Claims that touch on disclosures or the failure to disclose present special issues. The OCC’s preemption regulation states that “a national bank may exercise its deposit-taking powers without regard to state law limitations concerning . . . (3) [d]isclosure requirements.” One court held that the regulation preempted a UDAP claim that a bank’s disclosure of its overdraft fees did not accurately disclose when the fees were assessed and in what amounts. The court’s analysis was superficial, doing little more than noting that the claim involved disclosure.

A California decision, Smith v. Wells Fargo Bank, provides a more precise analysis. The court noted that OCC regulations under the federal Truth in Savings Act require banks to make clear, conspicuous, and accurate disclosure of the amount of any fee that may be imposed in connection with a deposit account and the conditions under which the fee may be imposed. The court held that a state claim based on violation of an OCC regulation could not be held to conflict with the deposit-taking powers of national banks. Furthermore, it held that a requirement that a bank comply with OCC regulations could not even be considered a “limitation” as that term was used in the OCC’s preemption regulation. It therefore concluded that federal law did not preempt claims that a bank’s unilateral imposition of overdraft fees violated California’s UDAP statutes, even to the extent the claims were based on disclosures or failure to disclose.

A claim based on the inaccuracy of disclosures is more likely to escape preemption than a claim based solely on a failure to make a disclosure. Even if federal law would preempt a claim based on failure to make disclosures on a particular topic, many courts have held that federal banking laws do not immunize banks from claims of affirmative misrepresentation. Moreover, a claim that a bank violated the duty of good faith and fair dealing—for example, by manipulating the order of posting charges—is not preempted even if it is based in part on misleading disclosures.

Footnotes


213 [202] 12 C.F.R. §§ 230.3, 230.4. See also 12 C.F.R. § 230.5 (requiring advance notice of any changes in terms that are required to be disclosed).


