DIVISION II Class Action Practice & Procedure

Chapter 13 Jurisdiction and Preemption

SYNOPSIS

§ 13.01 Jurisdiction of California Courts Over Out-of-State Defendants

[1] Overview of State's Exercise of Jurisdiction

Under the basic statutory rule, California courts "may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or the United States" (Code Civ. Proc. § 410.10; *Vons Cos., Inc. v. Seabest Foods* (1996) 14 Cal.4th 434, 444 [58 Cal.Rptr.2d 899, 926 P.2d 1085]). California's jurisdiction to hale a foreign defendant into court is thus coextensive with that of the federal courts (*Checker Motors Corp. v. Superior Court of Los Angeles County* (1993) 13 Cal.App.4th 1007, 1015 [17 Cal.Rptr.2d 618]). By imposing no limitation on the exercise of jurisdiction other than those imposed by the federal constitution, the legislature demonstrated its intent to provide California courts with the broadest possible authority (*Jamshid-Negad v. Kessler* (1993) 15 Cal.App.4th 1704, 1707 [19 Cal.Rptr.2d 621], citing *Sibley v. Superior Court* (1976) 16 Cal.3d 442, 445 [128 Cal.Rptr. 34, 546 P.2d 322]; *Quattrone v. Superior Court* (1975) 44 Cal.App.3d 296 [118 Cal.Rptr. 548]).

Courts may exercise personal jurisdiction over a nonresident defendant if that defendant "has certain minimum contacts with the state such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' " (*Vons Cos., Inc. v. Seabest Foods* (1996) 14 Cal.4th 434, 444 [58 Cal.Rptr.2d 899, 926 P.2d 1085], citing *International Shoe Co. v. Washington* (1945) 326 U.S. 310, 316 [66 S.Ct. 154, 90 L.Ed. 95]). Minimum contacts exist "where the defendant's conduct in, or in connection with, the forum state is such that the defendant should reasonably anticipate being subject to suit in that state" (*BBA Aviation PLC v. Super. Ct.* (2010) 190 Cal.App.4th 421, 429 [117 Cal.Rptr.3d 914]). On the other hand, "mere foreseeability, at least where products are not sold in a state as part of the regular and anticipated flow of commerce into that state, is not enough to establish minimum contacts with the forum state" (*Bombardier Recreational Products, Inc. v. Dow Chemical Canada ULC* (2013) 216 Cal.App.4th 591, 598, 602 [157 Cal.Rptr.3d 66]; *HealthMarkets, Inc. v. Superior Court* (2009) 171 Cal.App.4th 1160, 1169 [90 Cal.Rptr.3d 527] ["requir[ing] some manner of deliberately directing the subsidiary's activities in, or having a substantial connection with, the forum state"]). Once the plaintiff has demonstrated the existence of minimum contacts, the court must determine

whether that exercise of jurisdiction is fair and reasonable (*Vons Cos., Inc. v. Seabest Foods*, 14 Cal.4th 434, 449 [58 Cal.Rptr.2d 899, 926 P.2d 1085], citing *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 471–472 [105 S.Ct. 2174, 85 L.Ed.2d 528]; *As You Sow v. Crawford Laboratories* (1996) 50 Cal.App.4th 1859, 1867 [58 Cal.Rptr.2d 654] citing *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297 [100 S.Ct. 559, 62 L.Ed.2d 490]; *St. Joe Paper Co. v. Superior Court* (1981) 120 Cal.App.3d 991, 997 [175 Cal.Rptr. 94]).

The plaintiff has the initial burden of demonstrating facts justifying the exercise of jurisdiction (*Vons Cos., Inc. v. Seabest Foods* (1996) 14 Cal.4th 434, 449 [58 Cal.Rptr.2d 899, 926 P.2d 1085]). The plaintiff must present competent evidence of the necessary jurisdictional facts through affidavits and/or authenticated documents (*In re Automobile Antitrust Cases I and II* (2005) 135 Cal.App.4th 100, 100 [37 Cal.Rptr.3d 258]). The necessary facts must be shown as to each individual defendant, even when a conspiracy is alleged (*In re Automobile Antitrust Cases I and II* (2005) 135 Cal.App.4th 100, 100 [37 Cal.Rptr.3d 258]). Once facts showing minimum contacts with the forum state are established, it becomes the defendant's burden to demonstrate that the exercise of jurisdiction would be unreasonable (*Vons Companies, Inc. v. Seabest Foods* (1996) 14 Cal.4th 434, 449 [58 Cal.Rptr.2d 899, 926 P.2d 1085], citing *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 476–477; *In re Automobile Antitrust Cases I and II* (2005) 135 Cal.App.4th 100, 111 [37 Cal.Rptr.3d 258] [if the plaintiffs make a showing of minimum contacts with the forum state, "the burden shifts to the defendant to present a compelling case demonstrating that the exercise of jurisdiction by our courts would be unreasonable"]).

[2] Exercise of General Jurisdiction

"General jurisdiction" exists when a defendant is domiciled in the forum state or his or her contacts there are "substantial, continuous, and systematic" (*F. Hoffman-La Roche, Ltd. v. Superior Court* (2005) 130 Cal.App.4th 782, 796 [30 Cal.Rptr.3d 407]). Substantial, continuous, and systematic contacts include activities such as maintaining an office and employees in the forum, use of forum bank accounts, and the marketing or selling of products in the forum state (*Shisler v. Sanfer Sports Cars, Inc.* (2006) 146 Cal.App.4th 1254, 1259 [53 Cal.Rptr.3d 335], *citing Helicopteros Nacionales de Colombia v. Hall* (1984) 466 U.S. 408, 415, 104 S.Ct. 1868, 80 L.Ed.2d 404). When the defendant's contacts with the forum are sufficiently substantial, continuous, and systematic, it is not necessary that the cause of action alleged be connected with the defendant's business relationship to the forum (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 445 [58 Cal.Rptr.2d 899, 926 P.2d 1085]). However, contacts that are "random, fortuitous, or attenuated" do not justify the exercise of general jurisdiction (*F. Hoffman-La Roche, Ltd. v. Superior Court* (2005) 130 Cal.App.4th 782, 796 [30 Cal.Rptr.3d 407]; *Aquila, Inc. v. Superior Court* (2007) 148 Cal.App.4th 556, 568 [55 Cal.Rptr.3d 803]). As discussed below, web interactivity, while not determinative of general jurisdiction, is relevant to whether there is specific jurisdiction (*Mavrix Photo, Inc. v. Brand Techs., Inc.* (9th Cir. 2011) 647 F.3d 1218, 1227).

One justification for the assertion of general jurisdiction over a nonresident defendant is the "representative services" doctrine. Analysis under this doctrine "begins with 'the firm proposition that neither ownership nor control of a subsidiary corporation by a foreign parent corporation, without more, subjects the parent to the jurisdiction of the state where the subsidiary does business' " (*BBA Aviation PLC v. Super. Ct.* (2010) 190 Cal.App.4th 421, 430 [117 Cal.Rptr.3d 914] (quoting *Sonora Diamond Corp. v. Super. Ct.* (2000) 83 Cal.App.4th 523, 540, [99 Cal.Rptr.2d 824]). Under certain circumstances, however, "the contacts of a local agent through which a foreign principal acts may be imputed to that foreign defendant. In such circumstances, agency principles apply to confer general jurisdiction in California over a

nonresident defendant corporation (*In re Automobile Antitrust Cases I and II* (2005) 135 Cal.App.4th 100, 119 [37 Cal.Rptr.3d 258]). To show that the representative services doctrine applies to a defendant, plaintiffs must show evidence of agency, such that "the alleged principal had the right to control the activities of the alleged agent. The plaintiffs must show more than mere ownership or control of a local subsidiary by a foreign parent corporation. The foreign company must exercise a highly pervasive degree of control over the local subsidiary. It must veer into management and day-to-day operations of the local subsidiary in order to apply the representative services doctrine. An exercise of general jurisdiction under the representative services doctrine is only appropriate if the control of the subsidiary is *so pervasive and continual* that the local subsidiary functions as *an agent or instrumentality of the parent corporation*, despite the maintenance of separate corporate structures" (*In re Automobile Antitrust Cases I and II* (2005) 135 Cal.App.4th 100, 120 [37 Cal.Rptr.3d 258] [emphasis added]). When such evidence is produced to show the parent corporation's pervasive and continual control of the subsidiary's activities, the parent and subsidiary should be treated as one entity for jurisdictional purposes (*In re Automobile Antitrust Cases I and II* (2005) 135 Cal.App.4th 100, 121 [37 Cal.Rptr.3d 258]; *Aquila, Inc. v. Superior Court* (2007) 148 Cal.App.4th 556, 568 [55 Cal.Rptr.3d 803]).

[3] Exercise of Specific Jurisdiction

If a defendant's contacts with California are not substantial, continuous, and systematic, the defendant may still be hailed into California court based on the exercise of "specific jurisdiction." Specific jurisdiction over a nonresident defendant exists only if (1) the defendant has purposefully availed itself of forum benefits; (2) the controversy is related to or arises out of the defendant's contacts with the forum; and (3) the assertion of personal jurisdiction would comport with "fair play and substantial justice" (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269 [127 Cal.Rptr.2d 329, 58 P.3d 2]). However, because "California's long-arm statute manifests an intent to exercise the broadest possible jurisdiction (*Magnecomp Corp. v. Athene Co.* (1989) 209 Cal.App.3d 526, 535 [257 Cal.Rptr. 278]), its courts may apply the purposeful availment test most conducive to establishing specific jurisdiction over a defendant in a particular case, consistent with due process" (*Gilmore Bank v. AsiaTrust New Zealand Ltd.* (2014) 223 Cal.App.4th 1558, 1571 [168 Cal.Rptr.3d 525]).

The purposeful availment inquiry "focuses on the defendant's intentionality" (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269 [127 Cal.Rptr.2d 329, 58 P.3d 2]). This prong is satisfied when a nonresident defendant has either (1) purposefully directed its activities at forum residents, (2) purposefully derived benefit from forum activities, (3) purposefully availed itself of the privilege of conducting activities within the forum, or (4) deliberately engaged in significant activities with the forum or created continuing obligations with forum residents (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444 [58 Cal.Rptr.2d 899, 926 P.2d 1085]; *In re Automobile Antitrust Cases I and II* (2005) 135 Cal.App.4th 100, 108 [37 Cal.Rptr.3d 258] [defendant must have expressly aimed and targeted it tortious conduct at forum state]). In such cases the defendant has availed itself of the privilege of conducting business in the forum, and because the benefits and protections of the forum's laws attach to the activities, it is presumptively reasonable to require the defendant to submit to litigation in the forum (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444 [58 Cal.Rptr.2d 899, 926 P.2d 1085]). "A refusal by California courts to exercise jurisdiction cannot be justified by the mere fact that a claim arising from California contacts is *prosecuted* by a nonresident" (*Epic Communications, Inc. v. Richwave Technology, Inc.* (2009) 179 Cal.App.4th 314, 317–318 [101 Cal.Rptr.3d 572], italics added).

In addition to measuring the intent of the defendant, the test for specific jurisdiction asks

whether the controversy is related to or arises out of the defendant's contacts with the forum state. California courts apply the "substantial connection" test, which requires a "substantial nexus or connection between the defendant's forum activities and the plaintiff's claim" (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 456 [58 Cal.Rptr.2d 899, 926 P.2d 1085]; *Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1068 [29 Cal.Rptr.3d 33, 112 P.3d 28]; *see, e.g., Greenwell v. Auto-Owners Ins. Co*. (2015) 233 Cal.App.4th 783, 799–800 [182 Cal.Rptr.3d 873] [no substantial nexus with California where suit concerned fire damage to an Arkansas property, all witnesses except plaintiff were in Arkansas, and insurance policy was obtained in Arkansas and primarily covered potential damage to the Arkansas property]). In establishing a substantial connection, "the intensity of forum contacts and the connection of the claim to those contacts are inversely related" (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 452 [58 Cal.Rptr.2d 899, 926 P.2d 1085]). That is, the more wide-ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim" (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 455 [58 Cal.Rptr.2d 899, 926 P.2d 1085]). Thus, "[a] claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction" (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 452 [58 Cal.Rptr.2d 899, 926 P.2d 1085]).

Additionally, the forum contacts need not be directed at the plaintiff to warrant the exercise of specific jurisdiction (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 455 [58 Cal.Rptr.2d 899, 926 P.2d 1085]; *see also Anglo Irish Bank Corp., PLC v. Superior Court* (2008) 165 Cal.App.4th 969, 979 [81 Cal.Rptr.3d 535] ["in evaluating the quality and nature of the defendant's forum contacts, we consider not only the conduct directly affecting the plaintiff, but also the broader course of conduct of which it is a part"], citing *Cornelison v. Chaney* (1976) 16 Cal.3d 143, 149 [127 Cal.Rptr. 352, 545 P.2d 264]; *see, e.g., Bristol-Myers Squibb Co. v. Super. Ct.* (2014) 228 Cal.App.4th 605, 613 [175 Cal.Rptr.3d 412] [in coordinated actions brought by both California and non-California plaintiffs, finding that specific jurisdiction over an out-of-state defendant existed where it had "engaged in substantial, continuous economic activity in California, including the sale of more than a billion dollars' worth of" the prescription drug, and this activity was "substantially connected to the [nonresident plaintiffs'] claims, which [were] based on the same alleged wrongs as those alleged by the California resident plaintiffs."]), *pet. for review granted*, 337 P.3d 1158 (Cal. 2014)).

[4] Analysis of Internet Business Contacts

Use of the Internet has added new dimensions to the purposeful availment inquiry. The California Supreme Court adopted a sliding scale test in *Pavlovich v. Superior Court* (2002) 29 Cal.4th 262 [127 Cal.Rptr.2d 329, 58 P.3d 2]:

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involved a knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. [Citation.] At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. [Citation.] The middle ground is occupied by interactive Web sites where a user can exchange information

> with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

(*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 274 [127 Cal.Rptr.2d 329, 58 P.3d 2], quoting *Zippo Mfg. Co. v. Zippo Dot Com, Inc.* (W.D. Pa. 1997) 952 F.Supp. 1119, 1124; *see also Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1063–1064 [29 Cal.Rptr.3d 33, 112 P.3d 28] [website touting proximity of hotel to California and providing driving directions from California established "purposeful availment"].)

Notwithstanding the tripartite *Pavlovich* framework, there are essentially two categories of Internet-based businesses for purposes of jurisdictional analysis. On the one hand are web presences that do not transact business in California, or that do so only very sporadically, without specifically targeting California citizens (*see, e.g.*, *Shisler v. Sanfer Sports Cars, Inc.* (2006) 146 Cal.App.4th 1254 [53 Cal.Rptr.3d 335] [following *Pavlovich*, court affirmed order quashing service of summons when defendant's website did not target California residents, no files were exchanged, and site did not actually conduct any business]; *Boschetto v. Hansing* (9th Cir. 2008) 539 F.3d 1011, 1017–1018). On the other hand, a typical web-based business may be hailed into California court to the extent it regularly receives online communications from California citizens and its owners knowingly market to California customers and direct commerce to the state (*see, e.g.*, *Sleep Sci. Partners v. Lieberman* (N.D. Cal. Nov. 23, 2009) 2009 U.S. Dist. LEXIS 117932, at *13 [applying *Pavlovich* to assert jurisdiction over out-of-state defendant that maintained "an interactive website" on which people "fill[ed] out a prescription survey and purchase[d] its products online"]; *Craigslist, Inc. v. Kerbel* (N.D. Cal. Aug. 2, 2012) 2012 U.S. Dist. LEXIS 108573, at *12 [holding that an "interactive commercial website is sufficient to establish purposeful direction" where the defendant "expressly targeted California residents"]; *Gucci Am., Inc. v. Huoqing* (N.D. Cal. Jan. 3, 2011) 2011 U.S. Dist. LEXIS 783, at *6, *report and recommendation adopted sub nom. Gucci Am. v. Huoqing* (N.D. Cal. Jan. 5, 2011) 2011 U.S. Dist. LEXIS 776 [finding purposeful availment in default judgment motion where websites offered and sold counterfeit handbags within the forum]; *Allstar Mktg. Group, LLC v. Your Store Online, LLC* (C.D. Cal. 2009) 666 F.Supp.2d 1109, 1122 [finding personal jurisdiction because "by operating a highly commercial website through which regular sales of allegedly infringing products are made to customers in [California], [the defendant has] purposefully availed [itself] of the benefits of doing business in this district"]).

[5] Other Factors in Determining Jurisdiction

Courts will also consider the burden on the defendant of appearing in the forum, the forum state's interest in adjudicating the claim, the plaintiff's interest in convenient and effective relief within the forum, judicial economy, and the " 'shared interest of the several States in furthering fundamental substantive social policies' " (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 445 [58 Cal.Rptr.2d 899, 926 P.2d 1085], quoting *Asahi Metal Industry Co. v. Superior Court* (1987) 480 U.S. 102, 113, [107 S.Ct. 1026, 94 L.Ed.2d 92]).

§ 13.02 Federal Preemption—Overview of Recent Case Law

Few legal doctrines have assumed greater importance in recent United States Supreme Court jurisprudence than federal preemption. Several recent decisions involved Supreme Court determinations that state-law claims of various kinds were not preempted. First, in *Altria Group, Inc. v. Good* (2008) 555 U.S. 70 [129 S.Ct. 538, 172 L.Ed.2d 398], the Court held that a federal

statute concerning cigarette labeling and the Federal Trade Commission's enforcement policy did not preempt a consumer protection claim under Maine law based on allegedly deceptive advertisements. Second, in *Wyeth v. Levine* (2009) 555 U.S. 555 [129 S.Ct. 1187, 173 L.Ed.2d 51], the Court held that the federal Food, Drug, and Cosmetic Act, and the FDA's approval of warnings on a pharmaceutical drug's label, did not preempt a failure-to-warn claim under Vermont tort law. Third, in *Cuomo v. Clearing House Ass'n, L.L.C.* (2009) 557 U.S. 519 [129 S.Ct. 2710, 174 L.Ed.2d 464], the Court noted that states "have always enforced their general laws against national banks—and have enforced their banking-related laws against national banks for at least 85 years[.]" The Court therefore held that the National Bank Act and regulations issued by the Office of the Comptroller of the Currency did not preempt the New York Attorney General from filing suit against national banks under state fair-lending laws (*Cuomo v. Clearing House Ass'n, L.L.C.* (2009) 557 U.S. 519 [129 S.Ct. 2710, 2720, 174 L.Ed.2d 464]).

The Court in 2012 held Arizona's immigration statute mostly preempted by federal law, and in 2013 ruled that federal law preempted a state-law design-defect claim against generic drug manufacturers (*Arizona v. United States* (2012) ___ U.S. ___ [132 S.Ct. 2492, 83 L.Ed.2d 351]; *Mut. Pharm. Co. v. Bartlett* (2013) ___ U.S. ___ [133 S.Ct. 1466, 186 L.Ed.2d 607]). In 2015, the Court concluded that the Natural Gas Act did not preempt California antitrust claims arising from interstate pipelines' alleged manipulation of price indices (*Oneok, Inc. v. Learjet, Inc*. (Apr. 21, 2015), ___ U.S. ___, 2015 U.S. LEXIS 2808). The Court reasoned that the lawsuit targeted the effect of this collusion upon retail natural gas prices—not upon the wholesale rates that are regulated exclusively by the Federal Energy Regulatory Commission—and that state laws prohibiting unfair competition have a long lineage and ensure "background marketplace conditions" for all businesses and consumers (*id*. at *18-24).

Federal preemption arguments have had limited success in California. As the California Supreme Court recognized in its latest preemption decision, the United States Supreme Court "has been quite clear that states may depart from federal rules—or … accept an invitation to develop a gap in the law explicitly left by the Supreme Court—absent evidence of a clear congressional purpose to the contrary." (*In re Cipro Cases I & II* (Cal. May 7, 2015) __ P.3d __, 2015 Cal. LEXIS 2486, at *67.) In particular, California courts have demonstrated a strong interest in enforcing the state's broad consumer protection laws (*In re Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077 [72 Cal.Rptr.3d 112, 175 P.3d 1170] [stating that presumption against preemption applies "with particular force" to consumer protection laws]; *Cellphone Fee Termination Cases* (2011) 193 Cal.App.4th 298, 312–316, 122 Cal.Rptr.3d 726 [no preemption of California consumer protection laws by federal communications laws; court notably applied a deferential standard of review in light of the factually intensive nature of the preemption inquiry in that case]; *Paduano v. Am. Honda Motor Co., Inc.* (2009) 169 Cal.App.4th 1453, 1473–85 [88 Cal.Rptr.3d 90] [following *Farm Raised Salmon* to hold that federal fuel economy standards did not preempt claims under the UCL and CLRA]; *Physicians Committee for Responsible Medicine v. McDonald's Corp.* (2010) 187 Cal.App.4th 554 [114 Cal.Rptr.3d 414] [reversing finding that federal Poultry Products Inspection Act preempted Proposition 65's carcinogen disclosure requirement], *review den*., 2010 Cal. LEXIS 11033 (Oct. 27, 2010); *Dorsett v. Sandoz, Inc.* (C.D. Cal. 2010) 699 F.Supp.2d 1142, 1156 [actual and potential FDA procedures related to labeling of generic Prozac did not preempt claims under California law]; *Pom Wonderful LLC v. Ocean Spray Cranberries, Inc.* (C.D. Cal. 2009) 642 F.Supp.2d 1112, 1121–1123 [federal food and drug laws or regulations did not preempt California claims for false advertising and UCL violations]; *Church v. Consolidated Freightways, Inc.* (N.D. Cal. 1992) 1992 U.S. Dist. LEXIS 18234, at *13 ["California has a strong interest in preventing fraud by corporations residing and conducting business in California"] [citation omitted]; *see also Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1064, [80 Cal.Rptr. 2d 828, 968 P.2d 539] [citation

omitted]); *Kent v. DaimlerChrysler Corp.* (N.D. Cal. 2002) 200 F.Supp.2d 1208, 1216–1217).

In another case, a California court employed its remedial powers under Business and Professions Code section 17200 et seq. and Civil Code section 1780 to order the recall and repair of defects in Ford vehicles (*see* Appendix of Exhibits, Exhibit 4, *Howard v. Ford Motor Co*. (Alameda County Superior Court, The Honorable Michael E. Ballachey)). Plaintiffs alleged that certain Ford vehicles had a dangerous propensity to stall as a result of a defectively designed ignition system. Ford asserted that plaintiffs' claims were preempted by the federal regulatory authority of the National Highway Traffic Safety Administration (NHTSA) and Federal Motor Vehicle Safety Act (Safety Act), and therefore sought to remove plaintiffs' case to federal court. After an examination of the applicable law, the state court determined that the NHTSA and the Safety Act did not preempt plaintiffs' defective design claims and refused to remove the case. The court proceeded to hear overwhelming evidence that the defendant knew its ignition system was susceptible to stress and prone to failure, and had actively attempted to deceive the federal government and consuming public about its vehicles' safety. In a bold exercise of authority granted to it under California's consumer protection statutes, the court ordered Ford to recall and repair all affected vehicles to avert the unreasonable risk of danger to the traveling public and vehicle occupants.

Most other state courts have been reluctant to order such recalls (*see Chin v. Chrysler Corp.* (D.N.J. 1998) 182 F.R.D. 448, 464 fn. 6 [automotive recall might be inappropriate as matter of law]; *In re: Bridgestone/Firestone* (S.D. Ind. 2000) 153 F.Supp.2d 935, 946 [courts not authorized to recall]; *Walsh v. Ford Motor Co.* (D.D.C. 1990) 130 F.R.D. 260, 266–267 [money damages more appropriate]; *In re: Ford Motor Co. Ignition Switch Prods.* (D.N.J. 1997) 174 F.R.D. 332, 353 [same]; *Ford Motor Co. v. Magill* (Fl. Ct. App. 1994) 698 So.2d 1244, 1245; *Bloyed v. General Motors Corp.* (Tex. Ct. App. 1994) 881 S.W.2d 422, 432–433; *In re Bridgestone/Firestone Inc. Tires Prods. Liab. Litig.* (S.D. Ind. 2001) 153 F.Supp.2d 935, 944–945 [recalls under Safety Act preempt recalls ordered by courts under state law]; *Cuellar v. Ford Motor Co.* (Wis. App. 2006) 723 N.W.2d 747, 755–756 [when plaintiff does not seek recall, but only compliance with Safety Act and damages, claim is not preempted by federal law]; *Namovicz v. Cooper Tire & Rubber Co.* (D. Md. 2001) 225 F.Supp.2d 582, 584–585; *Lilly v. Ford Motor Co.* (N.D. Ill. Jan. 22, 2002) 2002 U.S. Dist. LEXIS 910, at *5–7).

Other courts have been willing to approve settlements involving such recalls (or even expanding upon them). For example, a district court in Texas approved a settlement of individual and (national) class claims against Firestone, related to NHTSA—investigated tires, that included a provision requiring Firestone to replace tires subject to a recall program since terminated by Firestone (effectively requiring Firestone to re-open its recall program). (*See* Appendix, Exhibit 20, *Shields v. Bridgestone/Firestone, Inc. and Bridgestone Corp.*, District Court for the 172nd Judicial District, Jefferson County, Texas, Hon. Donald J. Floyd, at pp. 6–7). Similarly, in *Hanlon v. Chrysler Corp.*, the Ninth Circuit affirmed the district court's approval of a settlement requiring the defendant manufacturer to implement a latch replacement program. (*Hanlon v. Chrysler Corp.*, (9th Cir. 1998) 150 F.3d 1011, 1027 ["The settlement presented to the district court obligates Chrysler to make the minivans safe"]).

§ 13.03 Determining Whether Federal Preemption Exists

Federal law is the supreme law of the land; state action that conflicts with an act of Congress lacks effect and is defunct (*see* U.S. Const., art. VI, cl. 2; *McCulloch v. Maryland* (1819) 17 U.S. 316, 427 [4 L.Ed. 579]; *Lorillard Tobacco Company v. Reilly* (2001) 533 U.S. 525, 550 [121 S.Ct. 2404, 150 L.Ed.2d 532]; *Crosby v. National Foreign Trade Council* (2000)

530 U.S. 363, 372 [120 S.Ct. 2288, 147 L.Ed.2d 352]; *Cipollone v. Liggett Group* (1992) 505 U.S. 504, 516, 518, 523]). State action may be preempted in three general circumstances:

(1) By express language in a congressional enactment (*see, e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 [112 S.Ct. 2608, 120 L.Ed.2d 407] [express preemption]);

(2) By implication from the depth and breadth of a congressional scheme that occupies the legislative field (*see, e.g.*, *Arizona v. United States* (2012) ___ U.S. ___ [132 S.Ct. 2492, 2502, 183 L.Ed.2d 351] [alien registration]; *Schneidewind v. ANR Pipeline Co.* (1988) 485 U.S. 293, 300 [108 S.Ct. 1145, 99 L.Ed.2d 316] [natural gas]); or

(3) By implication because of a conflict with a congressional enactment (*see, e.g.*, *Geier v. American Honda Motor Co.* (2000) 529 U.S. 861, 869–874 [120 S.Ct. 1913, 146 L.Ed.2d 914] [implied conflict preemption]; *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 550 [121 S.Ct. 2404, 150 L.Ed.2d 532]; *Hillsborough County v. Automated Med. Labs., Inc.* (1985) 471 U.S. 707, 715 [105 S.Ct. 2371, 85 L.Ed.2d 714] (Hillsborough County); *Chicago & North Western Transp. Co v. Kalo Brick & Tile Co.* (1981) 450 U.S. 311, 318 [101 S.Ct. 1124, 67 L.Ed.2d 258]).

These preemption categories are not "rigidly distinct" (*Smiley v. Citibank (S.D.), N.A.* (1995) 11 Cal.4th 138 [44 Cal.Rptr.2d 441, 900 P.2d 690]). For example, implied conflict preemption typically results from some federal regulatory involvement in the field (*see, e.g.*, *Parks v. MBNA America Bank, N.A.* (2012) 54 Cal.4th 376, 387 [142 Cal.Rptr.3d 837, 278 P.3d 1193], *cert. denied*, 133 S.Ct. 653). An express preemption clause does not automatically preclude a finding of implied preemption (*Spielholz v. Superior Court* (2001) 86 Cal.App.4th 1366, 1376 [104 Cal.Rptr.2d 197], citing *Geier v. American Honda Motor Co.*, 529 U.S. 861, 870–873 [120 S.Ct. 1913, 146 L.Ed.2d 914]), although the existence of a statutory savings or express preemption clause does "clearly weigh against implied preemption" (*Spielholz v. Superior Court*, 86 Cal.App.4th 1366, 1376 [104 Cal.Rptr.2d 197]; *see Freightliner Corp. v. Myrick* (1995) 514 U.S. 280, 288–289 [115 S.Ct. 1483, 131 L.Ed.2d 385]; *Geier v. American Honda Motor Co.*, 529 U.S. 861, 870–872 [120 S.Ct. 1913, 146 L.Ed.2d 914]).

Whether federal law preempts California law "is fundamentally a question whether Congress has intended such a result … . The 'starting presumption' is that Congress has not so intended" (*Peatros v. Bank of Am.* (2000) 22 Cal.4th 147, 157 [91 Cal.Rptr.2d 659, 990 P.2d 539] [citations omitted]). Further, "because preemption of state laws by federal law or regulation generally is not favored, the party claiming federal preemption … has the burden to show specific state law claims are preempted" (*Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1475 [38 Cal.Rptr.3d 653]). The California "[c]ourts are reluctant to infer preemption" (*Elsworth v. Beech Aircraft Corp.* (1984) 37 Cal.3d 540, 548 [208 Cal.Rptr. 874, 691 P.2d 630]; *see also Black v. Financial Freedom Senior Funding Corp.* (2001) 92 Cal.App.4th 917, 926, 931 [112 Cal.Rptr.2d 445]). The court in *Black*, for example, invoked a "heightened presumption against preemption" in declining to find plaintiffs' claims preempted absent a "clear manifestation" of Congressional intent (*Black v. Financial Freedom Senior Funding Corp.* (2001) 92 Cal.App.4th 917, 926, 931 [112 Cal.Rptr.2d 445]; *see also California Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177, 197 [127 Cal.Rptr.3d 726, 254 P.3d 1019] [noting that "in any pre-emption analysis, the purpose of Congress is the ultimate touchstone," and finding that a local worker retention ordinance did not impermissibly intrude into a field regulated by federal law], citation and internal quotation marks omitted).

A California court faced with a preemption argument focuses on "the precise language of the federal law or regulation" (*Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1476 [38 Cal.Rptr.3d 653] ["Considering the general presumption against preemption, we narrowly construe the precise language of the federal law or regulation to determine whether a particular state law claim is preempted"]). As to each state law claim, the court's "central inquiry is whether the legal duty that is the predicate of the [claim] constitutes a requirement or prohibition of the sort that federal law expressly preempts" (*Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1476 [38 Cal.Rptr.3d 653]). The court looks to "the nature of the activities which the states have sought to regulate, rather than on the method of regulation adopted" (*San Diego Building Trades Council v. Garmon* (1959) 359 U.S. 236, 243 [79 S.Ct. 773, 3 L.Ed.2d 775]; *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.* (1981) 450 U.S. 311, 317–318 [101 S.Ct. 1124, 67 L.Ed.2d 258]). When Congress has expressly permitted states to enact certain legislation, that legislation, by definition, exists alongside the federal regime and is not preempted. *See Martinez v. Regents of University of California* (2010) 50 Cal.4th 1277, 1298 [117 Cal.Rptr.3d 359, 241 P.3d 855] ["Congress did not impliedly prohibit what it expressly permitted"]).

When a federal preemption determination involves undisputed facts, whether a federal statute or regulation preempts a state law claim constitutes a pure question of law; and on appeal, the appellate court reviews *de novo* a trial court's preemption determination (*Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1476 [38 Cal.Rptr.3d 653]; *see Moran v. Rush Prudential HMO, Inc.* (7th Cir. 2000) 230 F.3d 959, 966). When facts relating to the preemption decision are disputed, a more deferential standard of review may apply (*Cellphone Termination Fee Cases* (2011) 193 Cal.App.4th 298, 316 [122 Cal.Rptr.3d 726] ["It is clear that the trial court considered the question of federal preemption here as a mixed issue of law and fact. So do we"]; *Hughes v. Blue Cross of Northern California* (1989) 215 Cal.App.3d 832, 859 [263 Cal.Rptr. 850] [preemption determination "involves complex questions of law and fact"]).

A conflict exists when compliance with both state and federal law is impossible, or when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 372–374 [120 S.Ct. 2288, 147 L.Ed.2d 352] [internal quotation marks omitted], quoting *Hines v. Davidowitz* (1941) 312 U.S. 52, 67 [61 S.Ct. 399, 85 L.Ed. 581]; *see also English v. General Electric Co.* (1990) 496 U.S. 72, 79 [110 S.Ct. 2270, 110 L.Ed.2d 65]; *Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 936 [63 Cal.Rptr.3d 50, 162 P.3d 569]; *Elsworth v. Beech Aircraft Corp.* (1984) 37 Cal.3d 540, 548 [208 Cal.Rptr. 874, 691 P.2d 630]).

An actual conflict must exist for a finding of preemption; hypothetical or potential conflicts are insufficient (*Rice v. Norman Williams Co.* (1982) 458 U.S. 654, 659 [102 S.Ct. 3294, 73 L.Ed.2d 1042]). "It is not … a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a preexisting right of [state] sovereignty" (*R. E. Spriggs Co. v. Adolph Coors Co.* (1974) 37 Cal.App.3d 653, 666 [112 Cal.Rptr. 585], quoting *Goldstein v. California* (1973) 412 U.S. 546, 554–555, quoting Hamilton, *The Federalist No. 32*). For example, in holding that the federal narcotics laws do not preempt California's medical marijuana laws, the Court of Appeal stated: "It is true that California and the federal government have conflicting views of the potential health benefits of marijuana. But that does not mean the application of state and federal laws are in conflict" (*Qualified Patients Ass'n v. City of Anaheim* (2010) 187 Cal.App.4th 734, 759 [115 Cal.Rptr.3d 89]). The court rejected federal preemption based on the finding that California's laws decriminalizing medical marijuana "do not mandate conduct that federal law

prohibits, nor pose an obstacle to federal enforcement of federal law" (*Qualified Patients Ass'n v. City of Anaheim* (2010) 187 Cal.App.4th 734, 757 [115 Cal.Rptr.3d 89]); *see also Schneidewind v. ANR Pipeline Co.* (1988) 485 U.S. 293, 310 [108 S.Ct. 1145, 99 L.Ed.2d 316] [hypothetical conflict insufficient]; *Miller v. Hedlund* (9th Cir. 1987) 813 F.2d 1344, 1348 ["the existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute"]).

There is no conflict when federal law expressly contemplates compliance with state law (*see California Coastal Comm'n v. Granite Rock Co.* (1987) 480 U.S. 572, 583–584 [107 S.Ct. 1419, 94 L.Ed.2d 577] [finding it "impossible to divine from these [Forest Service] regulations, which expressly contemplate coincident compliance with state law as well as with federal law, an intention to pre-empt all" regulation by California]; *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.* (1986) 474 U.S. 494, 505 [106 S. Ct. 755, 88 L. Ed. 2d 859] [holding that a Bankruptcy Code provision authorizing the trustee to abandon worthless or burdensome property did not supersede state environmental and public-safety laws prohibiting disposal of hazardous waste, because the Code also provides that the trustee is to 'manage and operate the property in his possession . . . according to the requirements of the valid laws of the State."], citing 28 U.S.C. § 959(b); *First Nat'l Bank in Plant City v. Dickinson* (1969) 396 U.S. 122 [90 S.Ct. 337, 24 L.Ed.2d 312] [giving effect to federal statute which provides that national banks are subject to state branch-banking laws to the same extent as state banks], citing 12 U.S.C. § 36(c); *First Nat'l Bank of Logan v. Walker Bank & Trust Co.* (1966) 385 U.S. 252 [87 S.Ct. 492, 17 L.Ed.2d 343] [same]; *see also Cipro, supra*, __ P.3d at p. __, 2015 Cal. LEXIS 2486, at *64 [no preemption where substantive standard under California competition law was determined to be "in harmony with" parallel federal standard]).

Nor do state-law claims conflict with federal law if no federal statute or regulation addresses their subject matter. *Brown v. Mortensen* (2011) 51 Cal.4th 1052 [126 Cal.Rptr.3d 428, 253 P.3d 522], involved a claim that the defendant had illegally disclosed confidential patient medical information to various consumer reporting agencies in the course of a dispute over an alleged medical debt. The court concluded that plaintiffs' state law claims under the Confidentiality Act (Civ. Code § 56 et seq.) were not preempted by the Fair Credit Reporting Act (15 U.S.C. § 681 et seq. [FCRA]). The court explained that FCRA preempts state law claims insofar as they arise out of a requirement or prohibition relating to the specific furnisher duties regulated by 15 U.S.C. § 1681s-2, i.e., the duties to provide accurate information and to take action on being notified of a dispute. The complaint alleged the disclosures occurred, were unauthorized, and injured plaintiffs. Plaintiffs were not required to show the disclosures were inaccurate or misleading as well. The complaint did not establish that any of the disclosures were made in the course of responding to official notice of a credit information dispute, such that 15 U.S.C. § 1681s-2(b) would apply. Accordingly, the claims as pleaded—having as their gravamen issues neither of accuracy nor of credit dispute resolution—did not involve the same subject matter as the pertinent federal law and were not displaced (*Brown v. Mortensen*, 51 Cal.4th at p. 1072; see also *Caldera Pharms., Inc. v. Regents of Univ. of Cal.* (2012) 205 Cal.App.4th 338, 359 [140 Cal.Rptr.3d 543] ["[A] state law tort claim is not preempted by the federal patent law, even if it requires the state court to adjudicate a question of federal patent law, provided the state law cause of action … is not an impermissible attempt to offer patent-like protection to subject matter addressed by federal law]).

By contrast, in *Parks v. MBNA America Bank, N.A.* (2012) 54 Cal.4th 376 [142 Cal.Rptr.3d 837, 278 P.3d 1193], *cert. denied*, 133 S.Ct. 653, the California Supreme Court held that federal banking law displaced and nullified Civil Code section 1748.9, a California law requiring various disclosures to accompany preprinted checks that a credit card issuer may provide to its cardholders for use as credit. The Court noted that federal law expressly empowers

national banks to "loan[] money on personal security," but found that section 1748.9 imposes "specific disclosure obligations" that "exceed any requirements in federal law" and, consequently, result in an impermissible conflict (*Parks*, 54 Cal.4th at pp. 387–388). In rejecting the contention that section 1748.9 is a non-preempted law of general application, the Court determined that "[i]t is a law specifically directed at 'credit card issuer[s]' " that "does not state a background legal principle against fraudulent, deceptive or unconscionable practices. It prescribes specific and affirmative conduct that credit card issuers must undertake if they wish to lend money through convenience checks" (Parks, 54 Cal.4th at p. 390).

Absent other indication in a federal statute, bona fide laws of general application that do not conflict with the letter or general purpose of a federal statute are not preempted (*see Oneok, Inc. v. Learjet, Inc*. (Apr. 21, 2015), ___ U.S. ___, 2015 U.S. LEXIS 2808, at *21–22 ["Antitrust laws, like blue sky laws, are not aimed at natural-gas companies in particular, but rather all businesses in the marketplace. … This broad applicability of state antitrust law supports a finding of no [field] pre-emption here."]); *People ex rel. Harris v. Pac Anchor Transp., Inc*. (2014) 59 Cal. 4th 772, 783–787 [329 P.3d 180, 174 Cal.Rptr.3d 626], *pet. for cert. pending* ("[T]he FAAAA embodies Congress's concerns about regulation of motor carriers with respect to the transportation of property; a UCL action that is based on an alleged general violation of labor and employment laws does not implicate those concerns."]; *Harris v. Wachovia Mortg., FSB* (2010) 185 Cal.App.4th 1018, 1024–26 [111 Cal.Rptr.3d 20] [holding that federal banking law did not preempt California claim for breach of contract]; *Cotton v. StarCare Medical Group, Inc.* (2010) 183 Cal.App.4th 437, 453 [107 Cal.Rptr.3d 767] [holding that the Medicare statute preempted some but not all claims under California law; rejecting implied federal preemption of "[c]ommon law causes of action for negligence, willful misconduct, breach of fiduciary duty, and fraud" because "they apply in a broad spectrum of factual contexts" and "are not limited to actions involving Medicare Advantage plans"]; *Davis v. Chase Bank U.S.A., N.A.* (C.D. Cal. 2009) 650 F.Supp.2d 1073, 1086 [because plaintiffs' California claims for unconscionability and alleged breach of covenant of good faith and fair dealing were "part of a general rule of contract law," they did not conflict with federal law and were not preempted]).

When the "particularized application" of a generally applicable law conflicts with letter or general purpose of a federal statute, then the law will be preempted as applied (*In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1272 [63 Cal.Rptr.3d 418, 163 P.3d 106]). For example, in *In re Tobacco Cases II*, the Supreme Court of California held that California's unfair competition law is a law of general application not based on concerns about smoking and health, an area expressly regulated by the Federal Cigarette Labeling and Advertising Act ("FCLAA"). Thus, the FCLLA did not preempt that law on its face (*In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1272 [63 Cal.Rptr.3d 418, 163 P.3d 106]). The Court, however, found that the plaintiffs' unfair competition claim sought to impose on tobacco companies a duty not to advertise in a way that could encourage minors to smoke, a purpose "inherently intertwined with" concerns about smoking and health (*In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1273 [63 Cal.Rptr.3d 418, 163 P.3d 106], *quoting Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 548 [121 S.Ct. 2404, 150 L.Ed.2d 532]). On this basis, the Court held that the FCLLA preempted plaintiffs' claim. On the other hand, when a state law as applied "only provides a means of enforcing federal requirements," it "is the type of state law not preempted by federal law" (*McKell v. Washington Mut., Inc.* (2006) 142 Cal.App.4th 1457, 1486 [49 Cal.Rptr.3d 227]; *see, e.g.*, *Gilstrap v. United Air Lines, Inc.* (9th Cir. 2013) 709 F.3d 995, 1010).

In *Gutierrez v. Wells Fargo Bank* (9th Cir. 2012) 704 F.3d 712, after a bench trial of claims under the UCL's unfairness and fraudulent prongs stemming from allegedly excessive overdraft fees and related misrepresentations, the district court awarded the plaintiff consumer

class $203 million in restitution and enjoined Wells Fargo from posting debit card transactions in high-to-low dollar order (*Gutierrez v. Wells Fargo Bank, N.A.* (N.D. Cal. 2010) 730 F.Supp.2d 1080). The Ninth Circuit vacated the judgment and reversed in part, holding that federal law entrusts to national banks the decisions of how to post account transactions (*Gutierrez,* 704 F.3d at pp. 722–725). At the same time, however, federal law does not empower national banks to defraud consumers through affirmative misrepresentations—e.g., in *Gutierrez,* Wells Fargo's statements to customers that debit card transactions would be subtracted from their checking accounts "automatically" or "immediately" when the bank did not in fact post transactions that way (*Gutierrez,* 704 F.3d at pp. 726–728; *accord, McKell,* 142 Cal.App.4th at p. 1487 [noting that "the state 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"]).

Preemption doctrine applies not only to positive enactments by legislation or regulation, but also to judicial acts that interfere or conflict with congressional intent (*In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1265 [63 Cal.Rptr.3d 418, 163 P.3d 106], *citing English v. General Electric Co.* (1990) 496 U.S. 72, 78–79 [110 S.Ct. 2270, 110 L.Ed.2d 65] [U.S. Supreme Court has held definitively that "[a]bsent any other indication, reference [in a federal statute] to a State's 'requirements' includes its common-law duties"]; (*Riegel v. Medtronic, Inc.* (2008) 128 S.Ct. 999, 1014 [169 L.Ed.2d 892]; *see also Bates v. Dow Agrosciences, LLC* (2005) 544 U.S. 431, 443 [125 S.Ct. 1788, 161 L.Ed.2d 687]; *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 517 [112 S.Ct. 2608, 120 L.Ed.2d 407)]). Thus, federal statutes expressly prohibiting state law "requirements" preempt common-law claims sounding in negligence or strict liability (*Riegel v. Medtronic, Inc.* (2008) 128 S.Ct. 999, 1014 [169 L.Ed.2d 892]; *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 247 [79 S.Ct. 773, 3 L.Ed.2d 775]).

Non-arbitrary federal regulations promulgated by an agency within the scope of its statutory authority may also preempt state law (*Hood v. Santa Barbara Bank & Trust* (2006) 143 Cal.App.4th 526, 536 [49 Cal.Rptr.3d 369]). For example, in *Fischer v. Time Warner Cable Inc*. (2015) 234 Cal.App.4th 784 [184 Cal.Rptr.3d 490], Federal Communications Commission regulations defeated a California consumer protection suit because, although adding several sports channels to a cable television package drove up its price without affording consumers a meaningful choice, the addition did not fundamentally change the service within the meaning of the preemption regulations. At the same time, courts are more reluctant to infer preemption from regulations than from statutes. As the Supreme Court has explained, "as a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer preemption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence" (*Hillborough County v. Automated Med. Labs., Inc.* (1985) 471 U.S. 707, 717 [105 S.Ct. 2371, 85 L.Ed.2d 714], citing *Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525 [97 S.Ct. 1305, 51 L.Ed.2d 604]).

§ 13.04 Presumption Against Preemption

It is presumed that the historic police powers of the states will not be superseded by a federal act unless Congress expresses a clear and manifest intent to do so (*Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 [112 S.Ct. 2608, 120 L.Ed.2d 407] quoting *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230 [67 S.Ct. 1146, 91 L.Ed. 1447]; *see also People v. Union Pacific R.R. Co.* (2006) 141 Cal.App.4th 1228, 1247 [47 Cal.Rptr.3d 92]. The presumption against preemption applies in matters traditionally regulated by the states, such as health and

safety (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485 [116 S.Ct. 2240, 135 L.Ed.2d 700]; juvenile justice (*In re Jose C.* (2009) 45 Cal.4th 534, 550 [87 Cal.Rptr.3d 674, 198 P.3d 1087]); health and animal welfare (*National Meat Ass'n v. Brown* (9th Cir. 2010) 599 F3d 1093, 1097); *People v. Union Pacific R.R. Co.* (2006) 141 Cal.App.4th 1228, 1247 [47 Cal.Rptr.3d 92]); antitrust (*California v. ARC America Corp.* (1989) 490 U.S. 93, 101 [109 S.Ct. 1661, 104 L.Ed.2d 86]); and consumer protection (*In re Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077 [72 Cal.Rptr.3d 112, 175 P.3d 1170] [consumer protection, *e.g.*, deceptive sales practices]; *Spielholz v. Superior Court*, 86 Cal.App.4th 1366, 1372 [104 Cal.Rptr.2d 197] [consumer protection, *e.g.*, false advertising]; *Smiley v. Citibank (South Dakota)*, 11 Cal.4th 138, 148 [44 Cal.Rptr.2d 441, 900 P.2d 690] [consumer protection and banking]; *Black v. Financial Freedom Senior Funding Corp.* (2001) 92 Cal.App.4th 917, 926, 931 [112 Cal.Rptr.2d 445] [unfair business practices, *e.g.*, home financing]; *Arnold v. Dow Chemical Company* (2001) 91 Cal.App.4th 698 [110 Cal.Rptr.2d 722] [general presumption against preemption]).

The presumption against preemption "accounts for the historic presence of state law but does not rely on the absence of federal regulation" (*Wyeth v. Levine* (2009) 555 U.S. 555 [129 S.Ct. 1187, 1195 n.3, 173 L.Ed.2d 51]). The presumption is not triggered when the state action purports to regulate in an area marked by a history of significant federal presence (*United States v. Locke* (2000) 529 U.S. 89, 108 [120 S.Ct. 1135, 146 L.Ed.2d. 69]; *Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1476 [38 Cal.Rptr.3d 653]). For instance, policing fraud against federal agencies is not a field traditionally occupied by the states (*Buckman Co. v. Plaintiffs' Legal Committee* (2001) 531 U.S. 341, 347 [121 S.Ct. 1012, 148 L.Ed.2d 854]; *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230 [67 S.Ct. 1146, 91 L.Ed. 1447]; *United States v. Locke*, 529 U.S. 89, 108 [120 S.Ct. 1135, 146 L.Ed.2d 69]). "To the contrary, the relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law" (*Buckman Co. v. Plaintiffs' Legal Comm.* (2001) 531 U.S. 341, 347 [121 S.Ct. 1012, 148 L.Ed.2d], citing *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500, 504–505 [108 S.Ct. 2510, 101 L.Ed.2d 442] [state law preempted by federal law when interests at stake were "uniquely federal" in nature]; *see also Wholesale Electricity Antitrust Cases I & II* (2007) 147 Cal.App.4th 1293, 1305 [55 Cal.Rptr.3d 253] [presumption against preemption does not apply in cases involving wholesale electricity distribution because federal government has long regulated wholesale electricity rates]).

The presumption against preemption applies in both express and implied preemption analyses (*Bates v. Dow Agrosciences, LLC* (2005) 544 U.S. 431, 449 [125 S.Ct. 1788, 161 L.Ed.2d 687] ["Federal laws containing a preemption clause do not automatically escape the presumption against preemption"]; *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485 [116 S.Ct. 2240, 135 L.Ed.2d 700]; *Philip Morris Inc. v. Harshbarger* (1st Cir. 1997) 122 F.3d 58, 68; *Vango Media, Inc. v. City of New York* (2d Cir. 1994) 34 F.3d 68, 72 [presumption applies whether preemption is express or implied]).

In practice, the presumption against preemption often means that when Congress is silent on whether federal law extends to the conduct at issue, the proponent of preemption faces a heavy burden. The Supreme Court's "pre-emption jurisprudence explicitly rejects the notion that mere congressional silence on a particular issue may be read as pre-empting state law" (*Wyeth v. Levine* (2009) 555 U.S. 555, 602–603 [129 S.Ct. 1187, 173 L.Ed.2d 51] [Thomas, J., concurring] [citation omitted]).

Common sense suggests it is "not plausible to interpret the statutory silence as tantamount to an implicit congressional intent" that state law is preempted (*Central Bank, N.A. v. First*

Interstate Bank, N.A. (1994) 511 U.S. 164, 185 [114 S.Ct. 1439, 128 L.Ed.2d 119], *superseded by statute on another ground as stated in Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.* (2008) 552 U.S. 148 [128 S.Ct. 761, 169 L.Ed.2d 627]; *Exxon Shipping Co. v. Baker* (2008) 554 U.S. 471, 488–489 [128 S.Ct. 2605, 171 L.Ed.2d 570] ["[W]e find it too hard to conclude that a statute expressly geared to protecting 'water,' 'shorelines,' and 'natural resources' was intended to eliminate *sub silentio* oil companies' common law duties to refrain from injuring the bodies and livelihoods of private individuals"]).

§ 13.05 Discerning Congressional Intent as to Preemption

Determining whether a federal act preempts state action is fundamentally a question of congressional intent. The purpose and intent of Congress is "the ultimate touchstone" in preemption analysis (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485 [116 S.Ct. 2240, 135 L.Ed.2d 700] [internal quotation marks omitted], quoting *Retail Clerks International Asso. v. Schermerhorn* (1963) 375 U.S. 96, 103 [84 S.Ct. 219, 11 L.Ed.2d 179]; *see also Lorillard Tobacco Company v. Reilly* (2001) 533 U.S. 525, 551 [121 S.Ct. 2404, 150 L.Ed.2d 532]; *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516 [112 S.Ct. 2608, 120 L.Ed.2d 407]; In re Tobacco Cases II (2007) 41 Cal.4th 1257, 1265 [63 Cal.Rptr.3d 418, 163 P.3d 106]). The California Supreme Court has held that "state law will be displaced only when affirmative congressional action compels the conclusion it must be" (*In re Jose C.* (2009) 45 Cal.4th 534, 550 [87 Cal.Rptr.3d 674, 198 P.3d 1087] [state juvenile wardship proceedings not preempted by federal immigration law when court found minor defendant brought aliens into United States illegally]). Thus, any interpretation of the scope and application of a preemption statute must rest primarily on "a fair understanding of congressional purpose" (*Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485–486 [116 S.Ct. 2240, 135 L.Ed.2d 700], quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 530 [112 S.Ct. 2608, 120 L.Ed.2d 407]).

Congress' intent is primarily discerned from the language of the preemption statute, the statutory framework surrounding it, and the overall purpose of the statute (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 486 [116 S.Ct. 2240, 135 L.Ed.2d 700]; *Hughes Aircraft Co. v. Jacobson* (1999) 525 U.S. 432, 438 [119 S.Ct. 755, 142 L.Ed.2d 881]; *Lorillard Tobacco Company v. Reilly* (2001) 533 U.S. 525, 551 [121 S.Ct. 2404, 150 L.Ed.2d 532] [considering predecessor preemption provision and circumstances in which current language was adopted]). A statute's comprehensiveness is not, however, an automatic indication of Congress's intent to preempt the field (*see Hillsborough County v. Automated Med. Labs., Inc.* (1985) 471 U.S. 707, 717 [105 S.Ct. 2371, 85 L.Ed.2d 714]). Moreover, even federal laws containing an express preemption clause may not preempt the entire field. "A preemption clause tells us that Congress intended to supersede or modify state law *to some extent*" (*Bates v. Dow Agrosciences, LLC* (2005) 544 U.S. 431, 449 [125 S.Ct. 1788, 161 L.Ed.2d 687) [emphasis added]]. Indeed, Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 517 [112 S.Ct. 2608, 120 L.Ed.2d 507]). "If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains" (*Altria Group, Inc. v. Good* (2008) 555 U.S. 70 [129 S.Ct. 538, 543, 172 L.Ed.2d 398]; *see National Meat Ass'n v. Brown* (9th Cir. 2010) 599 F.3d 1093, 1097) [holding that the Federal Meat Inspection Act, which contains an express preemption clause, did not preempt California Penal Code § 599f, which prohibits slaughter of non-ambulatory animals]). If the extent of federal preemption is not clear from the language of an express preemption clause, courts ordinarily "accept the reading that disfavors preemption" (*Bates v. Dow Agrosciences, LLC* (2005) 544 U.S. 431, 449 [125 S.Ct. 1788, 161 L.Ed.2d 687]).

§ 13.06 Savings Clauses Preserving State-Law Remedies

The inclusion of a "savings clause" preserving state-law remedies corroborates a finding that Congress did not intend to preempt state remedies (*see Wyeth v. Levine* (2009) 555 U.S. 555 [129 S.Ct. 1187, 1195–1196, 1200, 173 L.Ed.2d 51] [declining to find federal preemption when Congress included a savings clause but no express preemption clause]; *Peters v. Great Dane Trailers, Inc.* (N.D. Ind. 1996) 1996 U.S. Dist. LEXIS 17984). Congress knows how to preempt state actions while leaving common-law remedies intact. (*See Jevne v. Superior Court* (2005) 35 Cal.4th 935, 950 [28 Cal.Rptr.3d 685, 111 P.3d 954] [noting that when federal law contains a savings clause preserving state law in certain areas, "neither express preemption nor field preemption … is at issue"].) However, the existence of a general savings clause will not bar the ordinary workings of conflict preemption principles (*Geier v. American Honda Motor Co.* (2000) 529 U.S. 861, 869 [120 S.Ct. 1913, 146 L.Ed.2d 914]).

Savings clauses should generally not be interpreted so as to undercut or dilute an express preemption clause (*Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 328 [93 Cal.Rptr.2d 36, 993 P.2d 366], *overruled on other grounds by Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, 436, 452–454 [125 S.Ct. 1788, 161 L.Ed.2d 687] (disagreement recognized by *Barrett v. Rosenthal* (2006) 40 Cal.4th 33 [51 Cal.Rptr.3d 55, 146 P.3d 510]); *see also Ball v. GTE Mobilnet of California* (2000) 81 Cal.App.4th 529, 539 [96 Cal.Rptr.2d 801]). "Th[e savings] clause … cannot in reason be construed as continuing … a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself" (*American Telephone & Telegraph Co. v. Central Office Telephone, Inc.* (1998) 524 U.S. 214, 227–228 [118 S.Ct. 1956, 141 L.Ed.2d 222] [internal quotation marks omitted], quoting *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.* (1907) 204 U.S. 426, 446 [27 S.Ct. 350, 51 L.Ed. 553]). The Supreme Court has "repeatedly 'declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law' " (*Geier v. American Honda Motor Co.* (2000) 529 U.S. 861, 870 [120 S.Ct. 1913, 146 L.Ed.2d 914], quoting *United States v. Locke*, 529 U.S. 89 [120 S.Ct. 1135, 146 L.Ed.2d 69]; *International Paper Co. v. Ouellette* (1987) 479 U.S. 481, 494 n.14 [107 S.Ct. 805, 93 L.Ed.2d 883] [preemption found when savings clause was general in nature, used standard language, and did not reflect any considered judgment by Congress as to what other remedies were previously, or continued to be, available]); *see also Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 935 [38 Cal.Rptr.3d 220, 126 P.3d 1040]). A savings clause, therefore, will be read only to preserve rights not inconsistent with the federal statutory or regulatory requirements (*see American Telephone & Telegraph Co. v. Central Office Telephone, Inc.* (1998) 524 U.S. 214, 227 [118 S.Ct. 1956, 141 L.Ed.2d 222]).