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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

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| HARRY GIBSON et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>WORLD SAVINGS AND LOAN ASSOCIATION,<br><br>Defendant and Respondent. | E029823<br><br>(Super.Ct.No. 762321)<br><br>O P I N I O N |

APPEAL from the Superior Court of Orange County. William F. McDonald, Judge. Reversed.

Blumenthal Ostroff & Markham, Norman B. Blumenthal, David R. Markham, Sheldon A. Ostroff and Barron E. Ramos; Chavez & Gertler and Mark Chavez for Plaintiffs and Appellants.

Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General, Herschel T. Elkins, Senior Assistant Attorney General, Ronald A. Reiter,

Supervising Deputy Attorney General, and Michele R. Van Gelderen, Deputy Attorney General as Amicus Curiae on behalf of Plaintiffs and Appellants.

World Savings & Loan Association and Joseph A. Wynne; Steefel, Levitt & Weiss, Barry W. Lee, Anthony J. Justmanm, Jacqueline H. Sung and James W. Colbert III, for Defendant and Respondent.

Stroock & Stroock & Lavan, Julia B. Strickland, Lisa M. Simonetti and Andrew W. Moritz for Western League of Savings Institutions as Amicus Curiae on behalf of Defendant and Respondent.

Carolyn J. Buck, Chief Counsel, Thomas J. Segal, Deputy Chief Counsel and Paul K. Hutson, Senior Attorney, for The Office of Thrift Supervision as Amicus Curiae on behalf of Defendant and Respondent.

In a class action accusing a federally chartered savings association of committing unfair business practices, the trial court found that federal law preempts the plaintiffs' claim and entered judgment in favor of the defendant. The plaintiffs appeal. Finding that the trial court's belief that the action was preempted was mistaken and that the defendant has not demonstrated any other ground on which to affirm the judgment, we reverse.

## FACTUAL AND PROCEDURAL BACKGROUND

In April of 1996, Harry Gibson and Joyce A. Gibson, on behalf of themselves and all other persons similarly situated, sued World Savings and Loan Association. In substance, the complaint alleges: that the potential class members are borrowers under secured loans made or serviced by World; that those borrowers failed to maintain hazard insurance on the real property securing the loans; that although it was entitled to simply reinstate the borrowers' insurance policies, World purchased replacement hazard insurance ("forced order insurance" or "FOI") from an insurer of its own choice; that those FOI policies were much more expensive than the borrowers' policies; that World benefited financially from purchasing the more expensive policies; and that by charging the borrowers for the full price of the FOI policies, World violated the terms of the borrowers' deeds of trust, which authorized World to advance funds on behalf of the borrowers only to the extent necessary to protect World's rights. On the basis of those allegations, the complaint prays for relief on the theories of breach of contract, breach of the implied covenant of good faith and fair dealing, unfair business practices, conversion, unjust enrichment, and declaratory relief.

In August of 1999, the plaintiffs dismissed all claims except that for injunctive relief and restitution under the unfair competition law (Business and Professions Code section 17200, et seq.; "UCL") for World's allegedly unfair business practices. Thereafter, the plaintiffs abandoned their claim for injunctive relief. Accordingly, the issues presented by plaintiffs at trial were whether World's FOI charges violated the UCL and, if so, the amount of the restitution to be ordered. By that time, the plaintiffs had abandoned any

challenge to World's decision to buy FOI policies rather than to reinstate the plaintiffs' less expensive policies. Instead, they argued that the amounts World charged to the plaintiffs for FOI were too high because they included the cost both of replacement hazard insurance and of administrative services provided to World by the FOI insurer. They also argued that World had falsely represented that the FOI premiums charged to the plaintiffs were equal to the real cost of that insurance to World. In response, World contended that the plaintiffs' contentions are preempted by federal law, that the plaintiffs' challenge to FOI premiums can only be resolved by the California Department of Insurance ("CDI"), that its practices are not unfair or deceptive, and that restitution is not a proper remedy.

The trial court found that World is a federally chartered savings association and that it purchases FOI from Balboa Insurance Company. The premium charged to World by Balboa includes, not only the cost of the replacement hazard insurance, but also the administrative costs associated with tracking hazard insurance coverage. Moreover, the defaulting borrowers were not charged merely for those tracking services relating to their particular loans. Instead, the premiums compensated Balboa for tracking World's entire loan portfolio, including loans to which the FOI program could not apply.

The trial court concluded, however, that the plaintiffs' challenge to World's practice of charging its defaulting borrowers for the entire bundle of services provided to it by Balboa is preempted by federal law. Were it not preempted from doing so, the court said, it would have found that, by charging its defaulting borrowers an insurance premium that includes unrelated tracking costs that benefit only World, World had violated the terms of the plaintiffs' deeds of trust and had engaged in unfair business practices under Business and Professions Code section 17200.

In accordance with its finding of preemption, the trial court entered judgment in favor of World. The plaintiffs appeal.

contentions

The plaintiffs and an amicus curiae on their behalf, the California Attorney General, contend that the trial court erred in concluding that the plaintiffs' challenge to World's FOI practices is preempted by federal law. World and an amicus curiae in support of its position, the federal Office of Thrift Supervision, dispute that contention. In addition, World and a second amicus curiae on its behalf, the Western League of Savings Institutions ("League"), contend that, not only is the action preempted, but even if it were not, judgment

in its favor would still be required. In particular, they argue that the judgment should be affirmed because: the plaintiffs' claim is within the primary jurisdiction of the California Department of Insurance ("CDI"); the matter is within the exclusive jurisdiction of the Insurance Commissioner; the claim is barred by the "filed rate" doctrine; the plaintiffs are improperly seeking damages rather than restitution; World's FOI practices are not unfair; and the enforcement of the claim would constitute improper microeconomic regulation of business.

analysis

A. the plaintiffs' claims are not federally preempted.

1. The Law of Federal Preemption in General

The federal Constitution directs that "the Laws of the United States . . . shall be the supreme Law of the Land . . . ; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. Const., art. VI, cl. 2.) State laws can be contrary to, and thus preempted by, federal law "in either of two general ways. [1] If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. [Citations.] [2] If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, [citations], or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." (Silkwood v. Kerr-McGee Corp. (1984) 464 U.S. 238, 248 [104 S.Ct. 615].)

"'It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so.'" (New York State Dept. of Social Services v. Dublino (1973) 413 U.S. 405, 413 [93 S.Ct. 2507], quoting Schwartz v. Texas (1952) 344 U.S. 199, 202-203 [73 S.Ct. 232, 235].) Accordingly, "[w]hether federal law preempts state law is fundamentally a question whether Congress has intended such a result." (Peatros v. Bank of America (2000) 22 Cal.4th 147, 157.) Congressional intent to preempt may be either express or implied, i.e., either "'explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" (Fidelity Federal Sav. & Loan Assn. v. De La Cuesta (1982) 458 U.S. 141, 152-153 [102 S.Ct. 3014, 3022].) However, courts are "generally reluctant to infer preemption . . . ." (Exxon Corp. v. Governor of Maryland (1978) 437 U.S. 117, 132 [98 S.Ct. 2207, 2217].)

Preemption may result, not only from action taken by Congress itself, but also from action by a federal agency. (Louisiana Public Service Com'n v. F.C.C. (1986) 476 U.S. 355, 369 [106 S.Ct. 1890, 1898-1899].) A regulation's preemptive effect "does not depend on express congressional authorization to displace state law." (Fidelity Federal Sav. & Loan Assn. v. De La Cuesta, supra, 458 U.S. at p. 154.) Instead, the determinative issues are whether (1) the agency intended its regulation to have a preemptive effect and (2) the agency acted within the scope of its congressionally delegated authority by issuing the preemptive regulation. (Ibid.) So long as those conditions are met, "[f]ederal regulations have no less pre-emptive effect than federal statutes." (Id., p. 153.)

"'[T]he construction of statutes and the ascertainment of legislative intent are purely questions of law.'" (Bravo Vending v. City of Rancho Mirage (1993) 16 Cal.App.4th 383, 391, quoting Burnsed v. State Bd. of Control (1987) 189 Cal.App.3d 213, 218, fn. 3.) The same is true for the interpretation of administrative regulations. (Home Depot, U.S.A., Inc. v. Contractors' State License Bd. (1996) 41 Cal.App.4th 1592, 1599.) Accordingly, we determine the preemptive effect of either statutes or regulations independently (ibid.), without deferring to the trial court's conclusion or limiting ourselves to the evidence of intent considered by the trial court (Bravo Vending, pp. 391-392).

2. The HOLA, the OTS, and its Regulations

Federally chartered savings associations are regulated by the Home Owners' Loan Act ("HOLA"), codified in title 12 of the United States Code, beginning with section
1461. As amended, the HOLA creates the Office of Thrift Supervision ("OTS") (12 U.S.C. § 1462a(a)) and authorizes its director to issue regulations prescribing the operation of federal savings associations according to the "best practices of thrift institutions in the United States" (id., § 1464(a)(2)).

Pursuant to that authority, the predecessor to the OTS promulgated 12 Code of Federal Regulations section 545.2 ("section 545.2"), which provides: "The regulations of this Part 545 are promulgated pursuant to the plenary and exclusive authority of the [OTS] to regulate all aspects of the operations of Federal savings associations, as set forth in section 5(a) of the [HOLA]. This exercise of the [OTS's] authority is preemptive of any state law purporting to address the subject of the operations of a Federal savings association."

In 1996, the OTS issued 12 Code of Federal Regulations section 560.2 ("section 560.2") to address preemption specifically in the context of lending

operations. (61 Fed.Reg. 50952 (Sept. 30, 1996).) Section 560.2 states that the "OTS hereby occupies the entire field of lending regulation for federal savings associations," thereby permitting federal savings associations to extend credit "without regard to state laws purporting to regulate or otherwise affect their credit activities, except to the extent provided in paragraph (c) of this section . . . ." (§ 560.2(a).) It illustrates the scope of the preemption by listing various examples of the types of "requirements" that are within the field of exclusive regulation (§ 560.2(b)) and then specifying the types of laws that are outside that field (§ 560.2(c)).[1]

3. Unfair Competition Law Claims Are Not Preempted by Section 545.2.

It is well established in California that claims for relief under the UCL and related state laws are not preempted by section 545.2.

For instance, in Fenning v. Glenfed, Inc. (1995) 40 Cal.App.4th 1285, the plaintiff alleged that a federal savings association had engaged in deceptive business practices and sought relief for violation of the UCL, fraud, and negligent misrepresentation. (Id., p. 1289.) The court rejected the savings association's assertion that the plaintiffs' claims were preempted by section 545.2, explaining that "the Bank's argument that, by permitting fraud and unfair trade practices suits, the state is regulating the Bank's conduct, is off the mark. Plaintiffs' ability to sue the Bank for fraud does not interfere with what the Bank may do, that is, how it may conduct its operations; it simply insists that the Bank cannot misrepresent how it operates, or employ fraudulent methods in its operations. Put another way, the state cannot dictate to the Bank how it can or cannot operate, but it can insist that, however the Banks chooses to operate, it do so free from fraud and other deceptive business practices." (Fenning, p. 1299, fn. omitted.)

Similarly, in People ex rel. Sepulveda v. Highland Fed. Savings & Loan (1993) 14 Cal.App.4th 1692, the plaintiffs accused a lender of operating apartments that did not comply with habitability laws (id., p. 1700) and sought relief under a variety of theories, including UCL, fraud, and breach of warranty (id., pp. 1701-1702, fn. 4). The court found that neither the HOLA nor the OTS's regulations expressly preempted the actions under either the state common law or the statutory action for unfair business practices. (Id., p. 1708.) Nor were they impliedly preempted, because their effect on the operations of the savings association was incidental rather than direct. (Id., p. 1711; and see Siegel v. American Savings & Loan Assn. (1989) 210 Cal.App.3d 953, 958-964 [rejecting both express and implied preemption of UCL and numerous common-law claims].)

4. The Plaintiffs' UCL Claims Are Not Preempted by Section 560.2.

The plaintiffs contend that, just as section 545.2 did not preempt the UCL actions described above, the preemption defined by section 560.2 does not extend to their action to recover restitution under the UCL for unfair or deceptive business practices. The Attorney General of California supports that contention as an amicus curiae. It is disputed by World and the OTS, appearing as an amicus curiae on behalf of World.

Before beginning our exploration of their respective arguments, we make two preliminary observations.

First, as with any other issue arising under the Supremacy Clause of the United States Constitution, our analysis "'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" (Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504, 516 [120 L.Ed.2d 407], quoting Rice v. Santa Fe Elevator Corp. (1947) 331 U.S. 218, 230 [91 L.Ed.2d 1447].) The states' historic police powers include the regulation of consumer protection in general and of the banking and insurance industries in particular. (Smily v. Citibank (1995) 11 Cal.4th 138, 148; 20th Century Ins. Co. v. Garamendi (1994) 8 Cal.4th 216, 240.) Therefore, there is "strong presumption" (Cipollone, p. 523) that section 560.2 does not preempt the claims brought in this action. To overcome that presumption against preemption, World bears the burden of establishing that the claims are preempted. (Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 937.)

Second, no issue of implied preemption is before us. When Congress adopts legislation that includes a provision expressly addressing the issue of preemption, there is no need to infer congressional intent. (Cipollone v. Liggett Group, Inc., supra, 505 U.S. at p. 517.) "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." (Ibid.) The same reasoning applies here, where the express statement of preemptive intent is included in an administrative regulation rather than a statute. The question, therefore, is whether the scope of the express preemption extends to the claims at issue here.

a. No Preemption under Cipollone v. Liggett Group, Inc.

The method by which the scope of preemption is determined was explained by the United States Supreme Court when it decided the preemptive effect of the Federal Cigarette Labeling and Advertising Act. (Cipollone v. Liggett

Group, Inc., supra, 505 U.S. at p. 523.) Since then, the same method has been applied by California courts both in that context (Mangini v. R. J. Reynolds Tobacco Co. (1994) 7 Cal.4th 1057, 1066-1067) and in others (see, e.g., Etcheverry v. Tri-Ag Service, Inc. (2000) 22 Cal.4th 316, 335 [Federal Insecticide, Fungicide, and Rodenticide Act]). We '"must fairly but -- in light of the strong presumption against pre-emption -- narrowly construe the precise language of [the preemptive statute or regulation] and we must look to each of [the plaintiffs' state] law claims to determine whether it is in fact pre-empted.'" (Mangini, pp. 1066-1067, quoting Cipollone, pp. 523-524.) As to each state law claim, the central inquiry is whether the legal duty that is the predicate of the claims constitutes a requirement or prohibition of the sort that federal law expressly preempts. (Cipollone, p. 524; Etcheverry, p. 335; Mangini, p. 1067.)

The plaintiffs claim that World's FOI practice was an unfair business practice because the premium charged by World to the borrower was higher than the cost of that insurance to World, in violation of the terms of the deeds of trust between the plaintiffs and World, which entitled World to advance only such sums as were "necessary" to protect its security. They also claim that the practice was a fraudulent business practice because World misrepresented the cost of the replacement hazard insurance. The trial court found both claims to be true.

Those claims are predicated on the duties of a contracting party to comply with its contractual obligations and to act reasonably to mitigate its damages in the event of a breach by the other party, on the duty not to misrepresent material facts, and on the duty to refrain from unfair or deceptive business practices.

Those predicate duties are not requirements or prohibitions of the sort that section 560.2 preempts. That section preempts (1) state laws that (2) either purport to regulate federal savings associations or otherwise materially affect their credit activities. The predicate duties underlying the plaintiffs' claims do not meet that description.

The plaintiffs' principal complaint concerns the violation of contractual duties. Contractual duties are voluntarily undertaken by the parties to the contract, not imposed by state law. (Cipollone v. Liggett Group, Inc., supra, 505 U.S. at p 526.) A stated intent to preempt requirements or prohibitions imposed by state law does not reasonably extend to those voluntarily assumed in a contract.

Moreover, none of the predicate duties are directed toward federal savings associations. Instead, the duties on which the plaintiffs' claims are predicated govern, not simply the lending business, but anyone engaged in any business and anyone contracting with anyone else. On their face, they do not purport to regulate federal savings associations and are not specifically directed toward them. Nor is there any evidence that they were designed to regulate federal savings associations more than any other type of business, or that in practice they have a disproportionate impact on lending institutions. Any effect they have on the lending activities of a federal savings association is incidental rather than material.

Accordingly, the plaintiffs' claims are not preempted by section 560.2. The trial court erred in concluding otherwise.[2]

b. No Preemption under the OTS's Formula.

Our conclusion is the same if we employ an analysis suggested by the OTS rather than that prescribed by the United States Supreme Court. At the time it promulgated section 560.2, the OTS explained the manner in which it intended that section to be applied when determining whether a particular provision of state law is preempted: "[T]he first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c). For these purposes, paragraph (c) is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption." (61 Fed.Reg. 50966-50967 (Sept. 30, 1996).)

Even were we to ignore the contractual nature of the principal obligation that the plaintiffs seek to enforce, applying this three-step formula to the plaintiffs' claims shows that they are not preempted.

First, the types of laws that the plaintiffs seek to enforce are not listed in subdivision (b) of section 560.2. The plaintiffs seek to enforce a general proscription of unfair business practices. More specifically, the plaintiffs rely upon legal principles regarding the need to comply with contracts and the requirement to refrain from deceptive conduct. Although World is alleged to have violated those laws in the context of lending relationships with the plaintiffs, in the abstract the laws themselves do not relate to any of the subjects listed in subdivision (b).

Moving to the second step, the laws do affect lending businesses, just as they affect any other business that enters into contracts or makes representations during the course of its operations. Therefore, under the OTS's interpretation of the regulation, a presumption of preemption arises.

However, that presumption is rebutted if the laws at issue are general contract and commercial laws that only incidentally affect lending operations. In determining whether the effect of those laws is more than incidental, we are guided by OTS's own explanation of the intended scope of its regulatory preemption. At the time section 560.2 was issued, OTS stated that "the purpose of paragraph (c) is to preserve the traditional infrastructure of basic state laws that undergird commercial transactions . . . ." (61 Fed.Reg. 50966 (Sept. 30, 1996).) Accordingly, section 560.2 does not "preempt basic state laws such as state uniform commercial codes and state laws governing real property, contracts, torts, and crimes." (Ibid.) The limitation that the effect of those laws on lending cannot be more than incidental is intended to catch "state laws that may be designed to look like traditional property, contract, tort, or commercial laws, but in reality are aimed at other objectives, such as regulating the relationship between lenders and borrowers, protecting the safety and soundness of lenders, or pursuing other state policy objectives." (Ibid.)

The duties to comply with contracts and the laws governing them and to refrain from misrepresentation, together with the more general provisions of the UCL, are principles of general application. They are not designed to regulate lending and do not have a disproportionate or otherwise substantial effect on lending. To the contrary, they are part of the legal infrastructure that undergird all contractual and commercial transactions. Therefore, their effect is incidental and they are not preempted.

c. World's Authorities Do Not Support Preemption in this Instance.

In resisting our conclusion that the plaintiffs' claims are not preempted by section 560.2, World notes that courts in California and two other states have found particular unfair competition claims to be preempted. But those claims are materially different from the ones before us.

For instance, the California case -- Washington Mutual Bank v. Superior Court (2002) 95 Cal.App.4th 606 -- involves a UCL claim premised on a practice of charging pre-closing interest in a manner that allegedly violates Civil Code section 2948.5. (Id., p. 610.) The Second District held that the claim was preempted by section 560.2(b)(4) because interest is a term of credit. (Id., p. 621.) That holding has no application here, however, because

the predicate duty that those borrowers were suing to enforce -- to comply with the statutory limits on the accrual of interest -- was precisely the type of state-law "requirement" that is specifically preempted by section 560.2, i.e., one that is specifically intended to regulate lending. It bears no similarity to the claims here, which seek to enforce contract and commercial laws of general application.

Similarly, in Chaires v. Chevy Chase Bank (2000) 131 Md.App. 64 [748 A.2d 34], borrowers alleged that a federal savings association had committed unfair and deceptive business practices by charging loan fees that were excessive under Maryland's Secondary Mortgage Loan-Credit Provisions Law. (748 A.2d at pp. 36-37.) The Court of Special Appeals of Maryland correctly held that those claims were preempted by section 560.2(b)(5), concerning initial charges and other loan-related fees, and by section 560.2(b)(4), regarding terms of credit. (Id., pp. 42-47.) But as in Washington Mutual Bank v. Superior Court, supra, those borrowers were seeking to enforce a predicate duty that relates solely to lending, not to business activities generally. Accordingly, it falls squarely within the type of state-law "requirement" that is specifically preempted by section 560.2.

In the third example, Albank, FSB v. Foland (1998) 177 Misc.2d 569 [676 N.Y.S.2d 461], the borrower claimed that a bank had violated New York's Personal Property Law regarding the disclosures that must be made as part of an open-ended credit agreement. (676 N.Y.S.2d at p. 463.) A New York trial court found that the statutory regulations were preempted. (Id., pp. 463-464.) The predicate duty at issue there -- to make the disclosures prescribed by New York statutes -- is specifically preempted by section 560.2(b)(9), which refers to state-law requirements regarding "[d]isclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit- related documents . . . ."

Here, by contrast, the plaintiffs claim that statements made were improper, not because they violated statutory restrictions regarding lending activities or because they were otherwise insufficient, but because they were false. The general duty to refrain from making affirmative misrepresentations is not one of the requirements or prohibitions preempted by section 560.2, any more than it is by section 545.2. Therefore, what was true in Fenning v. Glenfed, Inc., supra, is true here: State law "cannot dictate to the Bank how it can or cannot operate, but it can insist that, however the Bank chooses to operate, it do so free from fraud and other deceptive business practices." (40 Cal.App.4th at p. 1299.)

World also relies upon an opinion letter issued by the OTS. In 1999, the General Counsel of the OTS rendered an opinion as to whether particular claims under the UCL were preempted by section 560.2. (Off. of Thrift Supervision, general counsel opn. March 10, 1999, Fed. Bank. L. Rep. (CCH) ¶ 83-301, pp. 94,201 - 94,209; "OTS Opinion.") Among the claims considered was a complaint "alleging that during the course of force placing hazard insurance on behalf of its borrowers, as a result of the borrowers' failure to pay the insurance premiums under their existing policies, Association A did not mitigate avoidable costs that were then passed on to the borrowers. Specifically, the complaint alleges that when the borrowers' hazard insurance coverages expired, Association A force placed alternative coverage from a different insurance company at a higher cost than the cost of the lapsed policy. The plaintiffs contend that Association A had an obligation to mitigate avoidable losses by maintaining the same policy in effect with the same insurance carrier at the same price (or even less). The plaintiffs allege that Association A's procedures for force placing hazard insurance constitute an 'unfair business practice' in violation of § 17203 of the [UCL]." (Id., pp. 94,204 - 94,205, fns. omitted.)

Noting that section 560.2(b)(2) preempts state laws regarding the ability of a federal savings association to require insurance for its collateral, the OTS stated that the **forced-placed** insurance claim described in the opinion was preempted, reasoning that "lending practices designed to protect the collateral that serves as security for a loan are an integral part of a federal savings association's lending operations. Accordingly, to the extent that the [UCL] is being used either to limit the Associations' ability to force place insurance on properties securing loans, or the Associations' choice of insurers or premiums to be charged on the forced placement of insurance, the [UCL] is preempted as an impermissible interference with the Associations' lending programs." (OTS Opinion, p. 94,208, fns. omitted.)

That conclusion does not apply here. OTS expressly limited its opinion to the factual and procedural circumstances posed by the party that had requested the opinion. It warned that "[a]ny material differences in facts or circumstances from those described [in the opinion] could result in different conclusions." (OTS Opinion, p. 94,209.) The claim described in the OTS Opinion is materially different from the claim asserted in the trial here.

The claim in the OTS opinion is simply that the lender had chosen to purchase insurance from an insurer with higher rates than the borrower's insurer. But here the claim is that the premium charged to the borrower for FOI was not only higher than the premium for the borrower's policy would have

been, but was higher because it represented the cost, not only of insurance, but of a bundle of other services being provided to World by the insurer, and that World lied to conceal that fact. In other words, the plaintiffs claim that, under the guise of charging them for hazard insurance, World actually charged them for something else -- some other type of insurance product -- for which they were not contractually obligated to pay.

Even were the two claims not materially different, we would question the OTS's conclusion. While it is true that section 560.2(b)(2) preempts state laws imposing requirements regarding the ability of savings associations to require or obtain insurance on loan collateral, it does not follow those lenders are free to charge whatever they wish for the insurance they purchase. While state law cannot prescribe limits on the premiums to be charged, the parties can agree to contractual terms that place certain restrictions on those premiums. And if the parties have done so, the courts of this state can interpret and enforce those contractual limitations without impinging upon the preempted field of regulation.

In summary, as the OTS itself emphasized in the very opinion on which World relies, section 560.2 does "not preempt the entire [UCL] or its general application to federal savings associations in a manner that only incidentally affects lending . . . ." (OTS Opinion, p. 94,209.) Resolution of the UCL claim here involves state laws of general application that affect lending only incidentally. Therefore, the trial court erred by concluding that the plaintiffs' claims were federally preempted.

## B. WORLD'S ALTERNATIVE BASES FOR AFFIRMING THE JUDGMENT ALSO FAIL.

World and the League contend that the trial court's error is not prejudicial because its judgment can be affirmed on bases other than federal preemption. As we shall explain, they are mistaken.

### 1. The Doctrine of Primary Jurisdiction Does Not Justify the Judgment.

As its first alternative basis for affirming the judgment, World relies upon the doctrine of primary jurisdiction. Its reliance is misplaced, for two reasons.

The primary jurisdiction doctrine applies when a claim is originally cognizable in the courts but the "'enforcement of that claim requires the resolution of issues which, under a regulatory scheme, have been placed within

the special competence of an administrative body . . . .'" (Farmers Ins. Exchange v. Superior Court (1992) 2 Cal.4th 377, 390, quoting United States. v. Western Pac. R. Co. (1956) 352 U.S. 59, 63-64 [1 L.Ed.2d 126, 132].) Unless the Legislature has prohibited a court from exercising its discretion under that doctrine, the court faced with such a claim may "decline to adjudicate a suit until the administrative process has been invoked and completed." (Farmers Ins. Exchange, p. 394.)

But "if a court decides to invoke the doctrine of primary jurisdiction, the proper procedure is not to dismiss the action, but to stay it, pending the administrative body's resolution of the issues within its jurisdiction." (AICCO, Inc. v. Insurance Co. of North America (2001) 90 Cal.App.4th 579, 594; accord, Farmers Ins. Exchange v. Superior Court, supra, 2 Cal.4th at pp. 389, fn. 8, and 393.) Therefore, that doctrine would not support the affirmance of a judgment in favor of World, terminating the plaintiffs' action.

Besides, even if the trial court's discretion under that doctrine were not so limited, it would be of no avail to World. In effect, World's assertion of the doctrine of primary jurisdiction -- i.e., that the judicial action should not be prosecuted until after the administrative agency has acted -- is a plea that the action has been brought prematurely. The defense that an action is premature is a dilatory plea or plea in abatement (Kelley v. Upshaw (1952) 39 Cal.2d 179, 186, 188), i.e., a plea that challenges, not the merits of the claim, but merely the time, place, or manner in which the claim is being prosecuted (Nevills v. Shortridge (1905) 146 Cal. 277, 278; and see generally, 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 1055, pp. 505-506).

Such a plea is waived unless it is specially pleaded in a timely fashion. (Kelley v. Upshaw, supra, 39 Cal.2d at pp. 186 & 188.) Like other objections to a complaint, the time to raise it is at the defendant's first opportunity -- by demurrer if it appears from the face of the complaint, or by answer if it does not. (Code Civ. Proc., § 430.80, subd. (a); Tingley v. Times Mirror (1907) 151 Cal. 1, 13; Color-Vue, Inc. v. Abrams (1996) 44 Cal.App.4th 1599, 1604; 5 Witkin, Cal. Procedure, supra, Pleading, § 1057, p. 507.)

World apparently did not demur at all and did not raise the defense in its answer. Indeed, World does not appear to have invoked the primary jurisdiction doctrine until after the trial had concluded. By its inordinate delay in raising the issue, World has waived any possible objection on the basis of the primary jurisdiction doctrine.

2. The Insurance Commissioner's Exclusive Jurisdiction over Insurance Rates

Does Not Bar this Suit.

The Insurance Code prescribes a comprehensive scheme for the regulation of insurance rates and rating practices. (Ins. Code, §§ 1850-1861.16; Walker v. Allstate Indemnity Co. (2000) 77 Cal.App.4th 750, 754.) In particular, Insurance Code sections 1860.1 and 1860.2 "provide exclusive original jurisdiction over issues related to ratemaking to the commissioner." (Walker, p. 755.) That exclusive jurisdiction "bar[s] claims based upon an insurer's charging a rate that has been approved" by the Insurance Commissioner. (Id., p. 756.) Relying on Walker, the League contends that the plaintiffs' action is barred.

The League's reliance is misplaced. Unlike Walker v. Allstate Indemnity Co., supra, this is not an action by insureds against their insurer, challenging the insurer's rates as excessive. The insurer in this instance, Balboa, is not even a party to this action. Nor does the action challenge the rates charged by Balboa to World for the forced-order insurance services provided by World. Instead, it is an action brought by borrowers against their lender, in which the borrowers contend that the lender has improperly insisted that the borrowers reimburse the lender for the cost of a type of insurance product for which the borrowers were not contractually obligated to pay.

The Insurance Code does not displace the UCL except as to insurance company activities related to rate setting. (Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 33; Walker v. Allstate Indemnity Co., supra, 77 Cal.App.4th at p. 758.) Because this is not an action against an insurance company and does not challenge the rates set by an insurance company, it is not barred by the Insurance Commissioner's exclusive jurisdiction over that subject.

3. The Filed-Rate Doctrine Does Not Bar this Suit.

The League also contends that the action is barred by the common-law "filed rate" doctrine. It is again mistaken.

"The filed rate doctrine applies to companies that are required to file a tariff with a federal agency where the agency has the authority to determine whether the rates are just and reasonable. [Citations.] The doctrine holds that the only lawful rate is the filed rate and that only the agency can determine the

reasonableness of rates. [Citations.] The rates stated in the filed tariff are conclusive and cannot be invalidated or altered by judicial action." (Spielholz v. Superior Court (2001) 86 Cal.App.4th 1366, 1377.) As a result, the regulated company is "insulated from lawsuits challenging those rates and from court orders having the effect of imposing a rate other than that filed" with the regulatory agency. (Day v. AT&T Corp. (1998) 63 Cal.App.4th 325, 335.) In those instances, "'the filed rate alone governs the relationship between the regulated entity and its customers.'" (Korte v. Allstate Ins. Co. (E.D. Tex. 1999) 48 F.Supp.2d 647, 650, quoting Southwestern Bell Telephone Co. v. Metro Link Telecom, Inc. (Tex.App. 1996) 919 S.W.2d 687, 693.)

The doctrine has been applied to insurance companies. (Korte v. Allstate Ins. Co., supra, 48 F.Supp.2d at pp. 650-651.) However, it does not assist World in this instance.

The federal filed-rate doctrine is well established. But "[s]ince this is a state case with no tariff filed with any federal regulatory agency, the direct application of the federal filed rate doctrine is inappropriate." (Pink Dot, Inc. v. Teleport Communications Group (2001) 89 Cal.App.4th 407, 416.) "There is no parallel state filed rate doctrine that would operate to bar all state statutory and common law claims." (Ibid.)

More importantly, even if the two doctrines were coextensive, this is not an action by an insured challenging the rates charged by the insurer. Instead, it involves parties outside the rate-setting authority of the Insurance Commissioner: a lender and its borrowers. Because the rate approved by the Insurance Commissioner does not govern the relationship between those parties, the filed-rate doctrine does not apply.

4. The Plaintiffs Are Seeking Restitutionary Relief.

When the UCL has been violated, a court is authorized to order restitution of "any money or property, real or personal, which may have been acquired by means of . . . unfair competition" (Bus. & Prof. Code, § 17203). "The purpose of such orders is 'to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains.'" (Bank of the West v. Superior Court (1992) 2 Cal.4th 1254, 1267, quoting Fletcher v. Security Pacific National Bank (1979) 23 Cal.3d 442, 449.) By contrast, an award of damages is not one of the remedies available for unfair competition. (Bank of the West, p. 1266.) "Damages" is money recovered by a party as compensation for a loss or detriment that the party has suffered through acts or

omissions of another. (Civ. Code, § 3281; AIU Ins. Co. v. Superior Court (1990) 51 Cal.3d 807, 826.)

At trial, the plaintiffs argued that they had not been contractually obligated to reimburse World for that portion of the FOI premium that represented the insurance tracking services that Balboa had bundled into the charge for replacement hazard insurance. They claimed that World had benefited from those overpayments because World applied those excess payments to pay for services that World would otherwise have paid itself as part of its administrative overhead. They asked for that portion of their payments to World to be disgorged by World and restored to them.

World contends that the remedy being sought by the plaintiffs is actually damages rather than restitution. We are not persuaded, for four reasons.

First, World relies entirely on an unpublished, and thus unciteable, federal trial court opinion.

Second, the recovery sought by the plaintiffs is not based upon the harm suffered by them, e.g., by the difference between what they paid and the reasonable cost of a hazard insurance policy for their property. Instead, they propose to measure the recovery by the unjust benefit enjoyed by World. That is a restitutionary rather than a compensatory measure of relief. As the Supreme Court has explained: "Under the law of restitution, an individual may be required to make restitution if he is unjustly enriched at the expense of another. [Citation.] A person is enriched if he receives a benefit at another expense. [Citation.] The term 'benefit' 'denotes any form of advantage.' [Citation.] Thus, a benefit is conferred not only when one adds to the property of another, but also when one saves the other from expense or loss." (Ghirardo v. Antonioli (1996) 14 Cal.4th 39, 51; accord, Rest., Restitution, § 1, pp. 12-13.) By seeking a sum equal to the expense that World would have otherwise incurred, the plaintiffs are seeking restitution.[3]

Third, World's argument appears to rest on an overly broad definition of "damages." "Damages" are sometimes used to denote any sum of money for which a court gives judgment to an injured party. (AIU Ins. Co. v. Superior Court, supra, 51 Cal.3d at p. 836.) When used in that broad sense, "damages" "may include a restitutionary element, but when the concepts overlap, the latter is easily identifiable." (Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal.4th 163, 174 [holding that unlawfully withheld wages may be recovered as restitution in a UCL action].) For instance, in a fraud action the plaintiff may "'recover the difference between the actual value of that with which the

defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction . . . .' Thus, while the award of damages may be greater than the sum fraudulently acquired from the plaintiff, the award includes an element of restitution -- the return of the excess of what the plaintiff gave the defendant over the value of what the plaintiff received. To that extent the award of damages literally includes restitution." (Ibid., quoting Civ. Code, § 3343, subd. (a).) Similarly, the plaintiffs here seek restitution of the overpayments exacted from them by World, not compensatory damages for any consequential harm they suffered by reason of being forced to make those excessive payments.

Finally, we note that, because the trial court erroneously believed that the claim was preempted, it never attempted to fashion any relief. Therefore, even if the relief sought by the plaintiffs were to have both compensatory and restitutionary aspects, the trial court would presumably devise an appropriately restitutionary measure of relief.

5. World Has Not Demonstrated that its FOI Practice Is Neither Unlawful, Unfair or Fraudulent.

World contends that the plaintiffs' UCL claim must fail because its FOI practices are not unfair. That argument fails, for at least two reasons.

First, unfair competition includes "any unlawful, unfair or fraudulent business act or practice . . . ." (Bus. & Prof. Code, § 17200.) Because the definition is disjunctive, a practice is prohibited if it is unfair or deceptive even if it is not unlawful, and vice versa. (Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180.) Therefore, even assuming that the practice is not unfair, that does not by itself establish a lack of liability under the UCL. Instead, it must also be non-deceptive. World does not argue that its FOI practice is not deceptive.

Second, the question of whether a business practice is unfair is an issue of fact. (People v. McKale (1979) 25 Cal.3d 626, 635.) The trial court made no finding that the practice was fair. To the contrary, it expressly stated that the plaintiffs had "met their burden under Business and Professions Code section 17200" and that World had been committing "an unfair business practice under Section 17200." To overcome those findings, World would have to demonstrate, not just that there is evidence that the practice was fair, but rather that there was no substantial evidence from which the trial court could have

determined that the practice was unfair. World has not even attempted to do so.

6. The Trial Court Would Not Abuse its Discretion by Granting Relief.

The League contends that the plaintiffs' action should be dismissed because it requires the trial court to improperly engage in micromanagement of the lending business. We are not persuaded.

Because "[l]egislatures . . . have the ability to gather empirical evidence, solicit the advice of experts, and hold hearings at which all interested parties may present evidence and express their views" (Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654, 694, fn. 31), the determination of economic policy is primarily a legislative rather than a judicial function (Harris v. Capital Growth Investors XIV (1991) 52 Cal.3d 1142, 1168, fn. 15; Max Factor & Co. v. Kunsman (1936) 5 Cal.2d 446, 455-456). Accordingly, in the absence of clear legislative direction, courts may abstain from engaging in complex economic regulation. (Harris, p. 1168.) For example, this court has previously held that, even when plaintiffs have succeeded in stating a cause of action for violating the UCL, a trial court has the discretion to abstain from granting equitable relief in the form of injunctions or restitution when doing so would require the court to decide complex issues of economic policy. (Desert Healthcare Dist. v. Pacificare FHP, Inc. (2001) 94 Cal.App.4th 781, 794-796.)

The trial court here entered a defense judgment solely because of its belief that the action was federally preempted. It did not find that the action required it to resolve complex issues of economic policy, nor did it decide to exercise its discretion to abstain from deciding such economic issues. To the contrary, it stated that, absent its belief that the action was preempted, it would have ruled in favor of the plaintiffs. Accordingly, we could affirm the judgment in favor of World only if we were to conclude that it would have been an abuse of the trial court's discretion not to abstain. (See, e.g., California Grocers Assn. v. Bank of America (1994) 22 Cal.App.4th 205, 217-219 [reversing a trial court's injunction as an abuse of discretion].)

We perceive no abuse of discretion here. The trial court did not need to resolve complex issues of economic policy to determine that World's business practice was unfair. Instead, it appeared to rely on the contractual language in deeds of trust between the parties and on the language of any other disclosures or notices given to the plaintiffs by World. Whether a party has complied with the language of its contractual documents and whether a party has misled its customers are the types of issues that trial courts are accustomed to deciding.

Similarly, although fashioning an appropriate restitutionary remedy may not be a simple matter, it will be no more difficult and will involve no more issues of economic policy than does the resolution of the questions presented by cases involving the determination of damages for the breach of complex commercial contracts.

We conclude that the trial court is not required to abstain from granting relief.

## DISPOSITION

The judgment is reversed. The plaintiffs' request for judicial notice filed May 1, 2000, is granted as to those documents attached as exhibit K but denied as to exhibits A through J. The defendant shall recover its costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

McKINSTER

Acting P. J.

We concur:

WARD

J.

GAUT