No.

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 75779-2-I)

FEDERAL HOME LOAN BANK OF SEATTLE,

Petitioner,

v.

CREDIT SUISSE SECURITIES (USA) LLC, f/k/a CREDIT SUISSE FIRST BOSTON LLC, CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., and CREDIT SUISSE MANAGEMENT LLC, f/k/a CREDIT SUISSE FIRST BOSTON MANAGEMENT LLC,

Respondents.

PETITION FOR REVIEW

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INTRODUCTION

Federal Home Loan Bank of Seattle (Seattle Bank) sued Credit Suisse Securities (USA) LLC, an investment bank, under the Washington State Securities Act (WSSA) for making untrue or misleading statements of material fact in connection with its sale to Seattle Bank of four residential mortgage-backed securities (RMBS) for hundreds of millions of dollars. Credit Suisse made those untrue or misleading statements in offering documents that it was required to deliver to Seattle Bank and to file with the Securities and Exchange Commission before it completed the sale of the RMBS to Seattle Bank. But for one RMBS Credit Suisse did so three hours, and for a second RMBS two days, after it delivered the RMBS to Seattle Bank and Seattle Bank paid for them. Credit Suisse had made nearly identical statements in its SEC filings for at least 22 similar transactions (including the other two RMBS it sold Seattle Bank).

Division One of the Court of Appeals affirmed summary judgment dismissing Seattle Bank's complaint because, in its view, the WSSA requires a plaintiff to prove that it relied on the untrue or misleading statements in deciding to buy the security that the defendant sold. Division One concluded that Seattle Bank could not have relied on the statements in the offering documents because it received them after it purchased the RMBS. The upshot of this decision is that a seller of securities can escape its lia-

bility for making untrue or misleading statements by the simple expedient of filing its offering documents with the SEC late.

This is the fifth time since 2004 that Division One has engrafted a reliance requirement onto the WSSA. The first four times it did so based on a single sentence in a 1990 decision of this Court in a case in which the issue of reliance was not before the Court. This time, the Court of Appeals explained its reasoning in imposing a reliance requirement. But that reasoning is in direct conflict with two fundamental precepts of this Court's jurisprudence under the WSSA: that the WSSA is a strict-liability statute, not a statutory version of a common-law action for fraud, and that the WSSA is to be interpreted liberally to protect investors. Moreover, Division One has put Washington into a small minority of only five other states that impose a reliance requirement in their counterparts to the WSSA. Twenty other states have rejected a reliance requirement, nine of them in decisions of the state's highest court.

The decision below conflicts with many decisions of this Court and involves an issue of substantial public interest in the protection of investors in Washington. RAP 13.4(b)(1), (4). That decision warrants review and correction by this Court.

IDENTITY OF THE PETITIONER

The petitioner is Federal Home Loan Bank of Seattle. In May 2015, it was merged into Federal Home Loan Bank of Des Moines, but the caption of this action was not amended.

DECISION OF THE COURT OF APPEALS

On December 11, 2017, the Court of Appeals, Division One, issued an unpublished decision affirming the trial court's grant of summary judgment dismissing Seattle Bank's complaint in its entirety. *Fed. Home Loan Bank of Seattle v. Credit Suisse Secs. (USA) LLP*, No. 75779-2-I.[1]

ISSUE PRESENTED FOR REVIEW

Whether, in an action under the WSSA, RCW 21.20.010(2),[2] the plaintiff must prove not only that the defendant made an untrue or misleading statement of a material fact in connection with its sale of a security to the plaintiff, but also that the plaintiff relied on the untrue or misleading statement in deciding to buy the security.

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[1] On the same day, Division One issued a published decision, also affirming a grant of summary judgment in a very similar case, *Federal Home Loan Bank of Seattle v. Barclays Capital, Inc.*, 406 P.3d 686 (2017) (*Barclays*), which, Division One wrote, controlled its decision in this case. Seattle Bank is concurrently petitioning for review of the decision in *Barclays* and respectfully suggests that the Court consider its two petitions together.

[2] RCW 21.20.010(2) makes it "unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly: . . . To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading."

STATEMENT OF THE CASE

A. Creating and selling residential mortgage-backed securities

This is one of hundreds of actions by investors in RMBS against the investment banks that created and sold trillions of dollars of such securities from 2004 to 2008. RMBS are not backed by the promise of an entity such as a corporation to pay principal and interest to their holders. Rather, they are backed only by payments that borrowers make on discrete groups of mortgage loans. CP 2657–2660, 2793–2796. If those borrowers fall behind in their mortgage payments, and if those payments are not enough to make the promised payments to investors in an RBMS, then the investors will suffer losses because no entity is required to make good the shortfall. CP 2666–2668, 2800–2802. Sellers of RMBS make detailed statements in their offering documents about the credit quality of the specific mortgage loans that back the securities. CP 2688–2689, 2799, 2817–2825, 2914–2923, 3152–3201, 3202–3249. These statements are material to investors in RMBS because payments on those mortgage loans are the sole source of payments to investors. CP 3038, 3043–3044, 3127–3130.

The process of creating and selling an RMBS takes several weeks. CP 3888–3892. The investment bank that is creating the RMBS chooses the mortgage loans that are to back the RMBS and devises various technical aspects of the RMBS, such as the relative rights of different RMBS

that are being sold in the same transaction. CP 3890. The investment bank then solicits investors like Seattle Bank to purchase the forthcoming RMBS. CP 3891. The investment bank sends potential investors various preliminary offering documents, such as term sheets, which give details of the specific mortgage loans that will back the RMBS (such as, for example, the rates and terms of the loans, the amount of equity that the borrowers have in their homes, etc.). CP 3152–3201, 3202–3249, 3828–3838, 3891. Based on the information in these preliminary offering documents, an investor makes a preliminary decision whether to purchase the offered RMBS. CP 3828–3838.

While this process is taking place, the investment bank completes the final offering document for the RMBS, the prospectus supplement that it will deliver to investors and file with the SEC. CP 3891. The content of prospectus supplements for RMBS is closely prescribed by the SEC.[3] Under federal law, before it can sell an RMBS, an investment bank must both deliver the prospectus supplement to potential investors and also file it with the SEC so it is available to the investing public at large.[4] Both may be done by uploading the prospectus supplement to the SEC's website.

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[3] SEC Regulation AB, 17 C.F.R. § 229.1100 *et seq.*

[4] Section 5(b)(2) of the Securities Act of 1933, 15 U.S.C. § 77e(b)(2), makes it "unlawful for any person, directly or indirectly- . . . to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after

Credit Suisse sold Seattle Bank four RMBS, one on July 29, 2005, for $70 million, a second on September 30, 2005, for $100 million, a third on November 15, 2005, for $33 million, and a fourth on May 30, 2007, for $45 million. CP 54, 88, 2657, 2793; SCP 9852, 10364. The second and fourth are involved here.

B. The untrue or misleading statements that Credit Suisse made to Seattle Bank; Seattle Bank's action against Credit Suisse under the WSSA

Seattle Bank alleged that Credit Suisse made untrue or misleading statements about the underwriting of the mortgage loans that backed the RMBS and the amount of equity that borrowers had in their homes. In its prospectus supplements, Credit Suisse stated that the loans were made in accordance with specified underwriting criteria. CP 2688, 2817. Such statements are material to investors like Seattle Bank because the credit quality of mortgage loans – and therefore the safety of an RMBS that they back – depends on whether the lenders followed their own guidelines in making the loans.

The amount of equity that borrowers have in their homes is measured by the loan-to-value ratio – that is, the ratio of the amounts of the mortgage loans to the values of the properties that secured those loans. An appraisal of the mortgaged property often provides the denominator in the

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sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 10" of that Act.

loan-to-value ratio.[5] In its prospectus supplements, Credit Suisse stated that the appraisals of the mortgaged properties were made in compliance with the Uniform Standards of Professional Appraisal Practice, the national standards of the appraisal profession. CP 2689, 2818. Such statements are material to investors in RMBS because loan-to-value ratios are a critical factor in the credit quality of mortgage loans, and compliance with professional appraisal standards helps ensure that the ratios are accurate.

Seattle Bank's complaint alleged that the statements described above were untrue or misleading because many of the mortgage loans were not made in accordance with the stated underwriting guidelines and many of the appraisals were not made in accordance with the Uniform Standards of Professional Appraisal Practice.

C. Credit Suisse's failure to deliver and file the prospectus supplements on time

Credit Suisse made these untrue or misleading statements not in the preliminary term sheets that it sent Seattle Bank, which gave details of the specific mortgage loans that would back the RMBS, but in the prospectus supplements for the two RMBS. Credit Suisse made nearly identical statements – that the mortgage loans were made in accordance with

[5] When a mortgage loan is used to purchase a house, the appraisal provides the denominator if the appraised value is lower than the purchase price of the house. When a mortgage loan is used to refinance an earlier mortgage loan, the appraisal always provides the denominator because there is no purchase price.

stated underwriting guidelines and that the appraisals were made in accordance with the Uniform Standards – in the prospectus supplements that Credit Suisse filed with the SEC in 22 similar transactions that preceded its sale of the second RMBS to Seattle Bank in May 2007 (including the two RMBS that it sold Seattle Bank that are not involved here). Appendix A to Brief of Seattle Bank to Court of Appeals; CP 4007–4014.

Although Credit Suisse was required to file the prospectus supplements with the SEC before it sold the RMBS to Seattle Bank, it did not do so. Credit Suisse filed one prospectus supplement three hours after, and the other two days after, Credit Suisse delivered the securities and Seattle Bank paid for them. CP 3276–3277, 3281–3282, 3286; SCP 9852, 10364. Credit Suisse admits that it offered each RMBS for sale "by means of a publicly filed prospectus supplement" (CP 2636), so it is indisputable that Credit Suisse made statements in the prospectus supplements for the two RMBS "in connection with the offer [or] sale" of those securities.

ARGUMENT

I. This Court should clarify that it did not intend to create a reasonable reliance requirement by a single sentence in 1990.

Division One first injected a reasonable reliance requirement into the WSSA in two nearly simultaneous decisions in 2004, *Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 86 P.3d 1175 (2004), and *Stew-*

art v. Estate of Steiner, 122 Wn. App. 258, 93 P.3d 919 (2004). In both, it did so with nothing more than a citation to the italicized phrase in the following sentence of this Court's decision in *Hines v. Data Line Systems, Inc.*, 114 Wn.2d 127, 134, 787 P.2d 8, 15 (1990):

> The [defendants] argue that before they can be liable under RCW 21.20.010, the investors must establish that defendants' misrepresentations were the proximate reason for their investments' decline in value. We disagree. *The investors need only show* that the misrepresentations were material and *that they relied on the misrepresentations in connection with the sale of the securities.*

Guarino, 122 Wn. App. at 109, 86 P.3d at 1182; *Stewart*, 122 Wn. App. at 260 & n.1, 264 & n.7, 93 P.3d at 920 & n.1, 922 & n.7. In two more decisions before the present one, Division One either simply assumed that proof of reasonable reliance was required, *Helenius v. Chelius*, 131 Wn. App. 421, 120 P.3d 954 (2005), or again said so with just a citation to *Hines* and its own decision in *Stewart*, *FutureSelect Portfolio Mgt., Inc. v. Tremont Group Holdings, Inc.*, 175 Wn. App. 840, 868 & n.67, 309 P.3d 555, 569 & n.67 (2013), *aff'd*, 180 Wn.2d 954, 331 P.3d 29 (2014). For two reasons, Division One should have realized that this Court did not intend by that one sentence to impose a reasonable reliance requirement.

First, the issue of reliance was not before this Court in *Hines*, so its observation about reliance was dictum. *Hines* did not involve a question of reliance, and the quoted passage appeared in a section of the Court's opin-

ion about the elements of loss and loss causation. 114 Wn.2d at 134-35, 787 P.2d at 12-13. The investor plaintiffs assumed that they had to prove transaction causation, which is the same as reliance. In their brief, they wrote that "at the very most, Investors here will have to demonstrate at trial a causal nexus not between [the CEO's] aneurysms [which were not disclosed in the offering documents] and [the company]'s demise, but between Respondent's failure to disclose material facts and Investors' decision to purchase the stock."[6] (Emphasis in original.) What the investor plaintiffs disputed was whether they also had to prove that the untrue or misleading statements were the cause of their loss.[7] This Court, of course, decided that they did not. In its reading of this Court's opinion, the Court of Appeals disregarded the principle that "general expressions in every opinion are to be confined to the facts then before the court and are to be limited in their relation to the case then decided and to the points actually involved." *Waremart, Inc. v. Progressive Campaigns, Inc.*, 139 Wn.2d 623, 647, 989 P.2d 524, 536 (1999) (internal quotation marks omitted).

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[6] Brief of Appellants in *Hines* at 62, attached as Appendix II to Credit Suisse's brief to Division One (emphasis in original). The investors said so again in their reply brief. "Investors contend that they need only show 'transaction causation,' i.e., that the omission was a substantial contributive factor in their decision to purchase the stock." Reply Brief of Appellants in *Hines* at 18, attached as Appendix I to Credit Suisse's brief to Division One.

[7] They wrote in their assignments of error: "Causation: . . . Must an injured investor prove that the specific fact or facts omitted from the offering materials directly caused the security to become worthless?" Brief of Appellants in *Hines* at 4.

Second, by the time Division One decided *Guarino* and *Stewart* in 2004, this Court had decided six cases under the WSSA, all in lengthy opinions and all in favor of the investor-plaintiffs.[8] It is inconceivable that this Court intended to make a major decision under the WSSA – let alone one that narrowed the protection of investors – in one sentence. This Court, like Congress, "does not . . . hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468, 121 S. Ct. 903 (2001).

II. The decision of Division One conflicts with this Court's settled doctrine that section (2) of the WSSA is a strict-liability statute.

In its previous four decisions, Division One misconstrued the one sentence in *Hines*. The reasoning in its present decision conflicts with a fundamental principle of this Court's jurisprudence under the WSSA, that section (2) of the WSSA is a strict-liability statute. To Division One, the WSSA is just a statutory version of a common-law action for fraud.

A. The statutory background

When the Legislature enacted the WSSA in 1959, there were (and still are) two federal laws against making an untrue or misleading statement of material fact in connection with the sale of a security. The first

[8] *Cellular Eng'g, Ltd v. O'Neill*, 118 Wn.2d 16, 820 P.2d 941 (1991); *Hoffer v. State*, 113 Wn.2d 148, 776 P.2d 963 (1989); *Hoffer v. State*, 110 Wn.2d 415, 755 P.2d 781 (1988); *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 744 P.2d 1032 (1987); *Kittilson v. Ford*, 93 Wn.2d 223, 608 P.2d 264 (1980); *Clausing v. DeHart*, 83 Wn.2d 70, 515 P.2d 982 (1973).

was section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2) (since renumbered 12(a)(2) but referred to here by its original number). It states:

> Any person who . . . offers or sells a security . . . by means of . . . *an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading* . . . shall be liable ... to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less than the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

(Emphasis added.) As countless courts agree, Section 12(2) creates a strict liability cause of action. Actions under it require no proof of scienter, reliance, loss, or loss causation, all elements of common-law fraud. As Division One acknowledges, "[i]t is undisputed that Section 12(2) of the 1933 Act created a strict liability cause of action." *Barclays*, 406 P.3d at 693.

The second federal law in effect in 1959 was the combination of section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. 240.10b-5, which the SEC promulgated in 1942 by authority of section 10(b). Section 10(b) states that:

> It shall be unlawful for any person, directly or indirectly, ... [t]o use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of [SEC] rules.

Following the language of section 12(2) exactly, Rule 10b-5 makes it unlawful to "make any untrue statement of a material fact or to omit to state

a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading."

When the Legislature enacted the WSSA in 1959, it also followed the language of section 12(2) (and Rule 10b-5) exactly:

> It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly: . . .
>
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

RCW 21.20.010(2). (The full texts of all the provisions discussed here are set forth in the Appendix.)

B. The reasoning of Division One is flawed.

Even though Division One agrees that "Section 12(2) of the 1933 Act created a strict liability cause of action," *Barclays*, 406 P.3d at 693, and even though this Court has held that the WSSA was modeled on section 12(2),[9] still Division One rejects the contention "that the legislature intended WSSA actions to be strict liability actions." *Id.* According to Division One, all that the Legislature took from section 12(2) was its private right of action. The "liability provisions" of the WSSA, on the other hand, the Legislature took from Rule 10b-5. *Id.*

[9] *See Hoffer v. State*, 113 Wn.2d 148, 151-52, 776 P.2d 963, 964-65 (1989); *Haberman v. Wn. Pub. Power Supply Sys*, 109 Wn.2d 107, 125, 744 P.2d 1032, 1048-1049 (1987).

Division One reasons to this conclusion in six steps. *First*, the language of RCW 21.20.010 is the same as the language of Rule 10b-5. *Barclays*, 406 P.3d at 690. *Second*, the words "reasonable reliance" do not appear in Rule 10b-5 or in RCW 21.20.010. *Id. Third*, the United States Supreme Court has long required proof of reliance in actions under Rule 10b-5, starting with its decision in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S. Ct. 1375. (1976). *Id.* at 690 n.17. *Fourth*, when a court interprets a statute, "that interpretation controls what the statute has always meant." *Id.* at 690. *Fifth*, "[t]hus, Rule 10b-5 has always [since the SEC promulgated it in 1942] required a showing of reasonable reliance, and did so when this state's legislature drew upon it [in 1959] to craft RCW 21.20.010(2)." *Id.* Therefore, *sixth*, "we conclude that the state legislature enacted RCW 21.20.010(2) with the intent that it be construed in the same way as Rule 10b-5 and have the same interpretation as federal case law of that rule. In short, reasonable reliance is a necessary element of this state claim." *Id.*

This chain of reasoning leads to either or both of two absurd conclusions: (i) when taking Rule 10b-5 as a model for RCW 21.20.010(2) in 1959, the Legislature understood that the rule required proof of reasonable reliance even though the rule did not say so and even though the United States Supreme Court would not interpret the rule that way for 17 more

years, or (ii) because it modeled RCW 21.20.010 on Rule 10b-5, the Legislature intended that RCW 21.20.010 would thereafter mean whatever the federal courts thought that Rule 10b-5 meant. This Court has long rejected the second conclusion, especially because the purpose of the 1934 Act is to protect the securities markets, whereas "'[t]he Washington Act is unique; special emphasis is placed on protecting investors from fraudulent schemes.'" *FutureSelect Portfolio Mgt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 970-71, 331 P.3d 29, 45-46 (2014).

C. This Court's interpretation of section (2) of the WSSA as a strict liability statute

Worse, the reasoning below conflicts with this Court's interpretation of section (2) of the WSSA as a strict liability statute.

Nothing in the language of section (b) of Rule 10b-5 or section (2) of RCW 21.20.010 (both taken verbatim from section 12(2) of the 1933 Act) requires proof of reasonable reliance or any other element of common-law fraud, including scienter, loss, or loss causation. In *Ernst & Ernst v. Hochfelder*, however, the United States Supreme Court held for the first time that an action under Rule 10b-5 requires proof of scienter. It held that the scope of Rule 10b-5 cannot exceed the scope of the statute that gave the SEC the authority to promulgate that rule, section 10(b) of the 1934. 425 U.S. at 214, 96 S. Ct. at 1391. Section 10(b) prohibits "any manipula-

tive or deceptive device or contrivance." The Supreme Court concluded that "[w]hen a statute speaks so specifically in terms of manipulation and deception, and of implementing devices and contrivances – the commonly understood terminology of intentional wrongdoing – and when its history reflects no more expansive intent, we are quite unwilling to extend the scope of the statute to negligent conduct." *Id.* at 214, 96 S. Ct. at 1391.

The year after the decision in *Ernst & Ernst*, Division Two applied it to the WSSA, ruling that a plaintiff in an action under the WSSA must prove no less than nine elements of common-law fraud – including "the [plaintiff]'s reliance on the truth of the representation [and] his right to rely on it" – all by "clear, cogent, and convincing evidence." *Ludwig v. Mutual Real Estate Invs.*, 18 Wn. App. 33, 41-42, 567 P.2d 658, 662-63 (1977). Three years later, in *Kittilson v. Ford*, this Court overruled *Ludwig*, deciding that "the holding in Ernst & Ernst v. Hochfelder, supra, [is] inapplicable to our Securities Act." This Court explained:

> First, the "manipulative or deceptive" language of section 10(b) of the 1934 act is not included in the Washington act. Secondly, in contrast to the federal scheme, the language of Rule 10b-5 is not derivative but is the statute in Washington. Finally, no legislative history similar or analogous to Congressional legislative history exists in Washington.

93 Wn.2d at 224, 608 P.2d at 264.

This Court extended *Kittilson* in two later decisions. In the first, *Hines*, this Court decided that a plaintiff need not show either loss or loss causation. 114 Wn.2d at 134-35, 787 P.2d at 12-13. Then, in *Go2Net, Inc. v. Freeyellow.Com, Inc.*, 158 Wn.2d 247, 143 P.3d 590 (2006), this Court rejected the argument that equitable defenses of waiver and estoppel should be available in actions under the WSSA. 158 Wn. 2d at 254, 143 P.3d at 593. After reaffirming that the WSSA "requires only proof of the seller's material, preclosing representation or omission," not proof of scienter, loss, or loss causation, *id.* at 253, 143 P.3d at 592, the Court agreed with a different panel of Division One that it was the legislature's "'intention to hold violators strictly accountable.'" *Id.* at 254, 143 P.3d at 593.

Division One believed that this Court imposed a reasonable reliance requirement in *Hines*. Yet it acknowledged that the Court decided in *Kittilson* that a plaintiff need not prove scienter, *Barclays*, 406 P.3d at 692-93, and in *Hines* itself that a plaintiff need not prove loss causation, *id.* at 693. (Division One ignores *Go2Net*.) Division One erred in treating these decisions as just ad hoc choices about which elements of common-law fraud do and do not apply in actions under the WSSA, and in ignoring the unifying logic of this Court's decisions. Because the WSSA has no counterpart to section 10(b) of the 1934 Act, a plaintiff need prove no el-

ements of common-law fraud. Once the plaintiff proves that the defendant made an untrue or misleading statement, the defendant's liability is strict.

III. The decision of Division One is in conflict with this Court's fundamental principle that the WSSA is to be interpreted to protect investors.

For more than 30 years, this Court has held consistently that the WSSA is to be interpreted liberally to protect investors. *FutureSelect,* 180 Wn.2d at 970-71, 331 P.3d at 37-38 (collecting earlier decisions of this Court). The result here illustrates how anti-investor a reliance requirement is. Just as happened here, this requirement enables a seller of securities to shift the focus from the truth of its statements to the buyer's reliance on those statements. This Court rejected a similar shift of focus when it held in *Go2Net* that defenses of waiver and estoppel are not available under the WSSA:

> [P]ermitting a seller to assert equitable defenses is contrary to the Act's primary purpose of protecting investors. Because the Act is intended to deter a seller's presale misrepresentations and omissions, a seller should not be permitted to avoid statutory liability by shifting the focus to the postsale conduct of the uninformed investor.

158 Wn.2d at 254, 143 P.3d at 593. Precisely the same is true of a reliance requirement. It gives sellers of securities a route to escape liability for their untrue or misleading statements – in this case by filing the offering documents late – and thereby dilutes the deterrent effect of the WSSA.

IV. Division One puts Washington at odds with the securities law of 20 other states, including all nine in which sister state supreme courts have considered (and rejected) a reliance requirement.

The highest courts of California,[10] Connecticut,[11] Massachusetts,[12] Nebraska,[13] New Jersey,[14] South Carolina,[15] Tennessee,[16] Utah,[17] and Wisconsin[18] all have rejected any requirement to prove reliance in actions under the counterpart statutes of the WSSA in their states. Intermediate state appellate courts and federal courts have decided the same under the laws of Arizona,[19] Colorado,[20] Indiana,[21] Kentucky,[22] Missouri,[23] Ohio,[24] Oklahoma,[25] Oregon,[26] Pennsylvania,[27] Texas,[28] and Virginia.[29] Other

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[10] *Diamond Multimedia Sys , Inc. v. Superior Ct*, 968 P.2d 539 (Cal. 1999).
[11] *Conn. Nat'l Bank v. Giacomi*, 699 A.2d 101 (Conn. 1997).
[12] *Marram v. Kobrick Offshore Fund, Ltd.*, 809 N.E.2d 1017 (Mass. 2004).
[13] *DMK Biodiesel, LLC v. McCoy*, 859 N.W.2d 867 (Neb. 2015).
[14] *Kaufman v. i-Stat Corp.*, 754 A.2d 1188 (N.J. 2000).
[15] *Bradley v. Hullander*, 249 S.E.2d 486 (S.C. 1978).
[16] *Green v Green*, 293 S.W.3d 493 (Tenn. 2009).
[17] *Gohler v. Wood*, 919 P.2d 561 (Utah 1996).
[18] *Esser Distrib. Co., Inc. v. Steidl*, 437 N.W.2d 884 (Wis. 1989).
[19] *Rose v Dobras*, 128 Ariz. 209 (1981); *Facciola v. Greenberg Traurig LLP*, 281 F.R.D. 363 (D. Ariz. 2012).
[20] *Fed. Deposit Ins. Corp. as Receiver for United Western Bank, F.S.B. v. Countrywide Fin. Corp* , Nos. 11-ML-02265-MRP (MANx), 11-CV-10400-MRP (MANx), 2013 WL 49727 (C.D. Cal. Jan. 3, 2013)..
[21] *Arnold v. Dirrim*, 398 N.E.2d 426 (Ind. Ct. App. 1979).
[22] *Carothers v. Rice*, 633 F.2d 7 (6th Cir. 1980).
[23] *Alton Box Board Co. v. Goldman, Sachs & Co.*, 560 F.2d 916 (8th Cir. 1977).
[24] *Murphy v. Stargate Defense Sys. Corp.*, 498 F.3d 386 (6th Cir. 2007).
[25] *Midamerica Fed. Sav. & Loan Ass'n v. Shearson/American Express Inc.*, 886 F.2d 1249 (10th Cir. 1989).
[26] *Everts v. Holtmann*, 667 P.2d 1028 (Or. Ct. App. 1983).
[27] *Kronenberg v. Katz*, 872 A.2d 568 (Del. Ch. 2004).
[28] *Wood v. Combustion Eng'g, Inc.*, 643 F.2d 339 (5th Cir. 1981).
[29] *Dunn v. Borta*, 369 F.3d 421 (4th Cir. 2004).

than Washington (as Division One views its law) only Georgia,[30] Illinois,[31] Kansas,[32] Minnesota,[33] and North Carolina[34] law require a plaintiff to prove reliance, and those interpretations were reached by intermediate appellate courts and federal district courts.

RCW 21.20.900 provides that "[t]his chapter [the WSSA] shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this chapter with the related federal regulation." This Court has often done just that.[35] Division One has done just the opposite.

CONCLUSION

The petition for review should be granted.

Dated: January 10, 2018

Respectfully submitted,

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[30] *Patel v. Patel*, 761 F. Supp. 2d 1375 (N.D. Ga. 2011).
[31] *JJR, LLC v. Turner*, 58 N.E.3d 788, 802 (Ill. App. Ct. (2016).
[32] *Jayhawk Capital Mgmt, LLC v. LSB Indus., Inc.*, No 08-2561-EFM, 2012 WL 4210462, at *8 (D. Kan. Sept 19, 2012).
[33] *Merry v Prestige Capital Mkts.*, 944 F. Supp. 2d 702, 709 (D. Minn. 2013).
[34] *Jadoff v. Gleason*, 140 F.R.D. 330 (M.D.N.C. 1991).
[35] *E g, Kinney v. Cook*, 159 Wn.2d at 843, 154 P.3d at 210; *Cellular Engineering*, 118 Wn.2d at 23–24, 820 P.2d at 945-46; *Kittilson*, 93 Wn.2d at 227, 608 P.2d at 265-66.

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CERTIFICATE OF SERVICE

I certify that on January 10, 2018 I served a copy of

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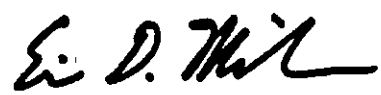
I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FEDERAL HOME LOAN BANK OF SEATTLE, a bank created by federal law, Appellant, v. CREDIT SUISSE SECURITIES (USA) LLC, f/k/a CREDIT SUISSE FIRST BOSTON LLC, a Delaware limited liability company; CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., a Delaware corporation; and CREDIT SUISSE MANAGEMENT LLC, f/k/a CREDIT SUISSE FIRST BOSTON MANAGEMENT LLC, a Delaware limited liability company, Respondents.	No. 75779-2-I DIVISION ONE UNPUBLISHED FILED: December 11, 2017

Cox, J. — Reasonable reliance is an essential element of a claim under RCW 21.20.010(2) of the Washington State Securities Act ("WSSA").[1] Federal

[1] Go2Net, Inc. v. Freeyellow.com, Inc., 158 Wn.2d 247, 251, 143 P.3d 590 (2006); Hines v. Data Line Sys., Inc., 114 Wn.2d 127, 134, 787 P.2d 8 (1990); Fed. Home Loan Bank of Seattle v. Barclays Capital, Inc., No. 75913-2-I, slip op. at 2-3 (Wash. Ct. App. Dec. 11, 2017); Stewart v. Estate of Steiner, 122 Wn. App. 258, 264, 93 P.3d 919 (2004), review denied, 153 Wn.2d 1022 (2005).

Home Loan Bank of Seattle ("FHLBS") commenced this action under the WSSA, after purchasing certain securities. FHLBS claimed that statements in prospectus supplements related to these securities were untrue or misleading. The trial court granted the motion for summary judgment by Credit Suisse Securities (USA), Credit Suisse First Boston Mortgage Securities Corp. and Credit Suisse Management LLC (collectively, "Credit Suisse").

On appeal, we conclude that there is no genuine issue of material fact whether FHLBS reasonably relied on the statements in either prospectus supplement. It could not have so relied because each supplement was made publicly available *after* FHLBS completed the purchases of the related securities. Credit Suisse is entitled to judgment as a matter of law. We affirm.

The material facts are undisputed. FHLBS purchased four residential mortgage backed securities ("RMBSs") from a Credit Suisse entity. RMBSs are securities that are created by a process called "securitization" that entitles an investor to the stream of income payments from a pool of residential mortgage loans.[2] Two of the four RMBSs are at issue here.

Credit Suisse filed prospectus supplements with the Securities and Exchange Commission for both RMBSs. It is undisputed that FHLBS purchased one of the two securities on September 30, 2005, before 2:00 p.m. Credit Suisse filed the related prospectus supplement that day but it was not publicly available until around 5:00 p.m. eastern time, after this purchase was completed.

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[2] See Barclays Capital, Inc., slip op. at 2-3; Clerk's Papers at 2657-60, 2793-96.

FHLBS purchased the other RMBS on May 30, 2007. Credit Suisse filed the related prospectus supplement with the SEC on June 1, 2007, the day after the purchase was completed.

FHLBS commenced this action for rescission and other relief. It alleged in its amended complaint that it had relied on untrue or misleading statements in both prospectus supplements. Credit Suisse moved for summary judgment, which the trial court granted. The court did so on the basis that "FHLBS failed to establish that it reasonably relied on the misstatements it alleged were contained in the prospectus supplements" because it purchased the securities before reviewing the prospectus supplements.[3]

FHLBS appeals.

REASONABLE RELIANCE

Despite the allegations in its earlier readings, FHLBS primarily now argues that the trial court improperly granted summary judgment because reasonable reliance is not an essential element under RCW 21.20.010(2). We disagree.

We will affirm an order granting summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[4] A material fact is one on which the outcome of the litigation

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[3] Clerk's Papers, Vol. 23 at 10461.

[4] McPherson v. Fishing Company of Alaska, 199 Wn. App. 154, 157, 397 P.3d 161, review denied, 189 Wn.2d 1021 (2017).

depends.[5] We review de novo orders of summary judgment.[6] We also review de novo a trial court's legal conclusions.[7]

In summary judgment, the moving party bears the initial burden to show the absence of an issue of material fact.[8] When the moving party is the defendant, and meets this burden, the burden shifts to the plaintiff.[9] If the plaintiff cannot establish the existence of an essential element in its case, which it would bear the burden to prove at trial, then the trial court should properly grant summary judgment.[10] Failure to prove an essential element of "'the nonmoving party's case necessarily renders all other facts immaterial.'"[11]

In construing a statute, we seek to ascertain and carry out the legislature's intent.[12] When the legislature takes a state statute substantially verbatim from a federal statute, "'it carries the same construction as the federal law and the same

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[5] Knight v. Dep't of Labor & Indus., 181 Wn. App. 788, 795, 321 P.3d 1275 (quoting Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008)), review denied, 181 Wn.2d 1023 (2014).

[6] Id.

[7] Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

[8] Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

[9] Id.

[10] Id.

[11] Id. (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

[12] Thorpe v. Inslee, 188 Wn.2d 282, 289, 393 P.3d 1231 (2017).

interpretation as federal case law.'"[13] And when the legislature passes an "amendment to a statute without alteration of a section previously interpreted by the courts," such action may "evidence[] legislative acquiescence in the interpretation."[14]

RCW 21.20.010 makes it:

> unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:
>
> . . . .
>
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.
>
> . . . .

The supreme court has determined that RCW 21.20.010 "is patterned after and restates in substantial part the language of the federal Securities Exchange Act of 1934."[15] And this court has specified that RCW 21.20.010 is "related" to Section 10(b) of that act, as well as SEC Rule 10b-5.[16] The only difference between the Washington statute and federal rule is the latter's more limited application to interstate commerce.[17]

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[13] Anfinson v. FedEx Ground Package System, Inc., 174 Wn.2d 851, 868, 281 P.3d 289 (2012) (quoting State v. Bobic, 140 Wn.2d 250, 264, 996 P.2d 610 (2000)).

[14] McKinney v. State, 134 Wn.2d 388, 403, 950 P.2d 461 (1998).

[15] Clausing v. DeHart, 83 Wn.2d 70, 72, 515 P.2d 982 (1973).

[16] Guarino v. Interactive Objects, Inc., 122 Wn. App. 95, 110, 86 P.3d 1175 (2004).

[17] 15 U.S.C. § 78j.

A plaintiff bringing an action under RCW 21.20.010 must show that she reasonably relied on the challenged statement in entering the transaction. Federal courts have long required reliance in Rule 10b-5 actions.[18] And Washington law holds that once a court makes a controlling interpretation of a statute, that interpretation controls what the statute has always meant.[19] As the Ninth Circuit Court of Appeals has explained, "'the Washington Legislature may be presumed to have known'" about the requirements of Rule 10b-5.[20]

The supreme court held in Hines v. Data Line Systems, Inc. that plaintiffs proceeding under RCW 21.20.010 must show that they "relied on the misrepresentations in connection with the sale of the securities."[21] Only "an investor who is wrongfully induced to purchase a security may recover his investment."[22] Several subsequent opinions have followed this rule.[23]

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[18] See, e.g., Janus Capital Group, Inc. v. First Derivative Traders, 564 U.S. 135, 140 n.3, 131 S. Ct. 2296, 180 L. Ed. 2d 166 (2011); Basic Inc. v. Levinson, 485 U.S. 224, 242, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 206, 96 S. Ct. 1375, 47 L. Ed. 2d 668 (1976)).

[19] In re Pers. Restraint of Johnson, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997).

[20] Wade v. Skipper's, Inc., 915 F.2d 1324, 1331 (9th Cir. 1990) (quoting WPPSS Securities Litigation, 1986 Blue Sky Law Rptr. ¶ 71,675 (W.D. Wash., MDL 1986)).

[21] 114 Wn.2d 127, 134, 787 P.2d 8 (1990).

[22] Id. at 135.

[23] See, e.g., Go2Net, Inc., 158 Wn.2d at 251; Guarino, 122 Wn. App. at 110; Stewart, 122 Wn. App. at 264.

The legislature has never acted to amend the statute in light of this construction by our courts. The Ninth Circuit Court of Appeals has observed that the "Washington State Legislature has demonstrated its willingness and ability to correct its own omissions" in the WSSA.[24] Since this court initially recognized a reliance requirement in 1970,[25] the legislature has amended the WSSA eight times.[26] It has at no point modified the requirement that reliance is required. For the reasons discussed, the legislative intent is clear. A plaintiff must show reasonable reliance to prevail under RCW 21.20.010.

FHLBS mounts several arguments against this statutory requirement. First, it argues that the language in Hines, quoted above, was mere dicta that this court need not follow. Not so.

As we recently held in Federal Home Loan Bank of Seattle v. Barclays Capital, Inc., Hines controls this case.[27] The legislature has not amended the reliance principle espoused in that case. And the supreme court has subsequently denied review in cases from this court that have held reasonable reliance an essential element of RCW 21.20.010 claims.[28] As we stated in

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[24] Wade, 915 F.2d at 1332.

[25] Shermer v. Baker, 2 Wn. App. 845, 858, 472 P.2d 589 (1970).

[26] Laws of 1998, ch. 15, § 20; Laws of 1986, ch. 304, § 1; Laws of 1985, ch. 171, § 1; Laws of 1981, ch. 272, § 9; Laws of 1979, Ex. Sess., ch. 68, § 30; Laws of 1977, Ex. Sess., ch. 172, § 4; Laws of 1975, 1st Ex. Sess., ch. 84, § 24; and Laws of 1974, Ex. Sess., ch. 77, § 11.

[27] No. 75913-2-I, slip op. at 9-10 (Wash. Ct. App. Dec. 11, 2017).

[28] Stewart, 122 Wn. App. at 264.

Barclays Capital, Inc., characterizing the language in Hines as dicta does nothing to dissuade us from the conclusion that the legislature intended reasonable reliance to be an essential element of a claim under RCW 21.20.010.

FHLBS next argues that RCW 21.20.010 creates a strict liability cause of action because the supreme court has held certain elements of fraud unnecessary to prove. This argument is also unpersuasive.

As we explained in Barclays Capital, Inc., the supreme court has held that a RCW 21.20.010 plaintiff need not show loss causation or scienter.[29] We noted that the supreme court has reached these holdings based on careful analysis of the statutory text and history of these elements.[30] These cases do not stand for the proposition that a plaintiff need not show reasonable reliance.[31]

FHLBS next argues that the legislature intended WSSA actions to be strict liability actions because it borrowed language from Section 12(2) of the 1933 federal Securities Act. Not so.

Although Section 12(2) created a strict liability action, we recently held in Barclays Capital, Inc. that the legislature borrowed only the remedy section from that statute.[32] It borrowed the WSSA's liability provisions from Rule 10b-5. RCW 21.20.430 clearly states by cross reference that RCW 21.20.010 defines

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[29] Barclays Capital, Inc., slip op. at 11.

[30] Id. at 13.

[31] Id.

[32] Id.

liability.[33] Thus, RCW 21.20.430 and Section 12(2) are irrelevant to whether RCW 21.20.010 requires a plaintiff to show reliance to establish liability.

FHLBS further contends that other states' statutes persuasively suggest that RCW 21.20.010 is strict liability. As Barclays Capital, Inc. makes clear, these other statutes tell us nothing about the controlling legislative intent: that of the legislature of Washington.[34]

In sum, the failure of FHLBS to prove it reasonably relied on the prospectus supplements is a failure of proof of an essential element of its claims. Accordingly, all other future disputes are immaterial for summary judgment purposes. Credit Suisse is entitled to judgment as a matter of law.

We affirm the summary dismissal of these claims.

Cox, J.

WE CONCUR:

Spearman, J.

Schindler, J.

[33] RCW 21.20.430(1).

[34] Barclays Capital, Inc., slip op. at 14.

Texts of Statutes and Rule Referred to in the Petition

Section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2):

> CIVIL LIABILITIES ARISING IN CONNECTION WITH PROSPECTUSES AND COMMUNICATIONS
>
> Any person who . . . offers or sells a security . . . by means of . . . an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading . . . shall be liable ... to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less than the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b):

> REGULATION OF THE USE OF MANIPULATIVE AND DECEPTIVE DEVICES
>
> It shall be unlawful for any person, directly or indirectly, ...
>
> (b) To use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of [SEC] rules.

SEC Rule 10b-5, 17 C.F.R. 240.10b-5:

> EMPLOYMENT OF MANIPULATIVE AND DECEPTIVE DEVICES
>
> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make

the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Washington State Securities Act:

RCW 21.20.010 UNLAWFUL OFFERS, SALES, PURCHASES

It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:

(1) To employ any device, scheme, or artifice to defraud;

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

RCW 21.20.430 CIVIL LIABILITIES – ....

(1) Any person, who offers or sells a security in violation of any provisions of RCW 21.20.010 ... is liable to the person buying the security from him or her, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at eight percent per annum from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he or she no longer owns the security. Damages are the amount that would be recoverable upon a tender less (a) the value of the security when the buyer disposed of it and (b) interest at eight percent per annum from the date of disposition.