No. D058503

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FOURTH APPELLATE DISTRICT, DIVISION ONE

JESUS DE LA CRUZ and WILLIE MAE JACKSON,
Plaintiffs-Appellants,

v.

WACHOVIA DEALER SERVICES, INC. f/k/a WFS FINANCIAL,
Defendant-Appellee.

Appeal from the Superior Court of San Diego County
The Honorable Jeffrey Barton, Judge
No. 37-2009-00088963-CU-BT-CTL

Application of AARP, Center for Responsible Lending, and National Consumer Law Center for Leave to File *Amici Curiae* Brief and Proposed Brief in Support of Appellants and Reversal of the Superior Court Decision

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APPLICATION OF AARP, CENTER FOR RESPONSIBLE LENDING, AND NATIONAL CONSUMER LAW CENTER FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND PROPOSED BRIEF IN SUPPORT OF APPELLANTS AND REVERSAL OF THE SUPERIOR COURT DECISION

To the Honorable Judith D. McConnell, Presiding Justice of this Court:

The AARP, Center for Responsible Lending, and the National Consumer Law Center (*Amici*) request leave to file an *amici curiae* brief in this case in support of Jesus de la Cruz, *et al.*, Plaintiffs-Appellants in this action. *Amici* are organizations with a commitment to consumer protection which have an interest in seeing strong and effective enforcement of consumer protection laws. *Amici* have seen the primary role that state laws have played in protecting consumers from financial institutions' abusive practices, and believe that consumers, communities and the economy are ill-served by preempting state consumer protection laws for the nation's largest banks. *Amici* have appeared before this and numerous other courts as *amici curiae* on preemption issues. *Amici* also filed an *amicus* brief in *Aguayo v. U.S. Bank* (9th Cir. 2011) 653 F.3d 912. The Court in *Aguayo* specifically held that federal law does not preempt Rees-Levering's post-repossession notice provisions.

No party other than *Amici* authored the proposed amicus brief in whole or in part or made a monetary contribution to the preparation or submission of the brief.

STATEMENT OF INTEREST OF *AMICI CURIAE*

AARP is a nonprofit, nonpartisan membership organization that helps people over the age of 50 to have independence, choice and control in ways that are beneficial and affordable to them and society as a whole. As the largest membership organization in the United States dedicated to addressing the needs and interest of people age 50 and older, AARP is greatly concerned about ensuring strong consumer protections against unfair practices in the marketplace that target vulnerable consumers. Because older Americans are disproportionately victimized by unfair practices, AARP supports state laws and public policies that protect consumers' rights.

CRL is a non-profit policy, advocacy, and research organization dedicated to exposing and eliminating abusive practices in the market for consumer financial services and to ensuring that consumers may benefit from the full range of consumer protection laws designed to inhibit unfair and deceptive practices by banks and other financial services providers. CRL is an affiliate of Self-Help, a non-profit lender that has provided more than $6 billion in financing to help over 50,000 low-wealth borrowers buy

homes, build businesses, and strengthen community resources. Self-Help also operates state- and federally-chartered community development credit unions with over $900 million in assets that serve 87,000 members.

CRL has been extensively involved in the debate over preemption of state consumer protection laws by national banks. CRL was the principal author of amicus briefs to the U.S. Supreme Court in *Watters v. Wachovia Bank, N.A*. (2007) 550 U.S. 1 and *Cuomo v. Clearing House Ass'n* (2009) 129 S.Ct. 2710, the Supreme Court's two most recent preemption decisions involving national banks. CRL staff also authored, Quester & Keest, *Looking Ahead after Watters v. Wachovia*, (2008) 27 Rev. of Banking & Fin. L. 187. CRL's ongoing involvement in shaping preemption jurisprudence is evidenced by its amicus submissions to the Ninth Circuit in *Aguayo, supra*, 653 F.3d 912 and *Gutierrez v. Wells Fargo Bank*, Nos. 10-16959, 10-17468 & 10-17689. CRL also regularly testifies before Congress on preemption and consumer credit issues, and conducts original research to inform its policy positions on a wide range of issues affecting consumer credit, including auto financing. For example, CRL recently published: Davis and Frank, Center for Responsible Lending, *Under the Hood: Auto Loan Interest Rate Hikes Inflate Consumer Costs and Loan Losses* (2011), <http://www.responsiblelending.org/other-consumer-loans/auto-financing/research-analysis/Under-the-Hood-Auto-Dealer-Rate-Markups.pdf> (as of Dec. 14, 2011).

NCLC is a non-profit national research and advocacy organization, founded in 1969, focusing on the legal needs of low-income consumers. NCLC provides legal and technical assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC staff attorneys write and publish eighteen treatises on federal and state consumer protection law. These treatises include Repossessions (7th ed. 2010), a comprehensive review of the critically important state laws in this area, and The Cost of Credit: Regulation, Preemption, and Industry Abuses (4th ed. 2009 and Supp.), which analyzes the issues surrounding federal banking preemption in detail, as well as bimonthly newsletters on a range of topics related to consumer credit, debt collection, and preemption issues.

NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low-income people, and conducted training for thousands of legal services and private attorneys on the law and litigation strategies to address repossession, debt collection, and preemption issues. NCLC attorneys have also provided extensive oral and written testimony to Congressional committees and state legislatures on these topics. NCLC's attorneys have been closely involved with the enactment of all federal laws affecting consumer credit since the 1970s, and regularly provide extensive comments to the federal agencies on the regulations under these laws. NCLC staff members have frequently been invited to

testify before Congress on preemption and consumer credit issues and have served on the Federal Reserve Board's Consumer Advisory Council.

NCLC has also initiated a special *Working Cars for Working Families* project focused in part on ensuring effective protections for a car owner facing repossession. As part of this project NCLC has produced several reports addressing repossession including Fueling Fair Practices: A Road Map to Improved Public Policy for Used Car Sales and Financing (2009) and Repo Madness - How Automobile Repossessions Endanger Owners, Agents, and the Public (March 2010).

SUMMARY OF ARGUMENT

There are only two ways for a creditor to legally repossess a car in California: (1) self-help repossession in compliance with the Rees-Levering Motor Vehicle Sales and Finance Act ("Rees-Levering") and the California Commercial Code, or (2) judicial process.

Like other creditors, national banks must follow the law when they seize secured property or suffer the consequences of wrongful repossession. No federal law authorizes a bank to take a borrower's personal property without judicial process. But that is exactly what Wachovia did. It took Appellants' cars without following the rules that provide the only legal route to self-help repossession in California. These rules are set out in Rees-Levering, which is specifically incorporated into the California Commercial Code. The Commercial Code, in turn authorizes self-help

repossession subject to compliance with Rees-Levering's notice requirements. Wachovia cannot have it both ways. But for the very state statute that Wachovia claims is preempted, the Bank's conduct was nothing more than theft. Wachovia now claims the right to a deficiency judgment, a privilege not available at common law; this privilege is authorized only by statute, subject to compliance with the notice provisions of Rees-Levering, provisions that Wachovia plainly flaunted.

Rees-Levering's post-repossession notice provisions are not preempted by federal law when applied to national banks. Because no federal law governs repossession, the notice provisions at issue here cannot conflict with federal law. A contrary interpretation would create a lawless void in which national banks are permitted to take advantage of state laws authorizing non-judicial repossession, but follow their own whims in exercising that authority. The Ninth Circuit reached precisely this conclusion in its recent decision in *Aguayo v. U.S. Bank* (9th Cir. 2011) 653 F.3d 912 and rejected U.S. Bank's argument that federal law preempted Rees-Levering's post-repossession notice provisions. Like U.S. Bank, Wachovia's "argument goes too far."

> What, if any, law would apply to [Wachovia's] post-repossession actions in the state of California? It would not be bound by state law as enacted by the California legislature, nor would it be operating under any specific federal law because no federal law governs self-help repossession.
>
> (*Id.* at p. 924.)

In an apparent attempt to avoid the holding of *Aguayo*, Wachovia makes the extraordinary argument that its right to repossess the Appellants' cars is not grounded in California law, but instead derived from the National Bank Act. Wachovia's inability to point to a single citation in support of this unprecedented argument is unsurprising, given the longstanding interpretation that the National Bank Act ("NBA"), 12 U.S.C. § 1 *et seq.*, does not preempt state debt collection laws, which have historically been regulated by States as part of their traditional police powers. Wachovia's assertion that the National Bank Act authorizes Wachovia to enforce its right to collect debts and governs the manner of such enforcement, much less through self-help repossession, would turn more than a century of settled law on its head.

The Superior Court upset this settled law in two critical ways. First, it failed to comply with U.S. Supreme Court precedent holding that the National Bank Act only preempts state law where the state law in question "prevent[s] or significantly interfere[s] with the national bank's exercise of its powers." (*Barnett Bank of Marion County v. Nelson* (1996) 517 U.S. 25, 33.) Second, the Superior Court fundamentally misinterpreted a regulation promulgated by the Office of the Comptroller of the Currency ("OCC"). This Court should reverse the Superior Court's dangerous decision, which would leave California car loan borrowers – and many

other borrowers – without basic protections when national banks seize collateral.

ARGUMENT

I. National Banks Are Not Permitted To Engage In Debt Collection Unconstrained By Any Law

There is no federal law that authorizes non-judicial repossession in the context of a secured car loan, much less a federal law that regulates the manner in which such repossession may occur. (*Aguayo, supra*, 653 F.3d at p. 924 ["no federal law governs self-help repossession"].) Rather, state debt collection laws, such as Rees-Levering, form part of the framework of bedrock laws that provide the rules underlying banks' daily operations. The U.S. Supreme Court and the OCC have repeatedly acknowledged the validity of such state laws – particularly with respect to debt collection – when applied to national banks. The lower court's decision ignored these long-standing principles, leaving national banks at liberty to operate unconstrained by any law.

A. California State Law Authorizes Self-Help Repossession Subject to Balanced and Critical Consumer Protections

The California Legislature enacted Rees-Levering in 1962 to provide "more comprehensive protection for the unsophisticated motor vehicle consumer" (*Hernandez v. Atl. Finance Co. of L.A.* (1980) 105 Cal.App.3d 65, 69), in response to "major areas of abuse" in auto financing (see 15 Assembly Interim Committee Report No. 24, *Final Report of the Assembly*

Interim Committee on Finance and Insurance, Report on Automobile Financing (1960) at p. 8 (hereinafter *Final Report on Automobile Financing*).)

One of the topics covered by Rees-Levering is the parties' rights upon default. To further its desire to protect vulnerable consumers, the Legislature created comprehensive notice and recovery rights for defaulting borrowers. (*Cerra v. Blackstone* (1985) 172 Cal.App.3d 604, 608-09.) Rees-Levering "improved upon the [then existing] redemption provision by setting forth specific items which the notice of intent to sell must contain." (Robert S. Goldberg & Marvin G. Goldman, *Recent Legislation, The Rees-Levering Motor Vehicle Sales and Finance Act* (1962) 10 U.C.L.A. L.Rev. 125, 156.) California courts have held that complying with Rees-Levering's notice provision is important enough that it would be an "unreasonable and unfair result[]" to leave consumers without an effective remedy for its violation. (*Cerra, supra*, 172 Cal.App.3d at p. 608.)

Rees-Levering is prescriptive: it details the precise information loan holders must provide so that car owners know exactly how to exercise their right to recover their cars. (Civ. Code §§ 2983.2(a); 2983.8; see also *Juarez v. Arcadia Fin., Ltd.* (2007) 152 Cal.App.4th 889, 912.) The information required by the notice provision should be readily available to the loan holder, and providing it to the borrower presents little burden. (*Juarez, supra*, 152 Cal.App.4th at 905 [noting that the creditor already has

all relevant information a defaulting buyer needs to reinstate the contract and placing the burden on the creditor to disclose that information is consistent with the statute's purpose of providing comprehensive protection to unsophisticated buyers]; *In re McCarthy* (Bankr. E.D.Va. July 14, 2004, No. 04-10493) 2004 WL 5683383 at p. 6 [noting that figures such as principal, finance charges, interest rate, and "other" charges are "all information that should be readily available in an age in which . . . accounts are maintained on large and sophisticated computer systems"].)

Rees-Levering not only offers modest protections for borrowers, but also benefits loan holders. Specifically, it enhances the traditional common law right to repossess by permitting the loan holder to seek a deficiency judgment after selling the repossessed car, a remedy that was not available at common law. (James Phillips, *Note, California's Automobile Deficiency Judgment Problem* (1971) 4 U.C. Davis L.Rev. 91, 92-93.) California first provided statutory authorization for post-repossession deficiency judgments on car loans in 1957, and that right was carried forward in Rees-Levering. (*Id.* at p. 95.) However, the availability of a deficiency judgment in financed auto sales remains an exception; consumer loan deficiency judgments are still unavailable in California when most other types of collateral are seized. (Civ. Code § 1812.5 [prohibiting deficiency judgments in retail installment sales]; Code Civ. Proc. §§ 580b, 580d [prohibiting deficiency judgments after most foreclosures].)

In California, compliance with both the California Commercial Code and Rees-Levering is a condition precedent to a deficiency judgment. (*Bank of Am. v. Lallana* (1998) 19 Cal.4th 203, 210 [holding that to obtain a deficiency judgment, a creditor must comply with all provisions of Rees-Levering and any relevant provisions in division 9 of the California Commercial Code].) "'[T]he rule and requirement are simple. If the secured creditor wishes a deficiency judgment he must obey the law. If he does not . . . he may not have his deficiency judgment." (*Id.* [quoting *Backes v. Village Corner, Inc.* (1987) 197 Cal.App.3d 209, 216].)

Rees-Levering provides protection for consumers, but "leave[s] the greatest freedom of contract available to the experienced businessman." (*Shapiro v. Ogle* (1972) 28 Cal.App.3d 261, 266 [quoting 36 Cal.St. B.J. 689] [internal citations omitted].) Rees-Levering's repossession provisions carefully balance protections for California car loan borrowers with creditors' desire for quick and easy collection after default. In contrast, there is no federal law that governs the collection of car-secured debt or authorizes self-help repossession. In other words, if a creditor enters a California consumer's property and takes her car without complying with Rees-Levering, that creditor is committing theft, plain and simple.

(i) California's seventy-year history of regulating automobile transactions and addressing the industry's abuses

The California Legislature first took steps to regulate the sale and financing of automobiles in 1945 through enactment of the Automobile Sales Act ("ASA"). (Goldberg, *The Rees-Levering Motor Vehicle Sales & Finance Act, supra*, 10 U.C.L.A. L.Rev. at p. 126.) With the ASA, the California Legislature attempted to remedy serious abuses in the automobile financing industry. (*Id.* [purpose of the ASA was to "to provide protection for unwary consumers"]; *General Motors Acceptance Corp. v. Kyle* (1960) 54 Cal.2d 101, 108 [noting that one purpose of ASA is "protection of instalment buyers of automobiles from concealed and excessive finance and interest charges"].)

Prior to enactment of the ASA, installment financing of motor vehicles was governed by state common law principles of contract and tort. The common law framework eventually proved inadequate as a means of regulating modern installment financing and led to serious abuses in the industry. (See *Final Report on Automobile Financing, supra* at pp. 7-38.) For example, consumers had no protection in the event of default. There was no right of accounting and the common law rule of forfeiture allowed sellers to retain both the car and all sums paid by the buyer. (Project, *Legislative Regulation of Retail Installment Financing* (1960) 7 U.C.L.A. L. Rev. 618, 710.) As a result, consumers lost any built-up equity in the

event of default. (*Id.*) Creditors, on the other hand, did not have the right to deficiency judgments. Instead, they had a choice of two mutually exclusive options, known as the election of remedies doctrine: they could either sue the consumer to recover the balance due or repossess the collateral. (Phillips, *California's Automobile Deficiency Judgment Problem, supra* at pp. 92-93.) In practice, however, many creditors exploited this doctrine and managed to unfairly obtain "double recoveries," i.e., both the property and full contract price, not just the deficiency. (*Id.* at 93.)

The ASA aimed to provide more protection for unwary consumers and required full disclosure of costs to protect consumers from excessive charges. (Goldberg, *The Rees-Levering Motor Vehicle Sales & Finance Act, supra* at p. 126.) Originally, the ASA did not contain any provisions regarding parties' rights on default. However, "in recognition of the harshness of the common law rule," the California Legislature later amended the statute to provide more protection for both buyers and creditors in the event of default. (*Legislative Regulation of Retail Installment Financing, supra*, at p. 722.) As amended in 1957, the ASA gave buyers the right of redemption and afforded creditors statutory authorization for post-repossession deficiency judgments, abolishing the remedies doctrine at common law. (Phillips, *California's Automobile Deficiency Judgment Problem, supra*, at p. 95.)

Ultimately, however, the ASA proved ineffective in preventing abusive practices. (See *Final Report on Automobile Financing, supra*, at p. 8 [reporting on "major areas of ambiguity and deficiency in existing law"].) The Legislature specifically identified ASA's protections for borrowers in default as "insufficient." (*Id.* at p. 17.) The Legislature found that the generalized five-day notice of "intent to sell" inadequately protected borrowers in default from attempts by creditors to game default and repossession to their advantage. (*Id.* [recognizing that a creditor who can "satisfy its full interest" from the borrower, even after repossession, has an incentive to engage in commercially unreasonable conduct to the detriment of the borrower].) After a ten-month investigation, the California Legislature abandoned the ASA as "ineffectual" (*id.* at pp. 38-39), and enacted Rees-Levering in its place in order to provide "more comprehensive protection" for motor vehicle consumers (*Hernandez*, *supra*, 105 Cal.App.3d at p. 79; *Cerra*, *supra*, 172 Cal.App.3d at p. 609; see also *Shapiro*, *supra*, 28 Cal.App.3d. at p. 266 ["Rees-Levering was the result of an extensive study of the entire scope of motor vehicle sales and financing"].)

Rees-Levering adopted new notice provisions, requiring creditors to send specific information to consumers before sales of repossessed vehicles. A key concern underlying these new notice requirements was preventing creditors from unfairly using repossession as a means to unfair

or unreasonable profits. (See *Final Report on Automobile Financing, supra*, at p. 17; Philip Shuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale* (1969) 22 Stan. L.Rev. 20.) Rees-Levering's strengthened notice requirements were designed to provide consumers with the information they need to exercise their rights (*Juarez, supra*, 152 Cal. App. 4th at p. 901), and to protect borrowers in default by "ensur[ing] that the greatest possible amount will be realized on the sale" (*Final Report on Automobile Financing, supra*, at p. 17). In addition, to prevent creditors from reaping windfall profits by churning cars through serial repossessions, selling repossessed collateral at below-market prices, unfairly obtaining a double recovery by abusing the election of remedies doctrine, or otherwise behaving in a commercially unreasonable manner, the California Assembly conditioned a creditor's right to obtain any deficiency judgment on strict compliance with the notice provisions. (See Cal. Civ. Code §§ 2983.2(a), 2983.8(b).)

Statutory notice provisions such as those in Rees-Levering are critical to protecting debtors' rights in repossessions. Proper notice provides the debtor the opportunity to: (1) discharge the debt and redeem the collateral, (2) find another purchaser, or (3) verify that the sale is conducted in a commercially reasonable manner. (*Lallana, supra*, 19 Cal. 4th at p. 214 ["without notice of the time and place of sale, the debtor is denied the opportunity to determine whether the sale is conducted in a

commercially reasonable manner"]; *Ford & Vlahos v. ITT Commercial Finance Corp.* (1994) 8 Cal.4th 1220, 1232 ["one purpose of [notice] is to alert the debtor . . . to protect their interests"].)

Even with the protections of notice and an accounting, however, creditors have "perverse incentives" to abuse the availability of deficiency judgments by engaging in self-dealing with affiliated entities. (*Randolph v. Franklin Inv. Co.* (D.C. 1979) 398 A.2d 340, 346 & fn.10 [describing "common" practice of a creditor "resell[ing] the repossessed automobile to the original dealer at a price well below the market value … thereby facilitating an unnecessarily high deficiency claim and an inflated profit on the second resale"]; Shuchman, *Profit on Default*, *supra* at pp. 24-33; Ellen Corenswet, Note, *I Can Get It For You Wholesale: The Lingering Problem of Automobile Deficiency Judgments* (1975) 27 Stan. L.Rev. 1081.) A repossessed car is often sold off quickly "well below its wholesale value regardless of its condition," because creditors can always pursue a deficiency judgment from the debtor. (Richard Immel, *The Night Visitors: Repossession Practices for Cars Called Unfair to Defaulting Buyers*, Wall St. J. (July 21, 1970) p. 1.)

Unfortunately, the practice of using repossession as a business model to extract unfair and unreasonable profits from unsuspecting consumers remains alive and well. In 2001, Transouth Financial, then a subsidiary of Citigroup and now part of CitiFinancial Auto, paid over $6

million to settle claims that it had engaged in "an automobile 'churning' or revolving repossession scheme" in Virginia. (*Chisolm v. Transouth Fin. Corp.* (4th Cir. 1996) 95 F.3d 331, 34; 2d Notice & Admin. Order, *Chisolm v. Transouth Fin. Corp.* (E.D.Va. Jan. 16, 2001, 93-cv-00632, Dkt. No. 574) [directing certain actions with respect to settlement of $6,246,00.00].)

And as a recent investigative report by the Los Angeles Times shows,[1] the practice of intentionally churning cars through serial repossessions for enormous profits to creditors (and at enormous losses to consumers) remains all-too-common. As the Times investigation revealed, buy-here-pay-here dealers typically sell used cars at prices far above the Kelly Blue Book value and at exorbitant interest rates, repossess the car when the borrower defaults, obtain a judgment against the original borrower for nearly the unpaid balance of the loan, and then turn around and sell the same car for approximately the same price that they sold it for the first time, repeating the cycle "three, four, even eight times apiece." (Ken Bensinger, *Wheels of Fortune: A Vicious Cycle in the Used-Car Business*, L.A. Times (Oct. 30, 2011) p. 1 [part one of a three-part series on buy-here-pay-here car dealers; reporting on the cycle of default and repossession that is central to a business model "where profit margins average nearly 40%" per loan].) Repossession is the business model.

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[1] The full three-part investigative series, including original documentation of serial sale, repossession and resale of used automobiles, is available at http://documents.latimes.com/wheels-of-fortune/.

As one investor who purchases these types of high-cost-high-default car loans explained: "The amount of return from these loans you can't get on Wall Street. You can't get it anywhere. … It's the gift that keeps on giving." (Ken Bensinger, *Wheels of Fortune: Investors Place Big Bets on Buy Here Pay Here Used Car Dealers*, L.A. Times (Nov. 1, 2011) [part two of the series; quoting Michael Diaz, national sales manager for Small Dealers Assistance].)

(ii) No federal law authorizes self-help repossession or provides a remedy for unfair repossessions

Wachovia can point to no federal law as authority for its self-help repossession of Mr. De la Cruz's or Ms. Jackson's cars because none exists.[2] Indeed, the U.S. Supreme Court has long recognized that debt collection is a quintessentially state law concern, observing in one of its earliest decisions under the NBA that national banks are governed by state laws when collecting debts. (See *First Nat'l Bank v. Kentucky* (1869) 76 U.S. 353, 362; see also *Atherton v. F.D.I.C.* (1997) 519 U.S. 213, 222-23.)

In the face of this long-standing authority, Wachovia baldly asserts that its "right to repossess [Appellants'] vehicle … is derived from its lending powers under the National Bank Act." (Respondent's Brief at p. 51.) This assertion is demonstrably false. "The power to repossess

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[2] Federal law restricts national banks' repossession activities only when repossessing a car owned by an active-duty military service member. *See* 50 App. U.S.C. § 532(a).

ultimately stems … from the state law, either statutory or common." (45 A.L.R.3d (1972) 1233 § 2(b); see also 68A Am. Jur. 2d Secured Transactions, §§ 560 & 564 [whether a repossession has occurred lawfully is a question of state law].) In California specifically, Wachovia's authority to engage in self-help repossession derives from Section 9609 of the Commercial Code. (Com. Code § 9609(b); see also *Meyers v. Redwood City* (9th Cir. 2005) 400 F.3d 765, 767 ["The California Commercial Code provides a right of repossession for secured creditors."].)

California authorizes a secured creditor to engage in self-help repossession within its borders, but only if the repossession can be effected without breaching the peace, and subject to compliance with the additional requirements of Rees-Levering. (Com. Code §§ 9201 & 9609; see also *Lallana, supra*, 19 Cal. 4th at 210 [compliance with both Rees-Levering and relevant provisions of Commercial Code is a condition precedent to a deficiency judgment; "the Legislature has expressly described how the Rees-Levering Act and the California Uniform Commercial Code interrelate"].) California also regulates agents engaging in repossession. (Bus. & Prof. Code §§ 7500-11.) That California has the authority to condition the privilege of self-help repossession on appropriate protections, as determined by the Legislature, is evident from its uncontested authority to ban self-help repossession altogether, as is now the rule in both evictions and foreclosures (National Consumer Law Center, *Repo Madness: How*

Automobile Repossessions Endanger Owners, Agents and the Public (March 2010) at pp. 6-7 [recounting history of self-help repossession in connection with evictions and real property] (hereafter *Repo Madness*), <http://www.nclc.org/images/pdf/car_sales/Repo_madness_Report_0310.pdf> [as of Dec. 14, 2011].

States' longstanding tradition of regulating debt collection practices and the absence of any applicable federal law authorizing or regulating self-help repossession make clear that Rees-Levering's repossession provisions are not preempted. (See *Wyeth v. Levine* (2009) 129 S. Ct. 1187, 1194-95 & fn. 3 [a presumption against preemption exists in areas traditionally subject to state regulation]; *Anderson v. Sara Lee Corp*. (4th Cir. 2007) 508 F.3d 181, 192 [presumption against preemption is especially strong in a "field which the States have traditionally occupied"].)

Neither the Superior Court nor Wachovia identify any federal law addressing the numerous and very real issues arising from self-help repossession: how to seize collateral, how to notify borrowers of seizure, or how to resell collateral. Yet Wachovia would have this Court hold that conflict preemption prevents California from regulating the manner in which repossessions may occur. In essence, Wachovia takes the position that it may repossess private property unconstrained by any law at all.

That repossession is a uniquely state concern is evident in the all too frequent consequences of repossessions that go wrong. (See generally,

Repo Madness, supra.) Repossessions are extremely volatile and easily devolve into violence. (See, e.g., *Ford Motor Credit Co. v. Ryan* (Ohio Ct. App. 2010) 939 N.E.2d 891, 927 [courts recognize that repossession is an "inherently dangerous activity" because it "appear[s] to the public as theft" and therefore gives rise to a special non-delegable duty to prevent a breach of peace]; *Repo Madness, supra* at Appendix 1 [detailing dozens of violent incidents associated with repossessions in 23 states during a three year period].[3] For example, following the death of an Alabama citizen whose vehicle was violently repossessed, the Alabama State Sheriffs' Association is seeking expanded notice to law enforcement and restricted hours to reduce violence incident to repossessions. (*Repo Madness, supra*, at p. 16.)

Nor can consumers and the general public count on federal law to ensure that repossessions are conducted safely and without force, or to provide even the most basic protections against wrongful repossession. And since there is no federal law authorizing repossession, there is no federal remedy for wrongful repossession. The NBA gives consumers virtually no right to take action against national banks for wrongful

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[3] Repeated instances of violence continue to plague the repossession industry, and it is state legislatures and local law enforcement (not federal) who are responsible for curtailing such violence, whether by requiring repossession agents to be licensed, as California does (Bus. & Prof. Code §§ 7500-11), or mandating some type of notice (Civ. Code §§ 2983.2(a), 2983.8).

treatment, no matter how unfair or egregious the banks' conduct.[4] (See *Driesbach v. Murphy* (9th Cir. 1981) 658 F.2d 720, 730 [no private right of action under the Federal Trade Commission ("FTC") Act, the general federal consumer protection statute].)

To hold that the NBA preempts the exercise of such quintessential state police power as regulating the manner in which a private citizen may take the property of another without the involvement of law enforcement flies in the face of hundreds of years of legal precedent and would allow national banks to operate with respect to repossession, unconstrained by any law at all.[5] (See *Wyeth, supra*, 129 S. Ct. at pp. 1194-95 ["touchstone" of any preemption analysis is "assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress"].)

B. The Daily Operations of National Banks Are Largely Controlled by State Laws.

The Supreme Court has consistently held that national banks "are subject to the laws of the State … All their contracts are governed and construed by State laws. Their acquisition and transfer of property, ***their right to collect their debts***, and their liability to be sued for debts, are all

[4] The NBA provides a federal cause of action for usury. (12 U.S.C. § 86.)

[5] State statutes authorizing self-help or non-judicial repossession effectively provide a limited exception to such traditional state law prohibitions as trespass and conversion. (See *Madden v. Deere Credit Servs., Inc.* (Ala. 1992) 598 So.2d 860, 864-66.)

based on State law." (*First Nat'l Bank, supra*, 76 U.S. at p. 362 [emphasis added]; *Cuomo v. Clearing House Ass'n* (2009) 129 S. Ct. 2710, 2720 ["States . . . have always enforced their general laws against national banks"]; *Watters v. Wachovia Bank* (2007) 550 U.S. 1, 11 ["Federally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA"].)

The NBA preempts state laws only if they "prevent or significantly interfere with the national bank's exercise of its powers." (*Barnett Bank of Marion County v. Nelson* (1996) 517 U.S. 25, 33; *see also Watters, supra*, 550 U.S. at p. 12; *Anderson Nat'l Bank v. Luckett* (1944) 321 U.S. 233, 248.) The test is not whether the state law has *any* effect on banking powers—or even whether the state law has more than an incidental effect on those powers. Instead, the level of interference must be significant.

Preemption of state debt collection and repossession law would not protect the primacy of federal law, but would create a void in the legal landscape. Since there is no federal law authorizing or governing self-help repossession (and no federal remedy for wrongful repossession), Rees-Levering's provisions governing self-help repossession do not "significantly interfere" with Wachovia's banking powers. (*Barnett Bank, supra*, 517 U.S. at p. 33; *Aguayo, supra*, 653 F.3d at p. 924 [rejecting argument that Rees-Levering's post-repossession notice provisions were

preempted by federal law, in part because "no federal law governs self-help repossession"]; see also *Anderson, supra*, 508 F.3d at p. 192 [presumption against preemption "is stronger still … when no federal remedy exists] [internal citations omitted]; *Smith v. BAC Home Loans Servicing, LP* (S.D.W.Va. 2011) 769 F. Supp. 2d 1033, 1038 [presumption against preemption applies to "state consumer-protection statutes, which fit squarely within the States' traditional police powers"]; *Dietrich v. Key Bank* (11th Cir. 1996) 72 F.3d 1509, 1514 [holding federal Ship Mortgage Act does not preempt state law regarding self-help repossession because "the Act nowhere describes the procedures to be followed when parties to a preferred ship mortgage seek to enforce the mortgage using nonjudicial, self-help remedies"].) To hold otherwise would allow Wachovia to repossess private property unconstrained by any law at all, including state laws prohibiting the use of force in self-help repossessions.

As the Supreme Court's recent decision in *Cuomo* makes clear, the OCC lacks the authority to unilaterally declare the preemptive effect of the NBA or to set its own preemption standard for state law. (See 129 S. Ct. at p. 2721;[6] *Smith, supra*, 769 F. Supp. 2d at p. 1046 ["while the OCC's

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[6] The OCC has also acknowledged this limitation. (See Testimony of Julie Williams, First Senior Deputy Comptroller and Chief Counsel for the OCC, *Congressional Review of OCC Preemption: Hr'g Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 108th Cong. 108-65 (2004) ["[t]he regulation carefully follows standards established by the U.S. Supreme Court"],

regulation may be a helpful tool in distilling 150 years' worth of NBA preemption jurisprudence, it is not the actual stuff from which conflict preemption arises"].) The OCC regulations at issue here may set no different standard from that established by the NBA as articulated in *Barnett Bank*, and must be read with the understanding that only state laws that "significantly interfere" with Wachovia's national bank powers may be preempted. Thus, the Superior Court erred in relying solely on the OCC's regulations in holding Rees-Levering preempted by the NBA, without conducting an independent analysis of whether compliance with Rees-Levering's repossession provisions "significantly interfere[s]" with Wachovia's exercise of its banking powers. (*Barnett Bank, supra*, 517 U.S. at p. 33.)

Rees-Levering is clearly exempted from preemption even under a plain reading of the OCC's regulation. The OCC specifically carves out seven categories of state laws, including laws related to "rights to collect debts," that are not preempted. (12 C.F.R. § 7.4008(e).) If repossession does not implicate the "right to collect debts," then nothing does.

C. Uniformity is Not a Relevant Consideration in Conflict Preemption

In advancing its federal preemption argument, Wachovia emphasizes its supposed need for uniformity and suggests that it is only bound by state

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<http://www.access.gpo.gov/congress/house/pdf/108hrg/93717.pdf at 13> [as of Dec. 14, 2011].)

law to the extent that law is exactly the same across all fifty states. (Respondent's Brief at 16, 30-31, 49-50.) However, there is simply no authority for the proposition that national banks need only comply with otherwise valid state laws to the extent such laws are "uniform" across all states. Wachovia's insistence on a distinction between "uniform" and "non-uniform" provisions of the Uniform Commercial Code (U.C.C.) does nothing to save its argument.[7] (See *id.* at pp. 30-31, 49-50.) The "uniform" **model** U.C.C. is not law. It is just that, a model, to be adopted and adapted by state legislatures, as they see fit. Until and unless a state legislature enacts the U.C.C. (in whole or in part, with or without revisions), it is not law in that state. That California has adopted protections for consumers facing repossession that may be different than those in other states does not entitle Wachovia to unilaterally pick and choose the particular provisions of California law with which it will deign to comply when availing itself of

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[7] Wachovia cites to an Interpretative Letter from 2004 in which the OCC. confirmed its view that the Uniform Commercial Code is not preempted by federal law. (See OCC Interpr. Letter No. 1005 (June 10, 2004).) Wachovia makes much of the fact that the OCC. distinguished between uniform and "non-uniform" provisions. (Respondent's Brief at 30-31, 49-50.) However, as Wachovia concedes, the OCC Interpretative Letter does not state that non-uniform U.C.C. provisions are preempted. (See OCC Interpr. Letter No. 1005 (June 10, 2004).) Instead, the letter merely states that the OCC "[was] not undertaking to address non-uniform provisions that individual states may adopt and elect to include in . . . their state commercial code." (*Id.* at p. 1 fn.2.) Thus, on its face, the letter is silent on the issue of non-uniform provisions.

the option to engage in self-help repossession, an option that is unavailable to Wachovia in the first instance except as allowed by California law.

(i) The "model" U.C.C. is not law anywhere, except as enacted and amended by the states.

As an initial matter, the Uniform Commercial Code, promulgated by the American Law Institute ("ALI") and the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), is not itself the law. It is merely a recommendation regarding what laws states should adopt in order to harmonize interstate business transactions. Neither the ALI nor the NCCUSL is a governmental entity with the ability to enact the U.C.C. as binding law. Rather, enactment is the choice of states' legislatures, which are free to adopt all, some or none of the U.C.C. provisions, as they see fit. (See *W.B. Farms v. Fremont Nat'l Bank & Trust Co.* (8th Cir. 1985) 756 F.2d 663, 667 ["Although courts strive for uniformity in the interpretation of the [U.C.C.], the Code still represents the act of the legislatures of the various states that have adopted it"].)

Amending model U.C.C. provisions to provide more protection to its citizens is well within the state's discretion and non-uniform amendments to the U.C.C. are common, as state legislatures respond to their local constituents and modify model provisions to address state-specific goals or concerns. In fact, the current version of Article 9 of the model U.C.C. encourages states to adopt additional state-specific (non-uniform)

protections for transactions involving consumers. (U.C.C. § 9-201(b) & official comment.)

The California Legislature's modification of U.C.C. Article 9 is merely one of the many examples of state legislatures adopting modified provisions to address unique needs of its local constituents or other state-specific considerations. Indeed, variations in state laws are both inevitable and desirable, and support the operation of state law in a federal system. States are first responders to abuses and threats that target consumers; they are better equipped to deal with local issues than the federal government. (See Center for Responsible Lending, Consumers Union, National Consumer Law Center, Public Citizen, and Sargent Shriver National Center on Poverty Law, *Comments to the OCC Regarding OTS Integration; Dodd-Frank Implementation Regulations* (June 27, 2011) at p. 3, <http://www.responsiblelending.org/mortgage-lending/policy-legislation/regulators/OCC-preemption-comments-June-27-2011-final.pdf> [as of Dec. 14, 2011].) States react more quickly, and state-level reforms almost always occur before any actions at the federal level. Laws enacted locally are also more responsive to the needs of those affected. States can experiment with different approaches to a new problem, and ultimately provide a model for federal laws. Sometimes, states also "copy and improve on each other's responses and then coalesce around a particular solution." (*Id.*)

In short, not only is there no authority for Wachovia's extraordinary assertion that it is free to ignore any state's laws until and unless such laws are identical across all fifty states, but such a policy would be profoundly unwise.

(ii) Uniformity has never been an objective in conflict preemption in the context of the NBA.

The proper test for preemption under the NBA is conflict preemption. (*Barnett Bank, supra*, 517 U.S. at p. 33.) Generally, conflict preemption can occur in one of two ways – where compliance with both federal and state laws is physically impossible or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Gade v. Nat'l Solid Wastes Management Ass'n* (1992) 505 U.S. 88, 115 [internal quotations omitted].) Absent a clear indication that Congress intends a particular statute or program to operate uniformly and unless such uniformity is necessary to achieve Congress' objectives, the fact that there is variation among the laws of the fifty states is irrelevant to the question of whether a state law "prevent[s] or significantly interfere[s] with a national bank's exercise of its powers." (*Barnett Bank, supra*, 517 U.S. at p. 33.)

In *Chae v. SLM Corp.* (9th Cir. 2010) 593 F.3d 936, 944, for example, the Ninth Circuit examined the Federal Family Education Loan Program and determined that Congress "intended it to operate uniformly,"

pointing to the "comprehensive framework" with specific rules that "go so far as to mandate specified repayment terms and specified insurance and guaranty requirements." (593 F.3d at p. 944 [holding that state-law claims were barred by conflict preemption because, if successful, they would be an obstacle to the achievement of congressional purpose of uniform administration of the FFELP]; see also *Pertuso v. Ford Motor Credit Co.* (6th Cir. 2000) 233 F.3d 417, 426 [finding conflict preemption where state-law claims to "redress wrongs under the Bankruptcy Code would undermine the uniformity the Code endeavors to preserve and would stand[] as an obstacle to the accomplishment and execution of full purposes and objectives of Congress"] [internal quotations omitted] [alterations in original].)

By contrast, the daily operations of national banks are largely subject to bedrock state laws. (*Watters, supra*, 550 U.S. at p. 11.) The key inquiry has always been whether a particular state law "prevent[s] or significantly interfere[s] with the national bank's exercise of its powers," not whether every one of the fifty states has the exact same law. (*Barnett Bank, supra*, 517 U.S. at p. 33.) In fact, in the consumer protection areas, Congress has generally adopted a federal floor preemption model, setting federal laws as the floor, and allowing states to provide more protections for their citizens. This model can be seen in various enactments of the Consumer Credit Protection Act. (See, e.g., 15 U.S.C. § 1691d(f) [Equal Credit Opportunity

Act]; 15 U.S.C. § 1692n [Fair Debt Collection Practices Act]; 15 U.S.C. § 1677 [Restrictions on Garnishment]; 15 U.S.C. § 1601 *et seq.* [Truth in Lending Act].)

Courts have consistently acknowledged that a federal floor model is intended to give states discretion in enacting and enforcing their own laws. (See, e.g., *Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861, 868 [noting that "where federal law creates only a floor, i.e., a minimum safety standard" this "leav[es] adequate room for state tort law to operate"]; *Harris v. Great Dane Trailers, Inc*. (8th Cir. 2000) 234 F.3d 398, 402 [holding that plaintiff's common law tort claims were not preempted by the uniform minimum federal safety standards in the National Traffic and Motor Safety Act of 1966 and noting that "only when federal regulators determine that uniformity is needed to promote the predominant legislative purpose of promoting safety will uniformity itself justify broad conflict preemption"]; *Williams v. First Gov't Mortg. & Investors Corp.* (D.C. Cir. 1999) 176 F.3d 497, 500 ["states remain free to impose greater protections for borrowers" than are provided by the Truth in Lending Act].)

Absent a clear congressional mandate for uniformity, which does not exist in the NBA, state laws are not preempted simply because they may vary from state to state.

D. Wachovia's Logic Allows National Banks to Claim They are Unrestrained by State Foreclosure Laws.

This case does not only affect whether national banks must comply with state repossession laws, or even whether a national bank is entitled to a deficiency judgment if it violates the statute. By ignoring the role that state debt collection laws play in the daily operations of national banks, the Superior Court potentially calls into question the real estate foreclosure laws of all 50 states.

Although the Superior Court's opinion technically interprets only the OCC's preemption regulation related to national banks' non-real estate lending powers (12 C.F.R. § 7.4008) the OCC used largely identical language in its preemption regulation related to national banks' real estate loans (12 C.F.R. § 34.4). Indeed, the language in 12 C.F.R. § 7.4008, used by the Superior Court to justify preemption of Rees-Levering, parallels 12 C.F.R. § 34.4, in OCC's real estate loan preemption regulation. For all practical purposes, interpreting how preemption regulation applies to Rees-Levering broadly dictates the continued applicability of any state law requiring a creditor to give notice to a defaulting borrower for any type of loan.

State-foreclosure laws are such laws. Many states have enacted non-judicial foreclosure statutes that carefully prescribe notices borrowers must receive to safeguard against unauthorized or unnecessary foreclosures, and

in exchange for strict compliance, permit creditors to foreclose on families' homes without the delay and expense of obtaining a court judgment. But foreclosure law has always been understood to be highly state-specific. (See *BFP v. Resolution Trust Corp.* (1994) 511 U.S. 531, 541-42 ["[T]he States have created diverse networks of judicially and legislatively crafted rules governing the foreclosure process, to achieve what each of them considers the proper balance between the needs of creditors and borrowers"].) Because "[i]t is beyond question that an essential state interest is at issue" in state foreclosure laws, the Supreme Court has specified that "the federal statutory purpose must be clear and manifest" to preempt them. (*Id*. at p. 544.)

This Court must avoid any holding that places into doubt the continued authority of state-foreclosure laws over national banks.

II. The OCC's Long History of Favoring National Banks At The Expense Of Consumers

The Superior Court's ruling has dire implications for auto buyers across the nation – not just in California. If consumer protection laws are preempted, state officials cannot help their citizens when a national bank owns their loan. As is true for Mr. De la Cruz and Ms. Jackson, consumers cannot avoid national banks and retain the protection of state laws – for the dealers made the decision to sell the car loan to Wachovia in a commercial transaction and neither Mr. De la Cruz nor Ms. Jackson was a party to the

contract between Wachovia and the dealer.[8] If the law is preempted, consumers are left with nothing when national banks ignore basic protections in commercial transactions, including repossession, as their interests are left unprotected by the national banks' federal regulator, the OCC.[9]

Instead, the OCC has focused on allowing national banks to maximize their short-term profits without regard to their treatment of consumers – a decision now understood to have had dire consequences for the nation's economy. [10] (See Patricia A. McCoy, et al., *Systemic Risk*

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[8] Importantly, there are two sets of contracts at issue here: (1) contracts between the Appellants, Mr. De la Cruz and Ms. Jackson and the auto dealers from whom they financed their cars, and (2) an entirely separate set of contracts between Wachovia and the auto dealers. The second set of contracts are **assignments** to a creditor, here, Wachovia. The assignments are separate, two-party commercial contracts between the auto dealer and the financial institution, to which the Appellants are not parties. (See Appellants' Opening Brief at pp. 18-23; Appellants' Reply Brief at pp. 11-14; see also Civ. Code § 1802.16 [defining a "financing agency" as a person or entity engaged "in whole or in part in the business of purchasing retail installment contracts, or installment accounts from one or more retail sellers"].)

[9] The Consumer Financial Protection Bureau will ultimately enforce federal consumer protection rights against national banks with assets over $10 billion; the OCC retains enforcement authority over national banks with assets under $10 billion. (Dodd Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1025 & 1026 (2010), 12 U.S.C. §§ 5515 & 5516.)

[10] Recent research reveals that the auto-financing industry continues to engage in many of the same abusive and deceptive lending practices, including hidden interest-rate markups that exceed the rate for which a consumer would otherwise qualify. (See Delvin Davis and Joshua M. Frank, Center for Responsible Lending, *Under the Hood: Auto Loan*

Through Securitization: The Result of Deregulation and Regulatory Failure (2009) 41 Conn. L. Rev. 1327, 1344-57 (reviewing the role that federal bank regulators' failure to protect consumers in mortgage underwriting played in causing the ongoing global credit crisis).)

The OCC has a reluctant and inadequate history of protecting consumers, especially if it means challenging the practices of large national banks, such as Wachovia, who fund most of the OCC's operations. The OCC has *never* taken a consumer protection enforcement action against a national bank for unfair or deceptive-car lending or repossession practices, and the OCC's enforcement against national banks' unfair deceptive acts or practices generally is both recent and anemic. The OCC admits that it did not invoke its long-dormant consumer protection authority under the 1975 amendments to the FTC Act until the year 2000. (See Julie L. Williams & Michael L. Bylsma, *On the Same Page: Federal Banking Agency Enforcement of the FTC Act to Address Unfair and Deceptive Practices by Banks* (2003) 58 Bus. Law 1243, 1247.)

In the decade since the OCC dusted off its FTC Act enforcement authority, its consumer protection efforts have remained lax. It has routinely ignored consumer complaints regarding banks and refused to

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Interest Rate Hikes Inflate Consumer Costs and Loan Losses (2011), <http://www.responsiblelending.org/other-consumer-loans/auto-financing/research-analysis/Under-the-Hood-Auto-Dealer-Rate-Markups.pdf> [as of Dec. 14, 2011].)

intervene on their behalf — outright dismissing allegations of abusive practices as "private party situation[s]." (Greg Ip & Damian Paletta, *Lending Oversight: Regulators Scrutinized in Mortgage Meltdown—States Federal Agencies Clashed on Subprimes as Market Ballooned*, Wall St. J. (Mar. 22, 2007), p. Al ([quoting the OCC's response to an elderly consumer with an abusive loan originated by a national bank].)

For instance, the ongoing mortgage crisis had its roots in the disappearance of underwriting from the subprime and "Alt-A" (other non-prime) markets, combined with risky loan products and terms. Although the OCC issued guidance about underwriting and best practices, the record of some banks it supervises suggests poor follow-through and intentional actions to protect the banks, at the expense of consumers. For example, in 2002, at the request of National City Mortgage, the OCC prevented Washington State from inquiring into that bank subsidiary's mortgage practices. (See Eric Nalder, *Mortgage System Crumbled While Regulators Jousted*, Seattle Post-Intelligencer (Oct. 10, 2008) p. A1.) The next year its parent, National City Bank, and subprime-operating subsidiary, First Franklin, sought and obtained an OCC ruling exempting national banks from state anti-predatory mortgage lending laws designed to protect consumers from unsafe loans. (See Preemption Determination and Order, 68 Fed. Reg. 46264 (Aug. 5, 2003).) Having been given a virtual green

light, these two entities concentrated on such poorly underwritten loans that neither institution survived the recent economic downturn.

The record of five of the nation's largest banks, which are all under OCC supervision, further illustrates the OCC's utter inattention to consumer protection:

> The five largest U.S. banks in 2005 . . . made heavy inroads into low-and no-documentation loans. The top-ranked Bank of America, N.A., had a thriving stated-income and no-documentation loan program. … Bank of America securitized most of those loans, which may explain why the OCC tolerated such lax underwriting practices. Similarly, in 2006, the OCC overrode public protests about a "substantial volume" of no-documentation loans by JPMorgan Chase Bank, N.A., the second largest bank in 2005, on grounds that the bank had adequate "checks and balances" in place to manage those loans.

(McCoy, *supra*, at p. 1354.)

The few consumer protection actions taken by the OCC further demonstrate its reluctance to protect consumers. OCC undertook no public-consumer enforcement action against a major bank until its 2008 action against Wachovia Bank for its relationships with telemarketing scammers, who fraudulently obtained bank account information and used the information to deposit "remotely created checks." (See Press Release, OCC, OCC Directs Wachovia to Make Restitution to Consumers Harmed by the Bank's Relationships with Telemarketers and Payment Processors (Apr. 25, 2008), <http://www.occ.gov/news-issuances/news-releases/2008/nr-occ-2008-48.html> [as of Dec. 14, 2011]; *see also* Charles

Duhigg, *Papers Show Wachovia Knew of Thefts*, N.Y. Times (Feb. 6, 2008) p. C1*; see also* Arthur E. Wilmarth Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection* (2004) 23 Ann. Rev. Banking & Fin. L. 225, 232 ["during the past decade the OCC has not initiated a single public prosecution of a major national bank for violating a consumer protection law"].) That investigation occurred only after it received information from private attorneys and federal prosecutors. (See Plaintiffs' Mem. in Support of the Petition for Approval of Agreed Attorney's Fees and Costs at pp. 3-4, 12, 15, *Faloney v. Wachovia Bank* (E.D. Pa. Dec. 22, 2008, 07-cv-1455, Dkt. No. 104).)

The OCC's original settlement with Wachovia was so inadequate, leaving many victims without relief and permitting large, unclaimed settlement funds to revert to the bank, that it was challenged in court, with the support of three Congressmen as *amici*; only then did the OCC amend the settlement to provide direct restitution payments to victims. (See Motion and Brief of Representatives Barney Frank, Edward Markey and Joseph Sestak, in support of Intervenor Faloney Plaintiff's Mot. for an Injunction Under the All Writs Act, *USA v. Payment Processing Center, LLC* (E.D. Pa. May 29, 2008, 06-cv-0725, Dkt. No. 351); Press Release, OCC, Wachovia Enter Revised Agreement to Reimburse Consumers

Directly (Dec. 11, 2008), <http://www.occ.gov/news-issuances/news-releases/2008/nr-occ-2008-143.html> [as of Dec. 14, 2011].)

Likewise, the OCC entered into a settlement with Capital One Bank, for unfairly charging fees to credit-card accountholders who closed their accounts, only after a rigorous investigation by state attorneys general into violations of state-consumer protection laws. (See Press Release, OCC Reaches Agreement with Capital One on Unfair Credit Card Account Closing Practices (Feb. 18, 2010)), <http://www.occ.gov/news-issuances/news-releases/2010/nr-occ-2010-16.html> [as of Dec. 14, 2011] ["The practices in question were brought to the OCC's attention by the offices of the California and West Virginia Attorneys General."].) West Virginia had been engaged in litigation with the bank for almost three years regarding its abusive treatment of credit-card account holders, when the OCC permitted Capital One to receive a national bank charter, in 2008. (See *Capital One Bank v. McGraw* (S.D.W. Va. 2008) 563 F. Supp. 2d 613, 614-15 [detailing litigation history].)

Finally, the OCC's most recent enforcement action against eight national banks for their systemic "robo-signing" practices and foreclosure abuses has prompted nearly universal criticism for its superficial investigation and tepid response. (See, e.g., Joe Nocera, *Letting the Banks Off the Hook*, N.Y. Times (April 19, 2011) p. A25 [describing settlement as "laughable"]; David Streitfield, *New Rules for Top Mortgage Servicers*

Face Early Criticisms, N.Y. Times (April 11, 2011) p. B3 ["'a sham settlement' that is worse than no settlement at all" (quoting Adam Levitin, former special counsel to the Congressional Oversight Panel supervising the Troubled Asset Relief Program)].)

Although OCC found that each major national bank—not a single bank was excluded —had "engaged in unsafe or unsound practices" in pursuing home foreclosures, it imposed no financial penalty, nor did it direct the banks to engage in remedial action other than to comply with operable law.[11] While commending federal regulators for recognizing "that the status quo for mortgage servicing is intolerable," Congressman Frank criticized the enforcement orders as "insufficient" and emphasized the need for further state action. (See Press Release on Mortgage Servicer Agreement, Representative Barney Frank (April 15, 2011) ("enforcement orders are in no way preemptive of any state actions to address mortgage servicing standards, nor are they intended to be the final word on this issue"),

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[11] Cease and desist orders were issued to all eight large national banks subject to OCC's investigation including Bank of America, Citibank, HSBC, JPMorgan Chase, MetLife Bank, PNC, U.S. Bank and Well Fargo. The OCC also entered into consent orders with two service providers: Lenders Processing Services ("LPS") and MERSCORP. *See* Press Release, OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices (April 13, 2011), <http://www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html> [as of Dec. 14, 2011].)

<http://democrats.financialservices.house.gov/press/PRArticle.aspx?NewsID=1417> [as of Dec. 14, 2011].)

The OCC's failure to impose any meaningful penalties on national banks in the face of a "robo-signing" scandal, in which national banks and servicers filed thousands of fraudulent affidavits in court proceedings around the country, demonstrates its focus on protecting banks from a more in-depth and comprehensive investigation by the 50 state Attorneys' General instead of on protecting borrowers from banks' abusive conduct. (See Nocera, *Letting the Banks Off the Hook*, *supra* at p. A25 [OCC is "back to its old tricks" of protecting its self-proclaimed "clients" from any meaningful regulation]; Marian Wang, *Lawyer at Center of Robo-Signing Scandal Sees 'More of the Same' From Banks*, ProPublica, Blog (Oct. 28, 2010), <http://www.propublica.org/blog/item/lawyer-at-center-of-robo-signing-scandal-sees-more-of-the-same-from-banks> [as of Dec. 14, 2011].)

Beyond the headline-grabbing aspect of robo-signers lurk even graver and more systemic problems, including servicing and accounting practices that are so "shoddy" and "sloppy" that banks routinely foreclose when borrowers are in the midst of modification proceedings with another arm of the bank, or even when borrowers are not behind on their mortgage payments at all. (See *In re Wilson* (Bankr. E.D.La. April 7, 2011, No. 07-11862) 2011 WL 1337240 at p. 12 [sanctioning Option One and LPS for

repeatedly seeking to foreclose on home of couple whose payments were current, and for filing fraudulent affidavits with the court].)

Despite widespread evidence of wrongful foreclosures, the OCC did not dig deeply to investigate the problem of foreclosures “that should not have proceeded” as the regulators’ interagency report concedes. (Editorial, *Wrongful Foreclosures*, N.Y. Times (April 16, 2011), <http://www.nytimes.com/2011/04/17/opinion/17sun2.html?ref=opinion> [as of Dec. 14, 2011].) The investigation was admittedly superficial and “may not have uncovered certain facts … that would lead an examiner to conclude that a foreclosure otherwise should not have proceeded.” (Interagency Review of Foreclosure Policies and Practices (April 2011) at p. 2, <http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf> [as of Dec. 14, 2011].)

The only relief that the OCC has offered to homeowners for injuries resulting from wrongful foreclosures, robo-signing and other abusive practices is a time-limited (2009 to 2010) and opaque investigation. And while the banks were required to choose independent consultants to conduct the review of banks’ foreclosure practices, significant questions have been raised regarding the independence, transparency and effectiveness of this process. Most recently, senators and others questioned the OCC’s approval of industry insiders with potential conflicts of interest to conduct the reviews. (See Kevin Wack, *Senate Dems Hammer OCC Over Foreclosure*

Reviews, Am. Banker (Dec. 13, 2011) [Julie Williams "faced nearly an hour of skeptical questioning from three Senate Democrats" who raised a series of questions regarding the fairness of the OCC's process for homeowners]; Francine McKenna, *Banks Hire Friendlies for 'Independent' Foreclosure Reviews*, Am. Banker (Oct. 4, 2011), <http://www.americanbanker.com/bankthink/OCC-consent-orders-foreclosure-reviews-mortgage-servicing-audits-conflicts-1042931-1.html> [as of Dec. 15, 2011], [allowing banks to select "their own judge, jury, and jailer presents almost untenable conflicts of interest"].)

As Judge Elizabeth Magner recently stated in sanctioning LPS for its fraudulent conduct, "[t]he deference afforded the lending community has resulted in an abuse of trust." (*In re Wilson, supra,* 2011 WL 1337240 at p. 10.) Unfortunately, the OCC's settlement, with its focus on self-correction and absence of punitive measures, is unlikely to prompt any genuine changes by the banks.

Several reasons explain the OCC's failure to protect consumers. One reason, in particular, involves "regulatory arbitrage." This permits institutions to examine various federal and state bank charters to identify the most favorable legal framework and regulatory enforcement. (See Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer* (2008) 157 U. Pa. L. Rev. 1, 79-83.) OCC regulators have unabashedly conveyed that the OCC markets its charter. (See Jess Bravin & Paul Beckett, *Friendly Watchdog;*

Federal Regulator Often Helps Banks Fighting Consumers—Dependent on Lenders' Fees, OCC Takes Their Side Against Local, State Laws—Defending Uniform Rules, Wall St. J. (Jan 28, 2002) p. Al [quoting former Comptroller, John D. Hawke, Jr., describing the OCC's use of its power to override state laws protecting consumers as "one of the advantages of a national charter" and asserting he was "not the least bit ashamed to promote it"].) This conclusion was seconded by the "Financial Crisis Inquiry Commission, [which] found that the OCC had pointed to its use of pre-emption to try to persuade banks to be regulated by and pay fees to the agency, 'offering pre-emption as an inducement to use a national bank – charter.'" (Tom Braithwaite, *Caution Urged On US Bank Foreclosure Fines*, Financial Times (April 25, 2011).) The OCC has the incentive to cater to this arbitrage because its funding is dependent on keeping banks within its ranks. The OCC's revenue, for fiscal year 2010, was $794 million—of which 97% derived from assessments levied on national banks. (OCC, Annual Report Fiscal Year 2010, at 42, 54, <http://www.occ.gov/publications/publications-by-type/annual-reports/annual-report-2010.pdf> [as of Dec. 14, 2011])

Whatever the explanation, neither federal law nor regulators manage the conduct of repossession or protect consumers from unfair practices by national banks. State repossession laws cannot create a duty that conflicts

with this federal void. Accordingly, without any such conflict, those laws cannot be preempted.

CONCLUSION

For the reasons stated in Appellant's brief, and including the foregoing arguments, in support, by *amici*, the Superior Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL RE: WORD LENGTH

I, Barbara Jones, hereby certify as follows:

I am counsel of record for *amicus curiae*. According to the word processing program I used to prepare this brief, the brief (excluding tables and this certificate) is 10,064 words long.

December 15, 2011 ___/s/ Barbara Jones_________________

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PROOF OF SERVICE

De la Cruz & Jackson v. Wachovia Dealer Services, Inc. f/k/a WFA Financial

Court of Appeal, State of California
Fourth Appellate District, Division One
Case No. D058503

I, the undersigned, declare as follows:

1. At the time of service, I am over the age of 18 and not a party to this legal action. I am employed in Washington, D.C. I am a resident or employed in the county where the within-mentioned service occurred.

2. My business address is: Center for Responsible Lending, 910 17th Street, NW, Suite 500, Washington, DC 20006.

3. On the date listed below, I served a copy of the following document(s):

Application of AARP, Center for Responsible Lending, and National Consumer Law Center for Leave to File *Amici Curiae* Brief and Proposed Brief in Support of Appellants and Reversal of the Superior Court Decision

on all interested parties in the above-captioned case as follows:

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Date: December 15, 2011