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STATE OF WASHINGTON
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No.

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 75913-2-I)

FEDERAL HOME LOAN BANK OF SEATTLE,

Petitioner,

v.

BARCLAYS CAPITAL, INC., BCAP LLC, and BARCLAYS BANK PLC,

Respondents.

PETITION FOR REVIEW

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INTRODUCTION

Federal Home Loan Bank of Seattle (Seattle Bank) sued Barclays Capital, Inc., 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 hundreds of millions of dollars of residential mortgage-backed securities (RMBS). 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 reasonably relied on the untrue or misleading statements in deciding to buy the security that the defendant sold. There is no dispute that Seattle Bank relied on the statements that Barclays made to it. But, Division One concluded, it was unreasonable as a matter of law for Seattle Bank to do so, even though, when Barclays solicited Seattle Bank to buy RMBS, it represented that it always made an exhaustive "due diligence" investigation to ensure that its offering documents contained no untrue or misleading statements, and Barclays made those statements in offering documents that it was required to file with the Securities and Exchange Commission because it was offering the RMBS to the investing public.

This is the fifth time since 2004 that Division One has engrafted a reasonable 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 reasonable 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 a published 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. Barclays Cap., Inc.*, 406 P.3d 686 (2017).[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 reasonably relied on the untrue or misleading statement in deciding to buy the security.

STATEMENT OF THE CASE

A. 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. SCP 15530, 23608. If those borrowers fall be-

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[1] On the same day, Division One issued an unpublished decision, also affirming a grant of summary judgment in a very similar case, *Federal Home Loan Bank of Seattle v. Credit Suisse Securities (USA) LLC*, which, Division One wrote, was controlled by its decision in this case. Seattle Bank is concurrently petitioning for review of the decision in *Credit Suisse* 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."

hind in their mortgage payments, and if those payments are not enough to make the promised payments to investors in an RMBS, then the investors will suffer losses because no entity is required to make good the shortfall. SCP 15521, 23598. Sellers of RMBS make detailed statements in their offering documents about the credit quality of the specific mortgage loans that back the securities. SCP 15532–15536, 15538–15542, 15627–15636, 23610–23614, 23616–23620. These statements are material to investors in RMBS because payments on those mortgage loans are the sole source of payments to investors. SCP 14310, 14315–14316, 15530, 23608.

To sell the RMBS it creates, an investment bank solicits investors like Seattle Bank. CP 1974. The investment bank sends potential investors various preliminary offering documents and then the final offering document, called a prospectus supplement. CP 1974–1975. The content of prospectus supplements is minutely 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

Barclays sold Seattle Bank four RMBS, two of which are involved here. Barclays sold Seattle Bank one of the RMBS on February 13, 2008, for $189.4 million and the other on April 15, 2008, for $232.4 million.

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

Seattle Bank alleged that Barclays 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. The two RMBS involved here were backed by 1,643 loans that Barclays purchased from IndyMac Bank to create these two RMBS. SCP 15532, 23610. IndyMac, in turn, had either made those mortgage loans or purchased them from other lenders. In its prospectus supplements, Barclays stated that the loans were made in accordance with specified underwriting standards. CP 1554, 1564. 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. SCP 12381–12385.

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

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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.

appraisal of the mortgaged property often provides the denominator in the loan-to-value ratio.[5] In its prospectus supplements, Barclays stated that the appraisals of the mortgaged properties were made in accordance with the national standards of the appraisal profession: "To determine the adequacy of the property to be used as collateral, an appraisal is generally made of the subject property in accordance with the Uniform Standards of Profession[al] Appraisal Practice." CP 1555, 1566. 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 to 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. Division One determined that Seattle Bank's reliance on the untrue or misleading statements was unreasonable as a matter of law.

There is no dispute that Seattle Bank relied on the statements discussed above in deciding to purchase the two RMBS from Barclays. The

[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.

Court of Appeals nevertheless affirmed a grant of summary judgment to Barclays because it determined that it was unreasonable as a matter of law for Seattle Bank to rely on those statements.

Division One based its conclusion on various factors, principally that, by early 2008, Seattle Bank was concerned about the deteriorating real estate market and its implications for RMBS, Decision at 16-18, and that "FHLBS was deeply involved in selecting the loans originated by IndyMac that ultimately constituted the two securities that the bank purchased," *id.* at 18. (Although Division One cited the record extensively to support its other findings, it cited nothing to support this one.)

The court did not address other factors, any one of which was sufficient to create a genuine issue of material fact as to the reasonableness of Seattle Bank's reliance. Among them were:

- When Barclays solicited Seattle Bank, it touted the thoroughness of its due diligence to ensure that its offering documents would contain no untrue or misleading statements. CP 4583-4586.

- Barclays made the statements in offering documents that it was required to file with the SEC, and in those documents Barclays advised investors that "[y]ou should rely *only* on the information contained in this prospectus and the accompanying prospectus supplement." CP 4270, 4275 (emphasis added).

- With access to the files on the 1,643 mortgage loans that backed the RMBS, Barclays conducted extensive due diligence about the underwriting of those loans. Barclays sent the results of its due diligence to IndyMac, but never to Seattle Bank. CP 4949, 4969, 5024, 5026.

- Seattle Bank had no access to those loan files. CP 4294, 4298, 4300, 4304, 4308, 4320.

- Barclays and IndyMac chose the loans to back the RMBS. Seattle Bank did not choose a single loan. CP 3044, 4890, 4895, 4918, 4921, 4947, 4951, 5033, 5040.

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 *Stewart 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, 12 (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 inves-*

> *tors 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 opinion 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 be-

tween 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).

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

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[6] Brief of Appellants in *Hines* at 62, attached as Appendix II to Barclays'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 Barclays'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.

[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).

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 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." Decision at 13.

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," Decision at 13, 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.*

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. Decision at 7. *Second*, the words "reasonable reliance" do not appear in Rule 10b-5 or in RCW 21.20.010. *Id.* at 8. *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 8 n.17. *Fourth*, when a court interprets a statute, "that interpretation controls what the statute has always meant." *Id.* at 8.

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[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).

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, 37-38 (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 manipulative 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 226, 608 P.2d at 265.

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, Decision at 11, and in *Hines* itself that a plaintiff need not prove loss causation, *id.* at 12. (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 elements 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 complex eight-factor test that Division One applied to determine whether Seattle Bank's reliance on Barclays's statements was reasonable, Decision at 19, illustrates how anti-investor a reasonable reliance

requirement is. Just as happened here, this test enables a seller of securities to shift the focus from the truth of its statements to the reasonableness of 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 to a defendant 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 reasonable reliance requirement. It gives sellers of securities a route to escape liability for their untrue or misleading statements 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

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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).

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 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

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[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).
[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).

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.

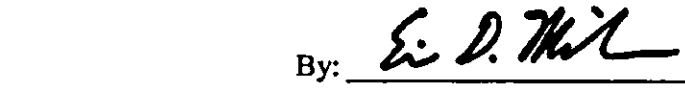
CONCLUSION

The petition for review should be granted.

Dated: January 10, 2018

Respectfully submitted,

PERKINS COIE LLP

By: 
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[35] *E.g., Kinney v. Cook*, 159 Wn.2d at 843, 154 P.3d at 210; *Cellular Eng'g*, 118 Wn.2d at 23–24, 820 P.2d at 945-46; *Kittilson*, 93 Wn.2d at 227, 608 P.2d at 265-66.

CERTIFICATE OF SERVICE

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

Respondents' Petition for Review via U.S. Mail, postage prepaid,

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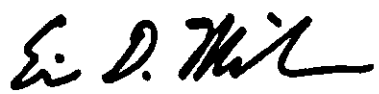
I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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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. BARCLAYS CAPITAL, INC., a Connecticut corporation; BCAP LLC, a Delaware limited liability company; and BARCLAYS BANK PLC, a public limited company registered in England and Wales, Respondents.	No. 75913-2-I DIVISION ONE PUBLISHED FILED: December 11, 2017

2017 DEC 11 AM 10:00

Cox, J. — Under the Washington State Securities Act ("WSSA"), an investor who sues on the basis that a prospectus contains either untrue statements or omissions of material facts must prove reasonable reliance on these statements or omissions.[1] Here, the Federal Home Loan Bank of Seattle ("FHLBS") purchased two residential mortgage backed securities ("RMBSs") in

[1] RCW 21.20.010(2); Hines v. Data Line Sys., Inc., 114 Wn.2d 127, 134, 787 P.2d 8 (1990); Stewart v. Estate of Steiner, 122 Wn. App. 258, 264, 93 P.3d 919 (2004), review denied, 153 Wn.2d 1022 (2005); Go2Net, Inc. v. Freeyellow.com, Inc., 158 Wn.2d 247, 251, 143 P.3d 590 (2006).

2008 that were described in prospectus supplements. In 2009, FHLBS commenced this action under the WSSA against Barclays Capital, Inc., BCAP LLC, and Barclays Bank PLC (collectively, "Barclays"). The essence of its claim for rescission and other relief is that the prospectus supplements contain untrue statements or omissions of material facts about the securities FHLBS purchased.

The trial court granted Barclays's motion for summary judgment. In this appeal, FHLBS fails in its burden to show that there are genuine issues of material fact. Barclays is entitled to judgment as a matter of law. We affirm the summary dismissal of these claims.

Some background about the nature of the transactions at issue in this case may be helpful to provide context. In early 2008, FHLBS purchased the two RMBSs that are the subjects of this action. These securities were created by a process known as "securitization."[2]

The subjects of this securitization are 1,643 loans that IndyMac Bank made to various residential borrowers throughout the country. IndyMac decided whether to make each loan by a process called "underwriting." After each loan approval, each borrower began making monthly payments to IndyMac. For purposes of securitization, IndyMac was the "originator" of these loans.

After IndyMac originated these loans, it pooled them together and transferred them to a Barclays subsidiary. The subsidiary then deposited them in

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[2] See Federal Housing Finance Agency v. Nomura Holding America, Inc., 60 F. Supp. 3d 479, 486 (S.D.N.Y. 2014).

a trust in exchange for investment certificates. The trust issued certificates that were then sold to FHLBS.

In sum, the stream of income from the monthly payments by borrowers for the loans from IndyMac, the originator, was transferred to FHLBS, the investor.

On February 13, 2008, FHLBS purchased the first security for $189,416,000. This RMBS is comprised of 951 of the 1,643 loans originated by IndyMac. This security is known as BCAP 2008-IND1 ("IND1").

On April 15, 2008, FHLBS purchased the second security for $232,438,000. This RMBS is comprised of the remaining 692 of the 1,643 loans originated by IndyMac. This is known as BCAP 2008-IND2 ("IND2").

During the underwriting process, most of these loans were characterized as "Alt-A", falling between "Prime" and "Subprime" loans in terms of creditworthiness. As their names suggest, Prime loans are those issued to borrowers who are the most credit worthy. Subprime loans, on the other hand, are to borrowers at the other end of the creditworthiness spectrum.

FHLBS purchased these securities at a time that one respected financial commentator has described as "the mortgage debacle — in 2008. That one brought world economies to the precipice and wiped out Lehman Brothers and a raft of troubled banks."[3]

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[3] Gretchen Morgenson, After 20 Years of Financial Turmoil, a Columnist's Last Shot, N.Y. TIMES (Nov. 10, 2017), https://www.nytimes.com/2017/11/10/business/after-20-years-of-financial-turmoil-a-columnists-last-shot.html?emc=eta1 [https://perma.cc/SA9J-9FQK].

In 2009, FHLBS commenced this action against Barclays to rescind these transactions and for further relief. In 2011, the trial court first ruled that reasonable reliance on the statements in the prospectus supplements is an element of an investor's claim under the WSSA. In 2016, following extensive discovery by the parties, the trial court granted Barclays's motion for summary judgment on lack of reasonable reliance as to the IND1 and IND2 transactions. The court necessarily decided that FHLBS failed to show any genuine issue of material fact on this element and that Barclays was entitled to judgment as a matter of law.

FHLBS appeals.

REASONABLE RELIANCE

Whether reasonable reliance is a necessary element of an investor's claim under the WSSA is a core issue in this case. FHLBS argues that the WSSA does not require that it prove that it reasonably relied on the statements in the prospectus supplements that it now challenges. We disagree and hold that such reliance is an essential element of an investor's claim under RCW 21.20.010(2).

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

[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 construing a statute, we seek to ascertain and carry out the legislature's intent.[8] When the legislature enacts a state statute substantially verbatim from a federal statute, "'it carries the same construction as the federal law and the same interpretation as federal case law.'"[9] 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."[10]

Here, FHLBS focuses its arguments on two statements in the prospectus supplements for the two RMBSs that it purchased.

The first challenged statement states:

> Mortgage loans that are acquired by IndyMac Bank are underwritten by IndyMac Bank according to IndyMac Bank's underwriting guidelines, which also accept mortgage loans meeting Fannie Mae or Freddie Mac guidelines regardless of whether such mortgage loans would otherwise meet IndyMac's guidelines, or

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

[9] 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)).

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

pursuant to an exception to those guidelines based on IndyMac's procedures for approving such exceptions.[11]

The essence of FHLBS's claim is that the statement is untrue or misleading because IndyMac allegedly did not follow "its own guidelines and procedures in making [these] loans."[12]

The other challenged statement deals with the loan to value ("LTV") ratios of these loans. FHLBS claims that many appraisals that determined the LTV ratios were not made in accordance with the Uniform Standards of Professional Appraisal Practice, the national standard of the appraisal profession. The numerator of this LTV ratio is the amount of a loan and the denominator is the appraised value of the property securing that loan. The purpose of this measure is to evaluate how much equity a borrower has in the property securing the loan.

RCW 21.20.010 states the elements of a claim under the WSSA:

> 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.
>
> . . . .

The question is whether the legislature intended reasonable reliance to be an element of a claim under this provision of the WSSA. We hold that it did.

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[11] Clerk's Papers at 1554, 1564.

[12] Appellant's Opening Brief at 9.

We begin our analysis by noting the substantial similarity of this state provision with its federal counterpart. As the following chart shows, the provisions of these statutes are substantially the same.

SEC Rule 10b-5	RCW 21.20.010
"It shall be unlawful for any person . . . in connection with the purchase or sale of any security . . . (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 . . . ."[13]	"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."[14]

The state supreme court has determined that RCW 21.20.010 "is patterned after and restates in substantial part the language of the federal

[13] (Emphasis added.)

[14] (Emphasis added.)

Securities Exchange Act of 1934."[15] And this court has clarified that RCW 21.20.010 is "related" to Section 10(b) of that act, as well as SEC Rule 10b-5.[16]

The words "reasonable reliance" do not appear in Rule 10b-5 or in RCW 21.20.010(2), its state counterpart. But the United States Supreme Court has long required reliance in Rule 10b-5 actions.[17] And Washington law holds that once a court makes a controlling interpretation of a statute, that interpretation controls what the statute has always meant.[18] Thus, Rule 10b-5 has always required a showing of reasonable reliance, and did so when this state's legislature drew upon it to craft RCW 21.20.010(2).

Accordingly, 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.[19] In short, reasonable reliance is a necessary element of this state claim.

It is particularly noteworthy that since Washington courts began recognizing a reliance requirement in 1970,[20] the legislature has amended the

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[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] 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)).

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

[19] Anfinson, 174 Wn.2d at 868 (quoting Bobic, 140 Wn.2d at 264).

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

WSSA eight times.[21] Not once did it modify the requirement that reliance is a required element. This is telling.

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.[22] With this presumed knowledge and no amendment of the WSSA to omit the reasonable reliance element, we must presume that the legislature intended that element to remain a part of this state statute.

FHLBS fails to argue why these principles do not control the determination of the legislature's intent in enacting this statute. Instead, it rests its arguments on reading case law and statutes in unpersuasive ways.

We note that our interpretation of the legislative intent of the statute has been consistently stated by the state supreme court and other appellate courts of this state. 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."[23] Only "an investor who is wrongfully induced to purchase a security may recover his investment."[24]

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[21] 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.

[22] 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)).

[23] 114 Wn.2d 127, 134, 787 P.2d 8 (1990).

[24] Id. at 135.

Subsequent opinions have consistently followed this holding.[25] And in no case has any Washington court departed from this interpretation of the statute.

Notably, in Stewart v. Estate of Steiner, this court reiterated the requirement of reasonable reliance when holding that the investor in that case did not have a cause of action under the WSSA.[26] As this court stated in that opinion, "The question is whether [the investor] ***reasonably relied*** on any of [the written materials] in making his investment decision."[27] If he did not, he failed to establish "an essential element of his claim."[28]

Notably, the supreme court denied review in that case. Had the court believed that this court had misstated the law by holding that reasonable reliance is an essential element of a claim under the WSSA, it seems likely that the court would have granted review to address the issue. It did not.

FHLBS advances a number of arguments why this statute does not require reasonable reliance. They are not persuasive.

FHLBS argues that the decision of the trial court violates the jurisprudence of this state that the WSSA is to be interpreted to protect investors. We disagree.

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[25] See, e.g., Go2Net, Inc., 158 Wn.2d at 251; Guarino, 122 Wn. App. at 110; Helenius v. Chelius, 131 Wn. App. 421, 441, 120 P.3d 954 (2005); Stewart, 122 Wn. App. at 264.

[26] 122 Wn. App. 258, 264, 93 P.3d 919 (2004), review denied, 153 Wn.2d 1022 (2005).

[27] Id. at 265 (emphasis added).

[28] Id. at 266.

First, FHLBS is correct that a purpose of this act is to protect investors.[29] With this purpose in mind, we construe the WSSA liberally.[30] But this general statement of purpose does not eliminate the clear legislative intent that we have already discussed in this opinion that reasonable reliance is a necessary element for a claim under RCW 21.20.010(2).

Second, FHLBS also argues that the legislature intended to eliminate, not impose, a requirement to prove reasonable reliance. Not so.

A basis for this argument is that the supreme court has held that certain elements of common law fraud, on which a WSSA action is based, are unnecessary to prove. For example, the supreme court held that a plaintiff need not show scienter in Kittilson v. Ford.[31] An earlier court of appeals decision had held otherwise, following the United States Supreme Court's holding in Ernst & Ernst v. Hochfelder.[32]

The Ernst & Ernst court had explained that because Rule 10b-5 derived from Section 10(b) of the 1934 Securities Exchange Act, and because Section 10(b) speaks of manipulation and deception, a Rule 10b-5 suit "clearly connotes intentional misconduct."[33] Section 10(b) imposed this requirement even though

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[29] FutureSelect Portfolio Management, Inc. v. Tremont Group Holdings, Inc., 180 Wn.2d 954, 970, 331 P.3d 29 (2014).

[30] Id.

[31] 93 Wn.2d 223, 225-27, 608 P.2d 264 (1980).

[32] Ludwig v. Mutual Real Estate Investors, 18 Wn. App. 33, 41, 567 P.2d 658 (1977) (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 96 S. Ct. 1375, 47 L. Ed. 2d 668 (1976)).

[33] 425 U.S. at 201.

the language of Rule 10b-5, standing alone, reached "any type of material misstatement or omission, and any course of conduct, that has the effect of defrauding investors, whether the wrongdoing was intentional or not."[34] But Section 10(b) conveyed to it the scienter requirement.[35]

But our state supreme court held that RCW 21.20.010 neither incorporated nor derived from a statute incorporating Section 10(b)'s scienter language.[36] And the legislative history of RCW 21.20.010 did not suggest a scienter requirement.[37]

Furthermore, the supreme court in Hines concluded that a WSSA plaintiff need not show loss causation but it did not suggest that liability is strict under the statute.[38] It based this decision on the nature of the remedy the WSSA provided. The "basic remedy" of that statutory scheme was rescission.[39] Under this scheme, an investor received the same remedy regardless of the size or occurrence of loss.[40] Thus, loss was irrelevant and unnecessary to prove in a WSSA suit.[41]

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[34] Id. at 212.

[35] Id. at 215.

[36] Kittilson, 93 Wn.2d at 226.

[37] Id.

[38] 114 Wn.2d at 135.

[39] Id.

[40] Id.

[41] Id.

These cases do not support the generalized proposition that RCW 21.20.010 is a strict liability statute. They merely illustrate that scienter and loss causation are not part of the statute. More importantly, they do nothing to support the argument that reliance is not an essential element of a WSSA claim, as Hines and other appellate decisions in this state have consistently held.

Third, FHLB 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. We again disagree.

It is undisputed that Section 12(2) of the 1933 act created a strict liability cause of action.[42] Moreover, the state legislature borrowed language from that section in crafting the scheme of the WSSA.[43] But the legislature only borrowed Section 12(2)'s remedy to draft the WSSA's remedy provisions in RCW 21.20.430. In contrast, it borrowed the state act's liability provisions from Rule 10b-5.

We note that RCW 21.20.430 clearly states by cross reference that RCW 21.20.010 defines liability.[44] 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.

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[42] Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 576, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995).

[43] See RCW 21.20.430; 15 U.S.C. § 77l.

[44] RCW 21.20.430(1).

Fourth, FHLBS contends that the statutes of other states persuasively suggest that RCW 21.20.010 is a strict liability statute. But the statutes of other states are largely irrelevant to determining the legislative intent of Washington's legislature.

Washington courts strive to "construe [the WSSA] as to effectuate its general purpose to make uniform the law of those states which enact" and adapt the Uniform Securities Act.[45] That uniform act also provided the basis for the WSSA. But this "does not mean our courts must imitate" the example of other states when Washington law differs.[46] Simply stated, the legislatures of other states do not decide what the Washington legislature intended by the WSSA. It is Washington law, in the end, that governs.[47]

Finally, FHLBS argues that the language in Hines, stating that reliance is an element under the WSSA, was mere dicta, which this court should not have followed in two previous decisions and should not follow now. We disagree with reading Hines and the cases that follow in this way. To the contrary, they clearly establish that reasonable reliance is an essential element of this claim.

Even if we were persuaded that the statement in Hines regarding reliance was dicta, that would not change our conclusion that the legislature intended reasonable reliance to be an essential element of a claim under RCW

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[45] RCW 21.20.900.

[46] Go2Net, Inc., 158 Wn.2d at 258 (quoting Kittilson, 93 Wn.2d at 227).

[47] In re Petersen, 138 Wn.2d 70, 80-81, 980 P.2d 1204 (1999).

21.20.010(2). That is the core question, not whether the statement in Hines is dicta.

For the reasons we have explained, we are convinced that the legislature intended that an investor must prove reasonable reliance in a claim under the WSSA.

GENUINE ISSUES OF MATERIAL FACT

Having concluded that reasonable reliance is an essential element that FHLBS must prove in this case, the question that follows is whether it met its burden to show the existence of any genuine issue of material fact on that element in response to Barclays's motion for summary judgment. We conclude that it failed in this burden.

It is not enough that a plaintiff relied upon the defendant's statements in purchasing securities. The WSSA requires that such "reliance must be reasonable under the surrounding circumstances."[48]

Reasonable reliance is generally a factual question.[49] However, if reasonable minds could reach only one conclusion, summary judgment on this element is proper.[50]

Our inquiry focuses on determining the existence of genuine issues of material fact whether FHLBS reasonably relied on the two statements it

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[48] FutureSelect Portfolio Management, Inc. v. Tremont Group Holdings, Inc., 175 Wn. App. 840, 868, 309 P.3d 555 (2013).

[49] Morgan v. Irving, 8 Wn. App. 354, 356, 506 P.2d 316 (1973).

[50] M.A. Mortenson Co., Inc. v. Timberline Software Corp., 140 Wn.2d 568, 579, 998 P.2d 305 (2000).

challenges. After carefully reviewing the extensive record before us, we conclude that FHLBS failed to show any genuine issue of material fact supporting the argument that it reasonably relied on these statements.

FHLBS is, without question, a sophisticated investor in RMBSs. Yet minutes of its risk management committee dated February 2008 warn that all but three of the regional FHLB banks, the Seattle branch within this minority, had stopped purchasing securitized "Alt-A" loans.[51] The minutes also report that another regional bank---Boston---was advised not to buy any additional mortgage backed securities for its portfolio. Credit Analysis Manager Len Reininger alerted his colleagues at the meeting to "how rapidly housing prices have plummeted and foreclosures and delinquencies have increased."[52] But at that time, Joel Adamo, Portfolio Manager on both the IND1 and IND2 transactions, was already considering purchase of IND2.

The risk management committee decided on February 29, 2008 that "with the uncertainty in the markets and the issues discussed that it would be desirable to look at alternative investment opportunities to those the Bank had been utilizing recently."[53]

The committee thus directed Reininger and Adamo to develop together "a proposal for the [RMBS] investment criteria that would be used in the current

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[51] Clerk's Papers at 662.

[52] Id. at 663.

[53] Id. at 662-63.

market conditions."[54] Until then, the committee directed a ban on the purchase of such securities.

Reininger preferred to maintain a total ban, until "the market settle[d] down."[55] But senior FHLBS staff differed and sought a compromise that would let them "still make some money."[56] Adamo and Reininger reached such a compromise to recommend lifting the ban for certain RMBS purchases.

In spite of these internal warnings, FHLBS continued purchasing IndyMac originated securities, comprised of Alt-A loans.

The record also shows that FHLBS initially made an internal decision not to purchase further securities of this type, only to change that decision to use available funds to purchase IND1 and IND2.

A November 2007 internal FHLBS memorandum also provides notice about IndyMac, the originator of the loans that were securitized and purchased by FHLBS. The memo states in relevant part:

> "IndyMac, the second-largest independent U.S. mortgage lender, lost $202.7 million in the third quarter, five times bigger than the company predicted. The company stated, 'We are in the midst of the most severe downturn our industry has experienced in modern times.'"[57]

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[54] Id. at 663.

[55] Id. at 690.

[56] Id.

[57] Id. at 1706.

Three months later and despite this and other information, FHLBS proceeded with the purchase of securities that were originated by IndyMac, the author of this warning.

Notably, the record shows that FHLBS was deeply involved in selecting the loans originated by IndyMac that ultimately constituted the two securities the bank purchased. This record also shows the selections occurred during communications directly between FHLBS and IndyMac, without involvement of Barclays.

This and other evidence in the record before us supports our conclusion that FHLBS did not reasonably rely on the statements it now claims induced it to buy IND1 and IND2. Reasonable minds could only reach this conclusion.

An alternative analysis further supports our conclusion that there are no genuine issues of material fact on reasonable reliance. In Stewart v. Estate of Steiner, this court utilized eight factors for considering whether reliance was reasonable under the circumstances of that case.[58] Stewart borrowed this test from an opinion of the First Circuit Court of Appeals, Jackvony v. RIHT Financial Corp., authored by then Judge Stephen Breyer.[59]

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[58] 122 Wn. App. 258, 274, 93 P.3d 919 (2004).

[59] 873 F.2d 411 (1st Cir. 1989).

The First Circuit's test has been widely applied by the federal courts, including the Second, Fourth, Sixth, Eighth, Tenth, and Eleventh circuits, in considering Rule 10b-5 claims.[60]

We again apply these factors, as we did in Stewart, to determine whether there are any genuine issues of material fact, recognizing that no such issue exists where reasonable minds could reach only one conclusion.[61] FHLBS provides only cursory mention of these factors in a footnote in its brief. We consider this footnote, as well as the record generally, in applying these factors.

No individual factor of this test is necessarily dispositive.[62] The factors are:

> (1) [T]he sophistication and expertise of the plaintiff in financial and securities matters; (2) the existence of long standing business or personal relationships; (3) access to the relevant information; (4) the existence of a fiduciary relationship; (5) concealment of the fraud; (6) the opportunity to detect the fraud; (7) whether the plaintiff initiated the stock transaction or sought to expedite the transaction; and (8) the generality or specificity of the misrepresentations.[63]

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[60] Brown v. E.F. Hutton Grp., Inc., 991 F.2d 1020, 1032 (2d Cir. 1993); Davidson v. Wilson, 973 F.2d 1391, 1400 (8th Cir. 1992); Myers v. Finkle, 950 F.2d 165, 167 (4th Cir. 1991); Molecular Technology Corp. v. Valentine, 925 F.2d 910, 918 (6th Cir. 1991); Bruschi v. Brown, 876 F.2d 1526, 1529 (11th Cir. 1989); Zobrist v. Coal-X, Inc., 708 F.2d 1511, 1516 (10th Cir. 1983).

[61] M.A. Mortenson Co., Inc., 140 Wn.2d at 578.

[62] Stewart, 122 Wn. App. at 274.

[63] Id.

Plaintiff's Sophistication

As for the first factor, "a sophisticated investor requires less information to call a '[mis-]representation into question' than would an unsophisticated investor."[64]

Here, FHLBS is indisputably sophisticated in the purchase of RMBSs. Along with other Federal Home Loan Banks, it was established by federal charter to facilitate mortgage lending.[65] By its own admission, it serves more than 300 members, "mainly community banks and credit unions" throughout the Western United States and the Pacific Territories.[66] It invests, including in RMBSs, to provide mortgage loan financing to borrowers. In doing so, it amassed an $8 billion portfolio of RMBSs.

Importantly, Joel Adamo, the portfolio manager for these two transactions, when testifying at deposition, was asked whether he was a sophisticated mortgage backed securities purchaser. He answered that he was "really knowledgeable about all the different securities types that are out there in the market."[67] He identified himself as an "expert on mortgage-backed securities."[68]

Reasonable minds could not differ that FHLBS is a sophisticated purchaser of these two RMBSs. FHLBS does not argue otherwise.

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[64] Banca Cremi, S.A. v. Alex. Brown & Sons, Inc., 132 F.3d 1017, 1028 (4th Cir. 1997).

[65] 12 C.F.R. § 1265.2.

[66] Clerk's Papers at 159.

[67] Id. at 1654.

[68] Id. at 1657.

Longstanding Relationships

FHLBS and Barclays lacked a longstanding business or personal relationship prior to these two transactions. Thus, reasonable minds could not differ whether Barclays was in a position to more easily defraud FHLBS.

Nothing in FHLBS's briefing suggests otherwise.

Access to Relevant Information

FHLBS argues that it lacked access to information necessary to avoid relying on Barclays's alleged statements in the prospectus supplements. This is an unproven assertion that fails to create a genuine issue of material fact.

A plaintiff relies unreasonably when he "possesses information sufficient to call [a mis-]representation into question,' but nevertheless 'close[s] his eyes to a known risk.'"[69] A plaintiff conscious of such risk relies unreasonably when he refuses to make necessary further investigations.[70]

We have already explained why FHLBS was warned both about IndyMac and the Alt-A loans that comprised the securities it purchased. Yet, despite these prior warnings, it proceeded with these transactions. FHLBS fails to point to any evidence in the record to show that it asked for any additional information it believed material to either of the two statements it now challenges.

A fair reading of the relevant portions of the supplements further undercuts this claim of lack of access to information.

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[69] Banca Cremi, S.A., 132 F.3d at 1028 (quoting Teamsters Local 282 Pension Trust Fund v. Angelos, 762 F.2d 522, 530 (7th Cir. 1985)).

[70] Id.

First, Barclays provided information regarding the relevant risks in the prospectus supplements themselves. Regarding internal IndyMac guidelines adherence, the IND1 prospectus supplement explained that the loans were originated "generally" in accordance with described underwriting guidelines. It explained that IndyMac used both traditional and electronic underwriting. But it also explained that IndyMac had processes to override its guidelines and make exceptions. It stated that IndyMac determined a borrower's FICO credit score by selecting the middle score of those provided by each of the major credit repositories and then choosing the lowest of these, making exceptions when a borrower had higher income or assets. And it explained that IndyMac could consider "compensating factors that would allow mortgage loans not otherwise meeting IndyMac Bank's guidelines."[71]

Barclays provided similar statements in the prospectus supplement for IND2, explaining that IndyMac approves loans under six different documentation programs. These vary, ranging from full verification of employment, income, and asset verification, to programs requiring no documentation or verification for borrowers with better credit scores and more valuable collateral property.

It also explained that loans failing to meet IndyMac guidelines could be "manually re-underwritten and approved under an exception to those underwriting guidelines."[72] It explained the compensating factors that would support an exception might include "significant financial reserves, a low loan-to-

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[71] Clerk's Papers at 1554.

[72] Id. at 1555, 1566.

value ratio, significant decrease in the borrower's monthly payment[,] and long-term employment with the same employer."[73] Thus, the prospectus supplements alerted FHLBS to possible divergences from the mortgage approval and guidelines.

In sum, this unproven claim that FHLBS lacked access to information it needed is without any support in the record.

Adamo himself expressed similar sentiments. He testified at his deposition that he "monitor[ed] market developments impacting the mortgage-related assets [he] bought."[74] He further testified that there was "turmoil in the RMBS market" at the time he made the relevant purchases.[75] During that discussion, he stated that "RMBS bonds backed by collateral pools of 2006 vintage collateral would never fully recover in price."[76] Further, he knew that any problems regarding subprime loans in the market could "leak into the rest of the market."[77] Bluntly, he testified that the "market was just plummeting" in late 2007.[78]

But, after purchasing IND1, FHLBS still had several hundred million dollars to invest. As discussed above, risk managers at FHLBS repeatedly

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[73] Id. at 1556, 1567.

[74] Id. at 1655.

[75] Id. at 534.

[76] Id. at 537.

[77] Id. at 580.

[78] Id. at 527.

warned about the riskiness of investing in RMBS based on loans originated with IndyMac. These warnings appear in the minutes of the risk management committee and in internal FHLBS memos from the relevant times. The record thus clearly indicates that FHLBS knew that these transactions carried great risk.

FHLBS possessed access to similar information regarding LTV ratios. This information was less extensive but that which was available was explicitly concerning. This information was provided in the prospectus supplements. These explained that IndyMac appraised the relevant mortgaged property in accordance with the Uniform Standards of Profession Appraisal Practice, and would either do a traditional inspection appraisal or else employ the algorithmic automated valuation model. But it also noted that "the determination of the value of a mortgaged property used in the calculation of the loan-to-value ratios of the mortgage loans may differ from the appraised value of such mortgaged properties or the actual value of such mortgaged properties."[79]

FHLBS was further aware that "appraisals are an art and not an exact science."[80] Vice President Gregory Teare explained that "[t]ypically, most appraisers will state the an [sic] appraisal of +/- 10% of the actual value."[81] This is relevant to the second challenged statement in the prospectus supplements.

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[79] Id. at 1548, 1562.

[80] Id. at 1422.

[81] Id.

Fiduciary Relationship

FHLBS and Barclays lacked a fiduciary relationship that might have enabled Barclays to defraud FHLBS. Reasonable minds could not differ on this factor.

FHLBS does not argue otherwise in its briefing on appeal.

Concealment

FHLBS fails to point to anything in this record to indicate any concealed fraud. As explained previously in this opinion, the prospectus supplements warned FHLBS about the integrity of the underlying collateral. They alerted FHLBS to possible variances from guideline adherence and LTV accuracy. And FHLBS cannot show that Barclays barred it from accessing the loan files. Thus, reasonable minds could not differ on this factor.

Opportunity to Detect the Fraud

As discussed above, FHLBS fails to demonstrate it lacked an opportunity to detect that alleged fraud. Adamo claimed that he could not obtain the loan files, but he never claimed to have asked for them. Similarly, the record indicates that neither Adamo nor anyone else at FHLBS asked for the underwriting or appraisal guidelines or information on possible divergences therefrom.

Rather, Adamo stated that:

> [he] rel[ied] on the securitization people who are making this – on their due diligence and their writings in the security. There is [sic] weaknesses and strengths with every factor, and I would try to take those into account. But I had limited knowledge as to what exactly happened between a loan officer and the security.[82]

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[82] Id. at 4300.

Adamo recognized there could be fraud in the pool but explained that he was not buying the pool but rather its securitization. He "relied on the representations given to [him] by the securitizer" despite "[r]ecognizing that there are risks in an investment."[83]

But Adamo's reliance on Barclays does not imply he lacked the opportunity to detect any possible fraud. Thus, reasonable minds could not differ whether FHLBS had an opportunity to detect the alleged fraud.

Initiation or Expedition of Transaction

The parties hotly dispute this seventh factor. Each alleges that the other drove the purchases of IND1 and IND2. Because this nondispositive factor does not appear to us to create a genuine issue of material fact, we need not decide who, Barclay or FHLBS, initiated this transaction.

After careful review of the record, we conclude that nothing in the discussion about this factor is material in determining the dispositive question: whether FHLBS reasonably relied on the quoted statements in the prospectus supplements regarding variances in IndyMac guideline adherence and the accuracy of LTV ratios. At no point does either party reference IndyMac's alleged divergence from loan underwriting guidelines. Nor does either party call into question the accuracy of LTVs. For these reasons, we conclude that any factual dispute on this factor is not material for summary judgment purposes.

[83] Id. at 4304.

· *Specificity of Statements*

Regarding this factor, FHLBS only challenges two statements in the prospectus supplements. The question here is how general or specific these statements were, not whether they were untrue or misleading.

The first challenged statement reads:

> Mortgage loans that are acquired by IndyMac Bank are underwritten by IndyMac Bank according to IndyMac Bank's underwriting guidelines, which also accept mortgage loans meeting Fannie Mae or Freddie Mac guidelines regardless of whether such mortgage loans would otherwise meet IndyMac Bank's guidelines, or pursuant to an exception to those guidelines based on IndyMac Bank's procedures for approving such exceptions.[84]

The second statement noted that the appraisals underlying the LTVs were made in accordance with the Uniform Standards of Professional Appraisal Practice.

These statements, especially when accompanied by certain qualifying language, were highly general. The first statement did not purport to explain what the underwriting guidelines were, or the procedures for overriding them. But both prospectus supplements explained that IndyMac could make exceptions from its guidelines if a loan application included compensating factors. Such factors might include "significant financial reserves, a low loan-to-value ratio, significant decrease in the borrower's monthly payment,] and long-term employment with the same employer."[85]

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[84] Id. at 1554, 1564.

[85] Id. at 1556, 1567.

The statement regarding appraisal practice standards was similarly general and qualified. The statement itself made no claim as to the accuracy of the appraisals, only naming the standards employed. But the prospectus supplements also stated that "the determination of the value of a mortgaged property used in the calculation of the loan-to-value ratios of the mortgage loans may differ from the appraised value of such mortgaged properties or the actual value of such mortgaged properties."[86]

Read alone or in the context of the respective prospectus supplements, these statements were highly generalized and subject to qualifications. They did not provide FHLBS any specific assurance or detail regarding the nature or quality of the collateral. They noted only the general procedure for acquiring loans and appraising properties, both subject to wide variances.

Reasonable minds could not differ that these statements were highly general and provided no specific assurances.

Applying the Stewart factors, we conclude that FHLBS fails to meet its burden in showing a genuine issue of material fact whether it reasonably relied on the challenged statements.

FHLBS also argues for the existence of other minor genuine issues of material fact. We disagree with its unconvincing arguments.

FHLBS argues that statements in the supplements that the readers should only rely on information in those documents creates an issue of fact. FHLBS similarly argues that Barclays assured investors that it was meticulous in

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[86] Id. at 1548, 1562.

preparing the supplements. But these arguments are directly contrary to settled law that reasonable reliance is determined by considering all the circumstances, not just what is in a prospectus supplement.

FHLBS also argues that Barclays's statements were specifically about the 1,643 loans constituting these two securities, and not the general climate of RMBS investments. That is true. But it does not create a genuine issue of material fact, given there were both internal and external warnings that put FHLBS on notice that it could not solely or reasonably rely merely on the supplements.

And FHLBS also argues that it had no access to loan files and that it was therefore unable to detect whether the prospectus supplements contained untrue or misleading statements. But, given the information that was available, FHLBS was on notice that the loans constituting the securities were risky and that the originator of those loans was also troubled. It could have asked for more information, but there is no evidence that it did.

We affirm the summary dismissal of these claims.

COX, J.

WE CONCUR:

Spearman, J.

Schindler, J.

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.