

Case NOT filed despite strong recommendations.

CONFIDENTIAL

State of California

Department of Justice
455 Golden Gate Avenue, Suite 11000
San Francisco, California 94102

M e m o r a n d u m

To : Frances T. Grunder
Senior Assistant Attorney General

Benjamin G. Diehl
Nicklas A. Akers
Supervising Deputy Attorneys General

Date: January 18, 2013
Telephone: (415) 703-5733
Facsimile: (415) 703-5480
E-mail: Nicholas.Campins@doj.ca.gov
Angela.Munoz@doj.ca.gov
Todd.Espinosa@doj.ca.gov
Susan.Saylor@doj.ca.gov

From : Nicholas G. Campins
Angela M. Muñoz
Todd I. Espinosa
Susan M. Saylor
Deputy Attorneys General
Consumer Law Section
Office of the Attorney General – San Francisco

Subject : Executive Summary - Request for Authorization to File Action against OneWest Bank, FSB
OneWest Investigation (SF2012105513)

Please see the attached Executive Summary.

Executive Summary

The Consumer Law Section requests authority to file a civil enforcement action against OneWest Bank, FSB. Because the limitations period for some of the claims will end on March 19, we request a decision by March 5.

Headquartered in Pasadena, OneWest began operations on March 19, 2009 with its acquisition of most of IndyMac's assets from the FDIC. Shortly thereafter, OneWest acquired the assets of two smaller banks: First Federal Bank of California, FSB and La Jolla Bank, FSB. As part of the acquisitions, OneWest obtained the servicing and/or beneficial rights to tens of thousands of troubled loans throughout California. Many of the loans were Option Adjustable Rate Mortgages whose rates became unaffordable for the borrowers, who were subsequently pulled into the foreclosure process.

Since March 2009, OneWest has foreclosed on approximately 35,000 California homes and initiated foreclosures on approximately 45,000 more. In April 2011, OneWest agreed to the Office of Thrift Supervision's (OTS) entry of a Consent Order. The Order included findings that OneWest recorded documents that were not properly notarized, initiated non-judicial foreclosures without proper authority, failed to devote sufficient resources to ensure proper administration and oversight of its foreclosure processes, and failed to sufficiently oversee vendors. The OTS's misconduct findings, together with consumer complaints and the large volume of foreclosures conducted by OneWest, prompted our investigation.

The investigation was hampered by our inability to subpoena OneWest, by OneWest's obstruction of our related LPS investigation, and by our apprehension that OneWest would file a declaratory relief action against us if we aggressively sought to obtain evidence from third parties. We were therefore limited to publicly recorded land records, a few hundred incomplete OneWest loan files obtained from LPS before OneWest objected, and documents we were able to obtain from foreclosure trustees used by OneWest.

Despite the limitations on the investigation, we uncovered evidence suggestive of widespread misconduct, including evidence that OneWest:

- (1) signed backdated and false instruments, acknowledged them to notaries, and then caused them to be recorded with county recorders throughout the State;
- (2) made and directed unlawful credit bids at trustee's sales which resulted in the wrong parties winning auctions and the unlawful evasion of documentary transfer tax obligations;
- (3) performed other acts in the foreclosure process without valid legal authority; and
- (4) failed to comply with requirements related to the execution, timing, and mailing of foreclosure documents.

We therefore recommend that the Attorney General authorize the filing of a civil enforcement action against OneWest.

M e m o r a n d u m

To : Frances T. Grunder
Senior Assistant Attorney General

Benjamin G. Diehl
Nicklas A. Akers
Supervising Deputy Attorneys General

Date: January 18, 2013

Telephone: (415) 703-5733 (Campins)
E-mail: Nicholas.Campins@doj.ca.gov
Angela.Munoz@doj.ca.gov
Todd.Espinosa@doj.ca.gov
Susan.Saylor@doj.ca.gov

From : Nicholas G. Campins
Angela M. Muñoz
Todd I. Espinosa
Susan M. Saylor
Deputy Attorneys General
Consumer Law Section
Office of the Attorney General – San Francisco

Subject : Request for Authorization to File Action against OneWest Bank, FSB *OneWest Investigation* (SF2012105513)

REQUESTED ACTION

The Consumer Law Section requests authority to file a civil enforcement action against OneWest Bank, FSB. An annotated copy of the draft complaint is attached as Exhibit A. Because the limitations period for some of the claims will end on March 19, we request a decision by March 5.

OVERVIEW

What Prompted the Investigation: Headquartered in Pasadena, OneWest began operations on March 19, 2009 with its acquisition of most of IndyMac's assets from the FDIC.¹ Shortly thereafter, OneWest acquired the assets of two smaller banks: First Federal Bank of California, FSB (December 2009) and La Jolla Bank, FSB (February 2010).²

¹ Detailed documentation concerning the IndyMac Acquisition is available at <<http://www.fdic.gov/bank/individual/failed/IndyMac.html>> (as of November 20, 2012). For information concerning the deal terms and bid terms, see <<http://www.fdic.gov/news/news/press/2009/pr09042.html>> (as of November 20, 2012); <http://www.fdic.gov/bank/individual/failed/IndyMac_bid_summary.html> (as of November 20, 2012); and <<https://www.owb.com/Press-Releases/03-19-2009---Investor-Group-Completes-Acquisition-of-IndyMac-Assets/>> (as of November 20, 2012).

² Detailed documentation concerning the First Federal Bank of California, FSB and La Jolla Bank, FSB failures, and their sale to OneWest are available at:

As part of the acquisitions, OneWest obtained the servicing and/or beneficial rights to tens of thousands of troubled loans throughout California. For example, Option Adjustable Rate Mortgages (ARMs) made up 75 percent of IndyMac's home loans from 2004 to 2006.³ Option ARMs allowed borrowers the option of making a minimum payment, an interest-only payment, or a payment of the interest and some of the principal balance. In 2006, 75 percent of IndyMac's Option ARM borrowers made only the minimum payment.⁴ Because the minimum payment did not cover the interest for the month, negative amortization occurred (i.e., the difference between the interest charged for the month and the payment was added to the principal balance). After a few years the monthly payment ballooned substantially and became unaffordable. When the homeowners could no longer make their payments, the loans entered the foreclosure process.

Since March 2009, OneWest has foreclosed on approximately 35,000 California homes and initiated foreclosures on approximately 45,000 more.

On April 13, 2011, OneWest executed a Stipulation and Consent to the Issuance of a Consent Order with the Office of Thrift Supervision (OTS). The Order included findings that OneWest (1) filed or caused to be filed in state and federal courts, or in local land records offices, numerous affidavits or other mortgage-related instruments that were not properly notarized; (2) initiated non-judicial foreclosure proceedings without always ensuring that the promissory note and mortgage document were properly endorsed or assigned; (3) failed to devote sufficient financial, staffing and managerial resources to ensure proper administration of its foreclosure processes; (4) failed to devote to its foreclosure processes adequate oversight, internal controls, policies, and procedures, compliance risk management, internal audit, third-party management, and training; and (5) failed sufficiently to oversee outside counsel and other third-party providers handling foreclosure-related services.

The OTS's misconduct findings, together with the tens of thousands of foreclosures conducted by OneWest, prompted our investigation. The goal of this investigation is to determine whether the misconduct described in the OTS findings extended to California.

<<http://www.fdic.gov/bank/individual/failed/firstfederal-ca.html>> (as of November 20, 2012) and <<http://www.fdic.gov/bank/individual/failed/lajolla.html>> (as of November 20, 2012).

³ See, e.g., United States Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, Majority and Minority Staff Report, *Wall Street and The Financial Crisis: Anatomy Of A Financial Collapse* (April 13, 2011) <<http://www.hsgac.senate.gov/download/?id=273533f4-23be-438b-a5ba-05efe2b22f71>> (as of November 20, 2012).

⁴ United States Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, Majority and Minority Staff Report, *Wall Street and The Financial Crisis: Anatomy Of A Financial Collapse*, *supra*, at pages 233-234.

Limitations on the Investigation: The investigation was hampered by our inability to subpoena OneWest,⁵ by OneWest's obstruction of the LPS investigation (outlined more fully beginning on page 10), and by our apprehension that OneWest would file a declaratory relief action against us if we aggressively sought to obtain evidence from third parties.⁶ We were therefore limited to publicly recorded land records, a few hundred incomplete OneWest loan files obtained from LPS before OneWest objected, and documents we were able to obtain from foreclosure trustees used by OneWest.

The Misconduct: Despite the limitations on the investigation, we uncovered documented evidence of wrongdoing suggestive of widespread misconduct, including substantial evidence that OneWest: (1) signed backdated and false instruments, acknowledged them to notaries, and then caused them to be recorded with county recorders throughout the State; (2) made and directed unlawful credit bids at trustees' sales which resulted in the wrong parties winning auctions and the unlawful evasion of documentary transfer tax obligations; (3) performed other acts in the foreclosure process without valid legal authority; and (4) failed to comply with requirements related to the execution, timing, and mailing of foreclosure notices and instruments.

For example, our review of draft and executed OneWest instruments obtained from Quality Loan Service suggests that many instruments executed and notarized by OneWest's employees and then recorded with county recorders are backdated.⁷ The results of the review to date are summarized in Table 1:

Table 1. Ongoing Quality Loan Servicing Review of Backdated Documents (BD)

Month	Total Reviewed	Total BD	% BD	BD 7 Days or More	% BD 7 Days or More	Notary BD	% Notary BD	Review Status
Jun-09	640	637	99.53%	67	10.47%	40	6.25%	Complete
Jul-09	116	115	99.14%	45	38.79%	16	13.79%	In Progress
Oct-09	157	157	100.00%	84	53.50%	73	46.50%	In Progress
Totals	913	909	99.56%	196	21.47%	129	14.13%	n/a

⁵ We were unable to subpoena OneWest because of a Supreme Court decision which classifies state-issued administrative subpoenas to national banks regarding core bank functions as a prohibited exercise of visitatorial powers (*Cuomo v. Clearing House Assn.* (2003) 557 U.S. 519, 536.)

⁶ Please see the subsection entitled "The Financial Freedom Litigation" and the section entitled "The Investigation," at pages 9-11 below.

⁷ See, e.g., Tab 1 (spreadsheet reflecting the results of the review for October 2009).

The review is resource intensive, and we still have 38 months worth of data to review. As detailed below, this backdating is important not only because it resulted in false instruments being recorded with county recorders,⁸ but also because it meant that the associated foreclosures moved more rapidly toward completion.

Another review conducted as a part of the investigation focused solely of publicly filed instruments in Alameda and Santa Clara counties and assumed that the dates set forth in the instruments are accurate. Even when the benefit of the doubt is given to OneWest regarding the veracity of the dates of the instruments, we still found substantial numbers of unlawful credit bids and substitutions of trustee.⁹ The results of the review to date are summarized in Table 2:

Table 2. Results of Ongoing Review of Publicly Filed Instruments in Alameda and Santa Clara Counties

County	Number of Foreclosures Reviewed	Number of Unlawful Credit Bids	Number of Unlawful Substitutions of Trustee	Combined % Violations
Alameda	175	15	10	14.29%
Santa Clara	87	13	4	19.54%
Totals	262	28	14	16.03%

Using the results of this review, Table 2A projects the total number of possible violations statewide:

Table 2A. Projected Number of Possible Credit Bidding and Substitution of Trustee Violations Based On Review of Publicly Filed Instruments

Servicer	Completed Foreclosures	Estimated % of Violations	Projected Total Violations
OneWest (exclusively)	14,992	16.03%	2,403
Completed by OneWest (Started by IndyMac, First Federal, or La Jolla)	20,031	16.03%	3,211
Totals	35,023	16.03%	5,614

⁸ The data show that backdated instruments were recorded in a variety of counties, including: Alameda, Contra Costa, El Dorado, Fresno, Imperial, Kern, Los Angeles, Merced, Riverside, San Bernardino, San Diego, San Joaquin, San Luis Obispo, Stanislaus, Tulare, and Ventura.

⁹ See, e.g., Tabs 8-11.

Once the effects of unlawful backdating are included in the calculation (i.e., there is proof that additional assignments were executed after the property was sold at auction and/or that the party signing a substitution of trustee was not the present beneficiary), we would expect this number to increase substantially. As detailed below, in the case of unlawful credit bidding, this misconduct was important because it resulted in a party taking title to a home pursuant to a credit bid when it did not have the right to do so and/or resulted in the unlawful nonpayment of documentary transfer taxes.

Finally, in the review of the 300 OneWest loan files obtained from LPS, we found that 21 files evidenced unlawful conduct by OneWest.¹⁰ Those 21 files (7 percent of those reviewed) contained falsely dated instruments executed by OneWest, substitutions of trustee in which OneWest falsely stated that it was the present beneficiary under an applicable deed of trust when it was not, or both. This unlawful conduct occurred throughout the state, concentrated primarily in southern California. The 21 files related to homes in the following nine counties: Los Angeles, Orange, Placer, Riverside, San Bernardino, San Diego, San Mateo, Santa Barbara and Ventura.

If the proposed enforcement action is authorized, we will be allowed to conduct full discovery.¹¹ We will use discovery to obtain the information we need to more definitively establish the number of violations of law by OneWest in California. We expect the number of proven violations to increase substantially.

Financial Status of OneWest: OneWest is in excellent financial condition and an IPO is expected to occur this year.¹²

Expected Outcome and Timeline: If the proposed enforcement action is authorized, the primary goals will be to obtain liability findings and to hold OneWest publicly accountable for its misconduct. If we succeed, we will seek extensive injunctive relief, penalties, restitution, and costs. We anticipate a removal fight, substantial motion practice, a lengthy civil discovery process (because of our inability to subpoena OneWest and its obstructive conduct), and a lengthy trial. Absent settlement, we expect that the litigation will last 3 to 5 years.

Likelihood of Success: Moderate. The proposed enforcement action would be the first of its kind in California and it raises complex legal and factual issues which may lessen the prospect of settlement and/or require appellate review. If we take the enforcement action to trial, we face a higher than average risk that the court may choose to award minimal amounts in

¹⁰ Because it was OneWest that executed the falsely dated instruments identified by the review (and not LPS), the misconduct at issue is not addressed by the settlement with LPS.

¹¹ 12 C.F.R. § 7.4000(c)(2) (2012) (“Exception for courts of justice. National banks are subject to such visitatorial powers as are vested in the courts of justice. This exception pertains to the powers inherent in the judiciary.”)

¹² Please see description of OneWest under the “The Players” section, at page 7 below.

restitution¹³ and/or penalties.¹⁴ We nevertheless expect to obtain a liability finding and secure injunctive relief. We believe that there is substantial public justice value in fully investigating OneWest's conduct through the use of civil discovery and holding it publicly accountable, even if sizable penalties and restitution are not awarded.

Resources: We expect resource intensive and prolonged litigation. We will need 2-3 full-time DAGs, substantial SDAG time, auditor time, and paralegal time. Outside expert (testifying and consulting) support will be required to assist us as we review and evaluate data regarding the tens of thousands of relevant foreclosures conducted by OneWest.

Supervision of the Litigation: The proposed enforcement action would be supervised by Frances Grunder (SAAG), Benjamin Diehl (lead SDAG), and Nicklas Akers (SDAG).

Relationship to the National Mortgage Settlement and the Homeowner's Bill of Rights: The proposed enforcement action would complement the prior efforts in three ways.

One, it would enable us to use the full panoply of tools available in civil discovery to conduct a full investigation of a national bank's misconduct and provide a public accounting of what happened. That is something we were unable to do in the prelude to the National Mortgage Settlement because of a Supreme Court decision which classifies state-issued administrative subpoenas to national banks as a prohibited exercise of visitatorial powers (*Cuomo v. Clearing House Assn.* (2003) 557 U.S. 519, 536.)¹⁵

Two, the proposed enforcement action would enhance the deterrent effect of SB 900 (the anti-robot signing legislation) by demonstrating the office's commitment to investigating and prosecuting entities that record instruments without verifying their accuracy.

¹³ OneWest will likely argue that the displaced homeowners defaulted on their mortgage obligations, were properly subject to foreclosure, and were not substantially harmed by any violations. We will dispute this and point out that the unlawful activities tended to shorten the amount of time available for borrowers to figure out a way to become current. Nevertheless, it is possible that OneWest's argument may resonate with the court and result in little to no restitution.

¹⁴ OneWest will likely argue that any violations it committed were trivial in nature. We will vigorously dispute this. However, given OneWest's size and the relative lack of attention traditionally paid by managers to loss mitigation departments, there is a risk that the court might be persuaded to award only a minimal penalty. In doing so, the court may embrace the theory that the violations are not indicative of a broader corporate culture of indifference to the law and/or the rights of borrowers, and that the violations were of a technical nature.

¹⁵ 12 C.F.R. § 7.4000(c)(2) (2012) ("Exception for courts of justice. National banks are subject to such visitatorial powers as are vested in the courts of justice. This exception pertains to the powers inherent in the judiciary.")

Three, the investigation has uncovered evidence of unlawful credit bidding, a type of misconduct that is not squarely addressed by either the National Mortgage Settlement or the Homeowner's Bill of Rights. As detailed below, unlawful credit bidding occurs when a party other than the foreclosing beneficiary uses the credit reflected by the deed of trust to take title to the home when it is not legally entitled to do so. This means that other bidders at the auction (perhaps in some cases the borrowers and/or their families) are unfairly disadvantaged in the bidding process and that cities and counties throughout the state lost documentary transfer tax revenue.

THE PLAYERS

Proposed Defendant: OneWest is the largest bank based in Southern California, and it operates 73 retail branches.¹⁶ OneWest has total assets of \$25 billion and \$14 billion in deposits.¹⁷ It is a federal savings bank and a subsidiary of IMB HoldCo LLC.¹⁸ OneWest's CEO, Steven Mnuchin, stated that he anticipates taking it public this year.¹⁹

OneWest conducts much of its mortgage servicing operation through its IndyMac Mortgage Services Division.²⁰ In addition to Pasadena, OneWest has significant operations in Austin, Texas and Kalamazoo, Michigan.

FDIC: The FDIC was the conservator of IndyMac for several months before selling its assets to OneWest. The agreement included a Shared-Loss Agreement whereby the FDIC agreed to share losses on a portfolio of qualifying loans.²¹ The Shared-Loss Agreement covers 7 percent of the loans OneWest services (the loans owned by OneWest) and applies after OneWest has taken specified losses exceeding \$2.5 billion. The Shared Loss Agreement does not cover losses for loans that OneWest failed to service in accordance with "Customary Servicing

¹⁶ See Unknown Author, *About OneWest Bank FSB* <<https://www.owb.com/About-Us/History/>> (as of January 16, 2013).

¹⁷ See footnote 16, *ante*.

¹⁸ Consent Order entered into by IMB HoldCo LLC and the Office of Thrift Supervision (now a part of the OCC) on April 13, 2011 (hereafter Consent Order) at page 1.

¹⁹ Taro, *From IndyMac to OneWest: Steven Mnuchin's Big Score* (Mar. 22, 2012) Bloomberg Businessweek <<http://www.businessweek.com/printer/articles/15022-from-indymac-to-onewest-steven-mnuchins-big-score/>> (as of November 20, 2012).

²⁰ See <<https://www.indymacmortgageservices.com/IndyMac/>> (as of November 20, 2012).

²¹ The shared loss agreement is available at <<http://www.fdic.gov/about/freedom/IndyMacSharedLossAgrmt.pdf>> (as of November 20, 2012).

Procedures.”²² Customary Servicing Procedures are defined as servicing procedures “which are in accordance with accepted mortgage servicing practices of prudent lending institutions.”²³ The FDIC states that it has not made any payments to OneWest under the Agreement.²⁴ The FDIC was briefly conservator of the other failed banks, First Federal and La Jolla, prior to the sale of their assets to OneWest.²⁵

The complaint states that we are not suing the FDIC or the failed banks. It also states that we are not seeking to hold OneWest accountable for the failed banks’ conduct. The possibility nevertheless exists that the FDIC might intervene on the ground that the litigation poses a risk of increasing the specified losses above the \$2.5 billion threshold and would require payments by the FDIC under the Shared-Loss Agreement.

However, we believe that the facts augur against FDIC intervention for several reasons. *First*, because OneWest has not exceeded the loss threshold, the FDIC has not paid any money under the agreement and any future theoretical payments as the result of the enforcement action would be speculative. *Second*, the agreement covers only 7 percent of the loans which are serviced by OneWest. *Third*, because the Shared Loss Agreement does not cover losses for loans that OneWest failed to service using accepted mortgage servicing practices of prudent lending institutions, the conduct at issue in the Complaint should not be covered.

OCC: On July 21, 2011, as a part of Dodd-Frank, the OTS was merged with the Office of the Comptroller of the Currency (OCC). Responsibility for enforcement of the April 13, 2011 Consent Order now resides with the OCC.

The Consent Order required OneWest to retain an independent audit firm to perform foreclosure reviews. OneWest retained Navigant Consulting.²⁶ According to the Statement of Work, the primary objective of the foreclosure reviews is to identify borrowers who were improperly foreclosed on or who incurred financial harm from errors, misrepresentations, or other deficiencies in the foreclosure process. Based on our discussions with consumers and consumer advocates, our understanding is that the foreclosure review process is not resulting in any redress to consumers and is not working well.

²² Shared Loss Agreement, *supra*, at article II, section 2.1(e), page 8.

²³ Shared Loss Agreement, *supra*, at article I, page 2.

²⁴ See Unknown Author, *Supplemental Facts about the Sale of IndyMac FSB to OneWest Bank* <http://www.fdic.gov/news/news/press/2010/onewest_lossshareb.html> (as of November 20, 2012).

²⁵ See footnote 2, *ante*, page 1.

²⁶ See Amended Statement of Work entered into between OneWest and Navigant Consulting, Inc. as amended pursuant to OCC comments on October 4, 2011, available at <<http://www.occ.gov/topics/consumer-protection/foreclosure-prevention/OWB-EL-00000001.pdf>> (as of November 20, 2012).

On January 7, 2013, ten mortgage servicing companies subject to enforcement actions for deficient practices in mortgage loan servicing and foreclosure processing reached an agreement in principle with the OCC and the Federal Reserve Board (FRB) to pay more than \$3.3 billion in direct payments to eligible borrowers and \$5.2 billion in other assistance, such as loan modifications and forgiveness of deficiency judgments. OneWest Bank is not included in this group. The OCC and FRB stated on January 7, 2013 that they continue to work to reach similar agreements with other servicers that are not parties to the January 2013 settlement, "but that are also subject to enforcement actions for deficient practices in mortgage loan servicing and foreclosure processing."²⁷

Key Executives and Investors: OneWest's CEO is Steve Mnuchin. Mnuchin was a partner and hedge fund manager at Goldman Sachs.²⁸ OneWest is not publicly traded and any information available about its investors is therefore unverifiable. According to press reports, its investors include: Steven Mnuchin, John Paulson, George Soros, and Chris Flowers.²⁹ As of April 13, 2011, the directors of OneWest included Steven T. Mnuchin, S. Kenneth Leech, Jay J. Miller, John J. Oros, Allen C. Puwalski, Eric J. Rosen, David J. Wermuth, Ravi P. Yadav, and Joseph Otting.³⁰ As of April 13, 2011, the directors of IMB HoldCo LLC included Steven T. Mnuchin, Allen C. Puwalski, John J. Oros, Eric J. Rosen, Ravi P. Yadav, David J. Wermuth, and Jay J. Miller.³¹

The Financial Freedom Litigation: On November 24, 2009, our office issued a subpoena to Financial Freedom Acquisition (FFA), a subsidiary of OneWest.³² The subpoena was designed to verify the results of a survey conducted by our office that uncovered evidence of FFA's predecessor's failure to provide legally required counseling to reverse mortgage recipients.

Shortly after service, OneWest raised concerns regarding the custody of loan documents and the costs of complying with the subpoena. Over the next month or so, we discussed and tried to address OneWest's concerns. We suspended the deadline on the subpoena and requested a subset of information in an effort to amicably resolve the issues. On January 26, 2010, OneWest raised visitorial powers and preemption concerns.

²⁷ See <<http://www.occ.gov/news-issuances/news-releases/2013/nr-ia-2013-3.html>> (as of January 8, 2013).

²⁸ Taro, *From IndyMac to OneWest: Steven Mnuchin's Big Score*, *supra*, at <<http://www.businessweek.com/primer/articles/15022-from-indymac-to-onewest-steven-mnuchins-big-score/>> (as of November 20, 2012).

²⁹ See <<http://www.forbes.com/profile/steven-mnuchin/>> (as of November 20, 2012).

³⁰ See Consent Order, *supra*, at page 29.

³¹ See Consent Order, *supra*, at page 14.

³² The following discussion is based on a February 5, 2010 Memorandum authored by Margaret Chen (Prolaw Matter No. LA2010500452).

Three days later, OneWest filed a declaratory relief action against us in federal court and sought to prevent the investigation and any resulting lawsuit. Rather than defend the action, we withdrew the subpoena in exchange for a dismissal of the declaratory relief action.

O'Melveny & Myers LLP represented OneWest in its action against us. The partner who signed the complaint was Brian Brooks. In March 2011, OneWest named Mr. Brooks its Vice Chairman.

Other Targets: In cooperation with the California Monitor, we continue to closely monitor the settling banks' compliance with the National Mortgage Settlement. It is our expectation that the multi-state process will resume with regard to the other targets. The next round includes potential targets like HSBC, US Bank, PNC, Ocwen and SunTrust. Based on data from DataQuick regarding foreclosures, none of these targets conducted as many California foreclosures as OneWest.

THE INVESTIGATION

We are barred from issuing an administrative subpoena to OneWest or any other national bank that seeks information about their core bank functions (see *Cuomo v. Clearing House Assn.* (2003) 557 U.S. 519, 536.)

OneWest obstructed our efforts to obtain evidence from third parties. For example, in an effort to gain more visibility into the banks' servicing operations, we subpoenaed loan files from Lender Processing Services (LPS). During the meet and confer process, LPS recommended that we start with a sample of OneWest's files and we agreed. On February 13, 2012, before production began, Jennifer Gray, OneWest's Head of Litigation, contacted our office and asserted that the loan files belonged to OneWest and that LPS could not produce them. She articulated a visitorial powers objection and threatened to block their production. To avoid the risk that we would be subjected to a declaratory relief action by OneWest before we could file against them, we were forced to accept a limited production of a few hundred loan files. This limitation was detrimental to the investigation of LPS and it added substantially to the work needed to investigate OneWest.

We heard from another subpoenaed entity, Meridian Foreclosure Services, that OneWest is requiring all of its vendors to immediately report to it any law enforcement subpoenas.

Together, several factors have hampered the investigation: the visitorial powers doctrine; OneWest's obstructive behavior; and our apprehension that OneWest would file a declaratory relief action against us if we aggressively sought to obtain evidence from third parties. Nevertheless, we were able to obtain information from: (1) publicly available sources and (2) from subpoenas to third parties who have information about OneWest. To date we have obtained over 204,000 publicly recorded foreclosure instruments from county recorders throughout the state including Alameda, El Dorado, Fresno, Kern, Los Angeles, Monterey, Orange, Riverside, San Mateo, San Diego, Santa Clara, and San Joaquin Counties. We supplemented this document collection with foreclosure data and documents available for purchase through a website called Foreclosure Radar. Litigation Support has compiled and organized the county recorder documents into a single text-searchable database.

We obtained information from the following third parties that directly informed the investigation and the allegations set forth in the complaint:

(1) Lender Processing Services (LPS): In response to a subpoena, we have received three hundred (300) internal loan files that were purportedly chosen randomly before OneWest obstructed further cooperation. We have completed the review of the documents in these files.

(2) MERS: We have received loan-level portfolio data for homes in foreclosure, emails, and other documents. The review of the MERS production is ongoing.

(3) Quality Loan Service Corp.: We have received thousands of substitutions of trustee, assignments, and other foreclosure-related documents. The review of the Quality documents is ongoing.

We have pending subpoenas out to two more third parties: Aztec Foreclosure Corporation and Meridian Foreclosure Service. We are preparing to review Meridian's production.

THE MISCONDUCT AND ANTICIPATED LEGAL CLAIMS

Using the investigative technique outlined above, we reviewed both publicly recorded documents and documents obtained pursuant to subpoena. Based on that review, we have identified the following five types of misconduct.

1. Backdated Foreclosure Instruments

Misconduct: OneWest signed thousands of backdated instruments, acknowledged them to notaries, and recorded them with county recorders throughout the State.

a. Instruments Purportedly Executed by OneWest prior to its Existence

During the initial investigation we identified 86 examples of recorded substitutions of trustee (SOTs) executed in OneWest's name bearing dates prior to the date that OneWest began operations (March 19, 2009).³³ Some of these bear dates more than a year before OneWest began operations. Because it would have been impossible for OneWest to sign the instruments before it became an operational bank, we deduced that these instruments were backdated and it led to further investigation. The execution date is not the only misrepresentation made in these SOTs. OneWest falsely asserted that it was the "present beneficiary" at the time of execution and by implication that it had authority to execute these legal instruments, when it did not.

³³ See, e.g., Tabs 2A, 3A, 4A and 5A.

b. Quality Loan Instruments

We subpoenaed drafts of SOTs, assignments, and other instruments from Quality Loan Service Corp. and are in the process of confirming that many are backdated. The results of our review are summarized in Table 1, on page 3 of this memorandum.³⁴

Without discovery, we cannot be certain why OneWest signed, acknowledged and recorded these false instruments. Our current theory is that the backdating was intended to “paper over” misrepresentations contained in notices of default.³⁵ Specifically, the notices of default represent that certain materials were delivered to the duly appointed trustee. We suspect that in instances where materials were delivered to a trustee before the trustee was properly substituted, the SOTs were backdated in order make the statements regarding delivery in the notice of default appear to be true. Correcting the error, instead of backdating the SOT, would have likely involved reissuing the notice of default, which would have delayed the foreclosure process.

c. LPS Loan Files

Our investigation has determined that OneWest’s backdating misconduct was not limited to foreclosures where Quality Loan served as trustee. Instead we found multiple examples of backdated assignments of deed of trust (ADT) and SOTs executed by OneWest personnel as part of the review of 300 internal LPS loan files that were purportedly chosen randomly, which involved various trustees other than Quality.³⁶ These instruments – which were uploaded to the LPS platform for execution by OneWest and subsequent recordation in counties throughout the state – were accompanied by upload metadata, showing the date upon which the instruments were made available to OneWest for signature. By comparing the metadata to the executed and recorded instruments, we were able to determine that the instruments at issue were backdated.

Anticipated Legal Claims: A UCL action may be premised on a business act or practice that is “unlawful,” “fraudulent,” or “unfair.” (Bus. & Prof. Code, § 17200.) Section 17200 “prohibits any [business] practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made.” (*Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 838-39.) Criminal statutes have been borrowed for this purpose. (*Stop Youth Addiction, Inc. v.*

³⁴ See also Tab 1.

³⁵ See notice of default text in Tabs 2B, 3B, 4B, and 5B stating, “[t]hat by reason thereof, the present beneficiary under such deed of trust, has executed and delivered to said duly appointed Trustee, a written Declaration of Default and Demand for same, and has deposited with said duly appointed Trustee, such deed of trust and all documents evidencing obligations secured thereby, and has declared and does hereby declare all sums secured thereby immediately due and payable and has elected and does hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby.”

³⁶ See, e.g., Tabs 6B-D and 7A-C.

Lucky Stores, Inc. (1998) 17 Cal.4th 553, 573; *People v. E.W.A.P. Inc.* (1980) 106 Cal.App.3d 315, 319-20.)

OneWest's filing of false instruments with county recorders subjects it to liability under the unlawful prong of the UCL: (1) Penal Code section 115, subdivision (a) (makes it a felony to knowingly procure or offer any false or forged instrument to be recorded);³⁷ and (2) Penal Code section 115.5, subdivision (a) (enhances the penalties applicable under Penal Code section 115 and is applicable to every person who knowingly files any false or forged document or instrument with the county recorder which affects title to, places an encumbrance on, or places an interest secured by a mortgage or deed of trust on a single-family residence.)³⁸

As secondary theories, the complaint asserts UCL claims grounded on the fraudulent prong³⁹ and on the unfair prong.⁴⁰

³⁷ Each such instrument procured or offered to be recorded is a separate violation. (Pen. Code, § 115, subd. (b).) According to the pattern jury instructions, the following are the elements of a violation: (1) a person procured or offered a false or forged instrument to be filed, registered, or recorded in a public office; (2) the instrument, if genuine, was one which it was proper to file, register, or record; and (3) the person knew that the instrument was false or forged. (CALJIC No. 15.06 (7th ed. 2012).)

³⁸ Many of the instruments at issue were drafted by trustees before OneWest executed them. Nevertheless, there are several reasons why we believe it is inadvisable to include the trustees in the proposed enforcement action. *First*, because OneWest employees signed and notarized the instruments at issue, we believe that OneWest is more culpable than the trustees. *Second*, the conduct at issue is not limited to one trustee, which leads us to believe that it was OneWest and not the trustees that was the catalyst for the misconduct. *Third*, some of the trustees at issue are small businesses that might well be bankrupt or nearly insolvent by the time the case goes to trial. This will make the case unnecessarily difficult to resolve. *Fourth*, because the proposed complaint contains DOE defendants, we can add one or more of the trustees in as defendants if discovery demonstrates that they had a greater role in the misconduct than we previously realized or if we determine that is in our strategic interest to do so.

³⁹ See *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 839 (UCL fraudulent prong prohibits practices likely to deceive the public).

⁴⁰ Courts have articulated at least four different tests for determining whether a business practice is considered unfair:

- the balancing test (*Motors, Inc. v. Times Mirror Co.* (1980) 102 Cal.App.3d 735, 740; *Klein v. Earth Elements, Inc.* (1997) 59 Cal.App.4th 965, 969-70 [the utility of the defendant's conduct is weighed against the gravity of the harm to the consumer]);
- the *Casa Blanca* test (*People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 530 [A practice is unfair if it offends an established public policy or is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers]);
- the *Cel-Tech* test (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 184-187 [usually applied in antitrust context, unfair practices

2. Unauthorized Conduct/Action in Foreclosure Process

Misconduct: OneWest undertook critical steps in the foreclosure process when it lacked the authority to do so. OneWest falsely asserted that its subsidiaries and the trustees for mortgage-backed securities trusts had authority to conduct critical steps in the foreclosure process when they did not. This misconduct related to three common steps in the foreclosure process, each governed by statute: (1) credit bidding; (2) payment of or claim of exemption from documentary transfer tax; and (3) execution of SOTs.

a. Credit Bidding

Civil Code section 2924h governs the conduct of foreclosure sales. The statute provides that, at foreclosure sales, the trustee has the right to require payment in cash or cash equivalents. The section provides an exception for *only* “the present beneficiary of the deed of trust under foreclosure” (Civ. Code, § 2924h, subd. (b)(1).) Under subdivision (b)(1), the present beneficiary is permitted to make a “credit bid” at the sale. When a party other than the present beneficiary makes a credit bid, it may distort the bidding process. Because the credit bid is typically announced at the beginning of the auction, a unlawful credit bid may serve to freeze out other potential bidders (which could include a borrower or her family).

Civil Code section 2924h, subdivision (g) further provides, “[i]t shall be unlawful for any person, acting alone or in concert with others . . . to fix or restrain bidding in any manner, at a sale of property conducted pursuant to a power of sale in a deed of trust or mortgage [,]” and criminalizes “any act which would operate as a fraud or deceit upon any beneficiary, trustor, or junior lienor.” Subdivision (g) proscribes misrepresentations or other actions by a beneficiary at a trustee’s sale that chill qualified bidders from the opportunity to bid. *Ibid.*; see also *South Bay Building Enterprises v. Riviera Lend-Lease* (1999) 72 Cal.App.4th 1111.

The review of publicly recorded instruments indicates OneWest made and directed credit bids in situations where a party other than the present beneficiary made the credit bid at the auction, in violation of Civil Code section 2924h, subdivisions (b)(1) and (g). We found multiple cases

are conduct that threatens an incipient violation of law and/or violates the policy or spirit of a law because its effects are comparable to or the same as a violation of the law]); and

- FTC Section 5 (*Camacho v. Automobile Club of Southern California* (2006) 142 Cal.App.4th 1394, 1403 [Factors: (1) The consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided].)

The state of the law is therefore uncertain. Nevertheless, we have strong arguments that OneWest’s conduct violates the unfair prong under any of these tests.

in which the assignment of the beneficial interest (i.e., the document that makes an entity the “present beneficiary”) was *executed* after the auction had taken place.⁴¹

The review for this type of misconduct is still in its early stages. That said, in just two counties (Alameda and Santa Clara) we have already located two examples of unlawful credit bids by OneWest, 10 examples of unlawful credit bids directed by OneWest and made by its subsidiaries, 15 examples of unlawful credit bids apparently directed by OneWest on behalf of various trustees for MBS Trusts and one on behalf of another bank. We are in the process of confirming additional examples.

b. Documentary Transfer Tax (DTT)

Many cities and counties impose a transfer tax on a variety of transactions in real estate, known as a documentary transfer tax.⁴² Instruments reflecting transfers to the *beneficiary* as a result of a foreclosure are exempt from such tax.⁴³

Typically, whether transfer tax was paid or not is shown on the face of the Trustee’s Deed upon Sale (TDS), the recorded instrument that memorializes the auction’s outcome. Therefore, we know from the TDS that in cases in which the wrong beneficiary made a credit bid (i.e., wrongly claimed to be the foreclosing beneficiary), an exemption from the applicable city and county transfer taxes was wrongly taken and no tax was paid.

c. Execution of Statutory SOTs without Authority

Civil Code section 2934a, subdivision (a) establishes a statutory procedure for substituting a trustee under a deed of trust upon real property. The statute provides, in relevant part, that “the trustee under a trust deed upon real property or an estate for years therein given to secure an obligation to pay money . . . may be substituted by the recording in the county in which the property is located of a substitution executed and acknowledged by . . . all of the beneficiaries under the trust deed, or their successors in interest . . .” In numerous instances, OneWest executed substitutions of trustee in which it falsely represented that it was the present beneficiary under the relevant deed of trust, when it had in fact already assigned away all of its beneficial interest under the deed of trust to another party.⁴⁴

⁴¹ See Tabs 8-10.

⁴² See, e.g., Alameda County Ordinance Code section 2.04.020; Contra Costa County Code section 64-6.404; Los Angeles County Code chapter 4.60; Riverside County Code section 4.08.030.; City and County of San Francisco Business and Tax Regulations Code article 12-C, Section 1102; and Santa Clara County Code section A30-33.

⁴³ See Revenue and Taxation Code section 11926.

⁴⁴ See, e.g., Tab 11.

To date, we have located five examples of such misconduct from public records, and we believe that many of the 86 examples of recorded substitutions of trustee (SOTs) executed in OneWest's name bearing dates prior to the date that OneWest began operations are likely to have been executed without authority (the entity purporting to sign them did not exist on the date that the assignment purportedly took place). Similarly, in the review of 175 completed OneWest foreclosures in Alameda County, we found 10 unlawful substitutions of trustee. The review is ongoing.

Anticipated Legal Claims: The team anticipates asserting UCL "unlawful" claims premised on violations of Civil Code sections 2924h, 2934a, and on the various DTT ordinances. In addition, we anticipate asserting UCL claims grounded on the "fraudulent" prong of the statute based on the theory that OneWest's manipulation of the credit bidding process was "likely to deceive the public."⁴⁵ We will utilize the unfair prong in a manner similar to that explained above.

3. Improperly Executed and Acknowledged Instruments

Misconduct: During our assessment of publicly recorded foreclosure instruments, we identified examples of improperly executed and acknowledged instruments recorded by OneWest.⁴⁶ For example, we found one OneWest SOT that was not signed, but was nevertheless acknowledged and recorded. Other problems include, but are not limited to, eight examples of instruments containing undated acknowledgements and other procedural defects. While not the focal point of the proposed enforcement action, it is nevertheless good strategy to include these defects so that the scale of OneWest's disregard for California's foreclosure laws is made manifest.

Anticipated Legal Claims: The team anticipates asserting UCL "unlawful" prong claims against OneWest for this misconduct predicated on violations of the procedural requirements of Civil Code section 2934a, subdivision (a)(1), and Government Code sections 27201, subdivision (b), and 27287.

4. Failure To Observe California Civil Code Required Time Periods For Issuance of Notices of Trustee Sale of Property

Misconduct: Throughout the applicable time period, the Civil Code required trustees exercising the power of sale on behalf of a beneficiary to allow at least three months to elapse from the filing of the notice of default to the issuance of a notice of sale.⁴⁷ During the review of publicly

⁴⁵ See *Saunders, supra*, 27 Cal.App.4th at page 839.

⁴⁶ See, e.g., Tabs 12-13.

⁴⁷ See, e.g., Cal. Civil Code § 2924, subdivision (a)(2). While different versions of the statute were in effect from January 2007 to December 2010, all versions of this operative statute required a 3-month waiting period.

recorded documents, we identified 30 instances where the foreclosing trustee (acting for OneWest) issued notices of trustee's sale before three months elapsed.⁴⁸

Anticipated Legal Claims: We anticipate asserting UCL claims based on the "unlawful" prong theory against OneWest predicated on its failure (through its agents) to comply with Civil Code section 2924, subdivision (a). We will assert the fraudulent and unfair prong theories based primarily on the fact that the relevant notices of default falsely stated that the borrower had three months from the date of the Notice of Default to become current before the Notice of Sale would be issued.⁴⁹

5. Violations of Notice Requirements to Homeowners Related to Substitutions of Trustee Under California Civil Code Section 2924a, Subdivision (b)

Misconduct: OneWest failed to comply with Civil Code sections 2934a, subdivisions (b) and (c), which establish mailing requirements related to substitutions of trustee. In the sample of 300 LPS files, we found 8 examples of recorded SOTs executed by OneWest with no attached affidavits of mailing where such affidavits were required.⁵⁰ While we have not identified many of these violations, they are significant in light of the other types of misconduct identified to date because they further demonstrate OneWest's lack of regard for the procedural requirements of nonjudicial foreclosures in California.

Anticipated Legal Claims: The team anticipates asserting a UCL claim under the "unlawful" prong, predicated on OneWest's violation of California Civil Code section 2924a, subdivisions (b) and (c).

THE VICTIMS

OneWest's misconduct resulted in significant injury to: (1) the public, including the multiple constituencies who rely on the integrity of the State's public records; and (2) specific homeowners.

Harm to the Public: California courts have been clear with regard to the legislative intent underpinning Penal Code sections 115 and 115.5—two of the core UCL predicates that we propose asserting against OneWest:

⁴⁸ See, e.g., Tab 14.

⁴⁹ See, e.g., Tab 14.

⁵⁰ See, e.g., Tabs 15-16.

Section 115.5 is but a more specific application of the general statute (§ 115) and the purposes behind both statutes are the same—namely, to preserve the integrity and reliability of public documents. It is no defense that the accused also owned the property for which the fraudulent documents were filed. Any contrary interpretation would draw an absurd distinction between classes of offenders.

...

Each false filing creates separate harm to the person defrauded as well as to the integrity of public records and the defendant may be punished for each such criminal act.⁵¹

OneWest's misconduct caused harm to multiple public groups who rely on the accuracy of publicly recorded foreclosure instruments, including but not limited to purchasers, sellers, title companies, insurance companies, banks, trustees, servicing entities, and tax assessors.

Harm to Specific California Homeowners: As reflected in the examples cited above and appended hereto, in many instances, OneWest's false filings and unauthorized conduct in the course of the foreclosure process harmed homeowners by denying them timely and important information about their foreclosures and potentially shortening the amount of time they had available to find a way to become current on their mortgage obligations.

OneWest will likely argue that the displaced homeowners defaulted on their mortgage obligations, were properly subject to foreclosure and were not substantially harmed. We will argue that while it may be true that the homeowners were delinquent on their mortgage obligations, that did not change the fact that they were denied the procedural protections required by law.

POTENTIAL REMEDIES

In the event the enforcement action is authorized, we will seek the following remedies:⁵²

- Injunctive Relief. As reflected in the National Mortgage Settlement, we anticipate seeking permanent injunctive relief that will require OneWest to verify the accuracy of each document it files with a county recorder and to otherwise comply with California's foreclosure laws. We anticipate seeking terms requiring monitoring and disclosure of OneWest's compliance.
- Civil Penalties. Based on the preliminary findings, we believe that the number of violations committed by OneWest may be substantial. Given the nature of OneWest's

⁵¹ *People v. Gangemi* (1993) 13 Cal.App.4th 1790, 1795-96, 1801.

⁵² See Bus. & Prof. Code sections 17203 and 17206.

misconduct and the harm incurred by the public and individual homeowners, we will ask the Court to impose the maximum \$2,500 statutory penalty for each violation.⁵³

- **Restitution.** Business and Professions Code section 17203 provides courts with authority to “make such orders or judgments . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.” With further discovery and community outreach, we hope to show at trial that OneWest’s misconduct pushed homeowners into premature foreclosures. Assuming that we are able to establish the appropriate factual basis, we will ask the court to award restitution in an amount that compensates the affected consumers for the premature loss of their home.⁵⁴ In doing so, we will try to exploit a standardized approach leveraging UCL case law that allows for restitution to all victims without a showing of individualized harm. (*People ex rel. Bill Lockyer v. Fremont Life Insurance Co.* (2002) 104 Cal.App.4th 508, 532 [“the rule that restitution under the UCL may be ordered without individualized proof of harm is well settled”].) While expert testimony will likely be necessary to establish the appropriate amount of restitution for the class of potential claimants, possible theories include: a standardized fair market rental value for homes prematurely foreclosed upon and/or using the federal government’s measure for relocation expenses.⁵⁵

ANTICIPATED DEFENSES

Federal Preemption: In the event that the proposed civil enforcement action proceeds, OneWest will likely assert that some or all of the claims are preempted by federal regulations issued by its prudential regulators. OneWest is a Federal Savings Bank that was regulated by the OTS prior to the implementation of Dodd-Frank, and by the OCC post implementation of Dodd-Frank. OneWest will therefore argue that prior to the integration of OTS into OCC, that OTS’s regulations occupied the field and that the proposed enforcement action is field preempted.

In response, we will argue that: (1) it is undisputed that conflict preemption applies after July 2011; and (2) the complaint seeks to hold OneWest accountable for types of misconduct that were outside the scope of OTS’s claimed field preemption because they involve criminal and civil code statutes which only incidentally affect the lending operations of federal savings associations.

⁵³ But see footnote 14, *ante*, page 6.

⁵⁴ But see footnote 13, *ante*, page 6.

⁵⁵ See, e.g., United States Department of Transportation, Federal Highway Administration, Uniform Relocation and Real Property Acquisition for Federal and Federally Assisted Programs; Fixed Payment for Moving Expenses; Residential Moves (73 Fed. Reg. 42895 (July 23, 2008).)

With regard to the first argument, Dodd-Frank helpfully clarified that conflict preemption—*not* field preemption—applies to federal savings associations. As of July 21, 2011, we can therefore establish that former OTS regulations regarding field preemption no longer applied to OneWest.⁵⁶ Thus, to the extent that the allegations pertain to misconduct subsequent that date, we can leverage the more favorable conflict preemption standards established by Dodd-Frank to argue that the enforcement action is not preempted.

With regard to pre-July 2011 misconduct, the types of claims asserted by the complaint, which are based on (unlawful prong claims) and/or are closely tethered to (unfair and fraudulent prong claims) criminal law and property law predicates, are not preempted because they involve criminal and real property statutes which only incidentally affect the lending operations of federal savings associations.⁵⁷

Removal: If the action is authorized, OneWest is likely to remove the action to federal court shortly after we file it. Indeed we faced such attempts in Countrywide and more recently other states have faced and defeated similar removal attempts in their actions against national banks (see, e.g., *Nevada v. Bank of America Corp.* (9th Cir. 2012) 672 F.3d 661). While it is difficult to predict the precise grounds OneWest will rely on in its removal petition, it seems likely that it will try to invoke the doctrine of preemption. In response, we will argue that preemption is an affirmative defense and is not an appropriate basis for removal (see 14B Wright & Miller, *Federal Prac. & Proc.* (4th ed. 2012) § 3722.2.)

Because we are asking the court to award restitution to harmed homeowners, OneWest might try to remove the enforcement action pursuant the Class Action Fairness Act (CAFA) (28 U.S.C. § 1332(d)) by essentially arguing that the enforcement action is a stand-in for a class action. However, three federal Courts of Appeals have now rejected such attempts in the context of attorney general civil enforcement actions (see *State ex rel. McGraw v. CVS Pharmacy Inc.* (4th Cir. 2011) 646 F.3d 169; *LG Display Co. Ltd. v. Madigan* (7th Cir. 2011) 665 F.3d 768; *Washington v. Chimei Innolux Corp.* (9th Cir. 2011) 659 F.3d 843; and *Nevada v. Bank of America Corp.* (9th Cir. 2012) 672 F.3d 661), and we expect to be able to fend off such an attempt.

⁵⁶ See 12 C.F.R. section 7.4010 (2012). As of July 21, 2011, the scope of laws deemed “not preempted” was widened further. See 12 C.F.R. section 7.4008 (2012) (providing that “state laws on [torts, criminal law, and acquisition and transfer of property] are not inconsistent with the non-real estate lending powers of national banks and apply to national banks to the extent consistent with the decision of the [United States] Supreme Court in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996).”)

⁵⁷ See, e.g., 12 C.F.R. section 560.2(c) (2012) (providing state laws regarding real property law, tort law, and criminal law “are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section.”)

Finally, OneWest may allege that the FDIC is a real party-in-interest and that the action is removable pursuant to federal statutes (see, e.g., 12 U.S.C. § 1819 (actions filed against FDIC are removable)). In an effort to prevent this, we included an express carve-out for the FDIC and the failed banks in the complaint.

PROS AND CONS OF FILING THE ENFORCEMENT ACTION

Pros:

- A public proceeding will allow us to use civil discovery to conduct a full investigation into the scope of OneWest's misconduct and to hold it publicly accountable.
- Filing will enhance the deterrent effect of HBOR by demonstrating our commitment to the integrity of California's non-judicial foreclosure rules and the related public-recording regime.
- Potential for augmented assistance for seriously delinquent homeowners (more likely in a settlement context).
- Potential civil penalties.⁵⁸ Business and Professions Code section 17206 provides for up to \$2,500 in mandatory penalties for each violation. The per-victim test is an established measure to count the number of violations. (*People v. Superior Court (Jayhill)* (1973) 9 Cal.3d 283, 289.) In addition, enhanced penalties may be available to the extent that OneWest's misconduct involved protected classes.
- Potential for permanent injunctive relief that will require OneWest to verify the accuracy of each document it files with a county recorder and to otherwise comply with California's foreclosure laws.

Cons:

- Substantial litigation risk. This action would be novel, first of its kind, **impact** litigation. Our ability to fully investigate OneWest was hampered by the visitorial powers doctrine and OneWest's obstructive behavior.
- Resource intensive. Absent settlement, we expect hard fought litigation that will last 3 to 5 years.
- High potential for delays. For example, it could easily be a year or two before we get past the removal and pleadings stages into merits discovery.
- We may be at odds with certain federal agencies. It is possible that the OCC will side with OneWest or that the FDIC will intervene.

⁵⁸ But see footnote 14, *ante*, page 6.

January 18, 2013
Page 22

RECOMMENDED NEXT STEPS

We recommend that the Attorney General authorize us to file a civil enforcement action against OneWest.

SF2012105513
40643954.docx