness claim based on a "borrowed" federal law, even though Congress had repealed that law's private enforcement provision. Rose v. Bank of America NA, __ Cal. 4th __.

The court based its holding at least in part on the fact that the federal statute contained an express "savings clause," stating that state laws consistent with the federal law were not superseded.

Rose concerned a complaint brought under the UCL for a bank's alleged violations of disclosure requirements of the federal Truth in Savings Act, 12 U.S.C. § 4301 et seq. Originally, TISA included a provision authorizing private civil actions for damages, but that provision was repealed as of 2001.

The defendant bank in Rose argued that the repeal of the private enforcement provision meant that Congress intended to foreclose private suits. In accordance with prior California Supreme Court jurisprudence, the bank argued, a plaintiff could not "borrow" TISA as a basis for a UCL unlawfulness claim, because that would "plead around" Congress' decision to preclude a private action.

However, as the state's highest court explained, TISA contains a separate provision stating that TISA does "not supersede any provisions of the law of any state relating to [disclosure requirements such as those in TISA], except to the extent that those laws are inconsistent with the provisions of this subtitle, and then only to the extent of the inconsistency." 12 U.S.C. § 4312.

Because this provision survived the repeal of the private enforcement provision, the court held that it was evident that Congress, in fact, did not intend to foreclose private suits under state law that challenged the same practices made unlawful by TISA. A UCL claim based on requirements borrowed from TISA was not "inconsistent" with TISA for the purposes of the savings clause. (The court declined to opine on whether the issue concerned preemption, deeming it irrelevant to its analysis.)

The court rejected the argument that the UCL could not borrow directly from a federal law that Congress had decided could not be enforced by private parties. The court concluded that the argument elevated form over substance, because the UCL suit was not to "enforce" TISA but rather to remedy unfair competition.

Similar to the UCL claim based on a borrowed penal code statute that the court allowed in Stop Youth Addiction Inc. v. Lucky Stores Inc., 17 Cal. 4th 553 (1998), a UCL claim based on TISA does not enforce violations of the borrowed law, but rather only uses the borrowed law to define conduct that constitutes "unlawful" competition under the UCL. Thus, the court said, "we have made it clear that by borrowing requirements from other statutes, the UCL does not serve as a mere enforcement mechanism" for the borrowed laws. Rose at *3.

Because the plaintiffs were not seeking to enforce or recover damages under TISA, but only to obtain equitable remedies under the UCL for conduct made unlawful by TISA, their suit was fully consistent with TISA — especially since "Congress expressly left the door open for the operation of state laws that hold banks to standards equivalent to those of TISA." Rose at *3.

The court also rejected a comparison to actions under the federal civil rights statute, 42 U.S.C. § 1983, which likewise are grounded in violations of other laws, and which are precluded where Congress' actions indicate an intent to prohibit private suits. Here, because of TISA's express "preservation of state law alternatives," there was no suggestion that TISA's enforcement provisions are exclusive. Rose at *4.

In addition, the UCL provides remedies that are cumulative to those provided by other law, and the plaintiffs sought only equitable remedies allowed by the UCL. It was unnecessary for the court to consider whether a state-law suit for damages would be consistent with TISA and Congress' repeal of the damages provision, because the plaintiffs did not seek — and the UCL does not provide — damages.

While the Rose opinion repeatedly references TISA's savings clause as evidence that Congress did not intend to preclude state-law suits based on violations of TISA, the opinion is silent as to whether and how its analysis might have differed had TISA not contained that express preservation of state-law suits.

Thus, while Rose appears to sweep broadly by opening up new avenues for creative uses of the UCL, its reach in fact may be narrow. By its terms, Rose should be limited to allowing UCL claims based only on borrowed federal laws where there is indication that Congress precluded, at least to some extent, private enforcement and also included a clause in the statute that expressly protects consistent state laws.

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