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No. 63207-8-I

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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DOROTHY ("DOTTIE") L. BROWN, by and through  
her guardian JOYCE M. RICHARDS,

Plaintiff-Appellant

v.

WELLS FARGO BANK, NATIONAL ASSOCIATION,

Defendant-Respondent

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ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Hon. William L. Downing)

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BRIEF OF RESPONDENT WELLS FARGO BANK N.A.

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## **I. SUMMARY INTRODUCTION**

Barry Brown misappropriated the proceeds from a reverse mortgage loan that his mother, appellant Dorothy (“Dottie”) Brown, received from respondent Wells Fargo Bank, N.A. Dottie had granted Barry two durable powers of attorney that were used to execute documents in the loan transaction. As the attorney-in-fact for his mother, Barry was a fiduciary. When a fiduciary breaches his or her duties, the law allocates the risk of loss to the principal who placed a general agent in the position to breach his or her fiduciary duties. The limited exception to this rule is when a third person has actual notice of the breach of fiduciary duties. That exception does not apply in this case. Although it is unfortunate that Dottie suffered this loss, neither the common law, the banking statutes nor the Unfair Business Practices/Consumer Protection Act (“CPA”) permit her to shift this loss to Wells Fargo.

Judge Downing correctly applied the law and dismissed the claims by Dottie’s Guardian and Barry against Wells Fargo on summary judgment. The “banking laws” and “consumer protection” theories on which the Guardian seeks to hold Wells Fargo jointly and severally liable are predicated on alleged violations of 12 U.S.C. § 1715z-20, the subsection of the National Housing Act, 12 U.S.C. §§ 1701-1750jj

(“NHA”) which establishes federal mortgage insurance programs.<sup>1</sup> Every court to specifically consider the issue has concluded that the NHA does not give rise to a private cause of action. Although the question of whether Section 1715z-20 of the NHA gives rise to a private right of action is apparently an issue of first impression; there is no “clear indication” of Congressional intent to imply a cause of action under this section. No court has ever ruled that such a cause of action exists in the past twenty-one years since § 1715z-20 was enacted, and this Court should not infer one in this case.

Even if this Court were to create a new, implied private cause of action under § 1715z-20, it should still affirm the grant of summary judgment in favor of Wells Fargo. The Guardian cannot establish a violation of the statute. The statutory structure delegates to an independent third party the obligation to counsel potential borrowers on reverse mortgages. Wells Fargo relied on a certificate from an independent counselor and on the multiple representations about residency in the loan application documents. There is no statutory basis for imposing a new free-floating duty of inquiry on lenders dealing with general attorneys-in-fact. Further, as Judge Downing stated, “a bank, and all of us, hopefully, can also presume that children caring for their parents

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<sup>1</sup> CP 689:25-690:2; 698:16-701:8.

are doing so in good faith.” 12/10/08 RP at 23:14-16. Wells Fargo was entitled to the protections afforded third persons who deal directly with general attorneys-in-fact under Washington’s Power of Attorney Act, the common law of agency, and analogous principals of the Uniform Commercial Code.

The Guardian’s claim under the CPA is fatally flawed because she cannot produce any evidence on four of the five elements required by Hangman Ridge Training Stables v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986). The making of a reverse mortgage loan under the unique circumstances of this case is not an unfair or deceptive act, and nothing Wells Fargo allegedly did or failed to do could deceive a substantial portion of the public. This case started, and remains, primarily a family dispute. Stanley Brown, Dottie’s other son, successfully petitioned for the appointment of a Guardian for his mother that terminated his brother Barry’s authority as attorney-in-fact. Then, the Guardian brought the case against Barry and his girlfriend, Beverly Hogg, alleging that they had improperly taken money from Dottie’s reverse mortgage loan and from other transactions. The Guardian has already obtained a judgment against Barry for the full amount of the reverse mortgage debt, which is the same amount she seeks to recover from Wells Fargo.

Judge Downing properly applied the law, and the summary judgment orders dismissing the Guardian's claims and Barry's claims against Wells Fargo should be affirmed in their entirety.

## **II. COUNTERSTATEMENT OF ISSUES**

1. Did the Guardian, at the summary judgment stage, demonstrate a violation of banking laws that proximately caused damage to her ward?

a. Does 12 U.S.C. § 1715z-20 give rise to an implied private cause of action for damages by reverse mortgage borrowers against their lenders?

b. If this Court were to depart from decades of precedent and rule that a private cause of action exists, did the Guardian submit specific evidence establishing violations of the credit counseling or residence provisions of § 1715z-20 and proof that the alleged violations proximately caused the alleged damages?

c. Did the Guardian overcome the presumption of competency and the prima facie evidence of competency and establish by clear, cogent and convincing evidence that Dottie was incompetent when she signed the powers of attorney?

d. Did the Guardian submit specific evidence to overcome the protections that Washington's Power of Attorney Act, the

common law of agency, and the Uniform Commercial Code afford third persons when dealing with an attorney-in-fact holding general powers?

2. Did the Guardian demonstrate, at the summary judgment stage, that she had admissible evidence sufficient to prove four of the elements required for a CPA claim?

### **III. COUNTERSTATEMENT OF THE CASE**

#### **A. The Beginning of the Reverse Mortgage Application Process.**

Dottie Brown has two adult sons, Barry and Stanley. For more than a decade prior to taking out the reverse mortgage, Barry resided with his mother at her condominium. Barry testified that his mother started looking into reverse mortgages in 2004 and they had met with a representative for three hours in 2004. CP 358 (citing Barry Dep. at 36-39).

Approximately two years later, on February 1, 2006, Wells Fargo received the initial information required to begin the application process for a reverse mortgage loan. CP 370-85. The application clearly indicated that the condominium was Dottie's primary residence; it stated "Yes" in response to the question: "Do you intend to occupy the property as your primary residence." CP 373.

Wells Fargo confirmed the initial application in a letter sent to Dottie's residence. The letter enclosed a variety of forms that informed

Dottie that she “must obtain credit counseling from one of the agencies” – the independent agencies approved by the United States Department of Housing and Urban Development (“HUD”). CP 370. The letter also outlined the next steps in the application process, including the signing and dating of the application, and a “Face-to-Face Certification along with your photo ID to your local Wells Fargo Branch.” One of the additional action items included “Power of Attorney – if you are using in conjunction with this loan (must be durable).” CP 370.

B. Dottie Brown Was Mentally Competent When She Began the Application Process and Signed Powers of Attorney Granting Her Son Barry General and Special Powers.

On February 1, the same day the application process began, Dottie’s in-home physical therapy provider described her as “alert and oriented X 3” (i.e., alert and oriented to person, place and time). CP 736, 758. Just a week earlier, her treating physician had found her mentally competent, testifying that “[s]he seemed to understand what was going on and followed what we were saying, what we were doing . . . [s]o I didn’t have any question or any concerns about her competency at that visit.” CP 938:7-10.

On February 15, Dottie executed two powers of attorney (“POA”), both of which appointed her son Barry as her attorney-in-fact. CP 745-54. The first POA was an immediately effective durable general POA that

gave Barry the power to “mortgage . . . lands . . . upon such terms and conditions, and under such covenants as [he] shall think fit.” CP 747. This POA also gave Barry “full power and authority to do and perform all and every act and thing whatsoever granted, as fully to all intents and purposes as [Dottie] might or could do if personally present[.]” Id.

The second POA was a “springing” POA, that became effective in the event Dottie suffered a physical or mental incapacity, and provided health care powers. CP 749-54. This “springing” POA also granted mortgaging powers. CP 750 ¶ 4.2.

The “springing” POA was also signed by Dottie in the presence of two witnesses, who both certified that:

Principal’s Action. The Principal, in my presence, and in the presence of the other witness whose signature appears with mine below, signed the foregoing instrument and requested that I and the other witness act as witnesses to his/her Durable Power of attorney and make this affidavit.

Principal’s Competency. I believe that at the time of the Principal’s previously-mentioned signing and request, the Principal was of sound mind and was not acting under duress, menace, fraud, undue influence, or misrepresentation.

CP 749-50, 754.

Ashley Scott, who notarized each of the POAs, certified that Dottie’s execution of these documents was “her free and voluntary act for the uses and purposes mentioned in the instrument.” CP 748, 753. The notary testified that:

Because of my training and my understanding of the duties of a notary public, I would not have notarized either of . . . the powers of attorney [at issue] had the Principal, Ms. Dottie Brown, appeared in any way to be incompetent or otherwise unable to understand the documents she was signing.

CP 746.

There is no other evidence of Dottie's mental status until seven days later, February 22, the date she undisputedly suffered a cerebrovascular stroke and was diagnosed with expressive aphasia.

CP 758-59.

In other words, two health care providers' medical records and personal observations indicate that Dottie's cognitive functioning was adequate when the loan application package was received on February 1.

CP 759. Further, three witnesses provided undisputed testimony that Dottie Brown was competent when she signed the POAs on February 15.

CP 746, 749-50, 754.

C. Dottie and Barry Completed the Mandatory "Face to Face" Verification and Received Mandatory Credit Counseling From an Independent Agency That Relied Upon the General (Non-Springing) Power of Attorney.

On February 15, the same day that Dottie signed the POAs, she and Barry completed the mandatory "Face to Face" verification of basic information for the loan application when she provided her drivers' license to Wells Fargo at the Federal Way branch. CP 389-90. That same day, Barry faxed a copy of the non-springing POA to Consumer Counseling

Northwest, a HUD-approved agency that provides the mandatory, independent credit counseling to reverse mortgage applicants. CP 949-51. On February 16, Consumer Counseling Northwest faxed the counseling certificate to Wells Fargo. CP 953-54. Pursuant to the immediate general durable POA, Barry signed the counseling certificate as his mother's attorney-in-fact on February 20. CP 954. The signed certificate was received by Wells Fargo on February 24, a date on which all parties agree Dottie was mentally incompetent following the February 22 cerebrovascular stroke. CP 755-59, 954, 955-71.

D. A Week After the Independent Credit Counseling, Dottie Suffered a Stroke and Was Unable to Speak.

Six days after the credit counseling session, on February 22, Dottie suffered an acute cerebrovascular stroke. CP 755-59, 955-71. On that date, Dottie's speech "predominantly continued to be garbled and [she] did not make any sense." CP 955. The next day she could answer only 5 of 8 simple yes/no questions. CP 958.

Dr. William Stump later reviewed her medical records and concluded that she became mentally incompetent as a result of her February 22 stroke and that, prior to that date, her cognitive functioning

was adequate. CP 755-59.<sup>2</sup> The Guardian does not dispute that Dottie was disabled as of February 22.

Three days later, Dottie was discharged to a skilled nursing facility. CP 969. Barry had cared for his mother for years and it was his intention to return his mother to her condominium. CP 355. More importantly, there is no evidence Wells Fargo was informed of the admission of Dottie to the nursing facility or that the admission was to be permanent.

E. Under the Authority Granted By the Powers of Attorney, Wells Fargo and the Browns Completed the Reverse Mortgage Transaction.

Following Dottie's stroke, Barry completed the application process. He submitted a letter dated April 1, 2006 from Dr. Michael Franceschina, who was treating Dottie for fractures, confirming the previous diagnosis of a stroke and aphasia. CP 972.

Barry, as his mother's attorney-in-fact, signed the deeds of trust securing the loan. CP 974-95. He disclosed that the purpose of the loan was for home improvements. CP 387. The deeds of trust contained a covenant that Dottie Brown would occupy the condominium as her primary residence. CP 976 ¶ 4, 987 ¶ 4. As part of the closing, Barry, as

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<sup>2</sup> Dr. Stump reviewed these records as an expert witness during the course of this proceeding. CP 755-59.

his mother's attorney-in-fact, executed an Occupancy Affidavit, which provided in relevant part:

I/We hereby acknowledge and understand that I am executing this Statement of Occupancy which provides that if my loan application on the above described property is approved, I will occupy the same as my principal residence within sixty (60) days of the loan closing.

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I further confirm my understanding and agreement that if I fail to occupy the property as my principal residence as provided above, such failure shall constitute a default under the terms and conditions of my loan, and upon the occurrence of such default, the whole sum of principal and interest shall immediately become due and payable at the option of the holder of my Note.

CP 192. When the reverse mortgage closed, there was no immediate draw. CP 378. During the next month, Barry later withdrew \$198,000 in loan proceeds in and deposited them at another bank in a joint account shared with his mother. CP 122-128, 637.

F. Four Months After the Closing, Dottie's Other Son, Stanley, Petitioned for a Guardianship. The Guardian Subsequently Sued Barry and Hogg but Waited a Year and a Half to Bring a Claim Against Wells Fargo.

Four months later, Dottie's other son, Stanley Brown, petitioned for a guardianship for his mother and the Court appointed a guardian on November 11, 2006. CP 5, 113. The reverse mortgage debt was ultimately paid off when the Guardian sold the condominium three months later. CP 118-20.

In December 2006, the Guardian filed this suit against Barry and Beverly Hogg for “misappropriation/conversion” of the loan proceeds and other amounts, breach of fiduciary duty, and for an accounting. CP 5-6. Stanley Brown testified that the day after his mother’s February 22, 2006 stroke, he learned that Barry had a POA. CP 231 ¶ 13. Several days later, Stanley and his wife also learned that Barry had withdrawn \$5,000 from Dottie’s checking account which was to have been used for funeral expenses. CP 237 ¶ 10. Although Stanley and his wife had concerns about Barry’s veracity (CP 231 ¶ 14, 237 ¶ 10), they did not seek the guardianship for his mother for another six months. CP 5, 113.

In July 2008, nineteen months into the Guardian’s suit against Barry, Barry joined Wells Fargo as a third-party defendant. CP 669-75. In October 2008, the Guardian filed an amended complaint, adding claims against Wells Fargo for misappropriation, violation of the CPA and the “Violation of Banking Laws.” CP 686-90. The complaint makes no allegations about Dottie’s competency other than a reference to the diagnosis of aphasia and dementia on February 26, 2006 (after the powers of attorney and loan applications were signed). CP 689. During the nineteen months between the filing of the suit and joining Wells Fargo as a defendant, the parties had conducted extensive discovery and motions

practice (over a hundred docketed entries), including summary judgment motions.<sup>3</sup>

G. Judge Downing Denied the Guardian's Summary Judgment Motion Against Wells Fargo and Granted the Cross-Motion Dismissing the Guardian's Claims.

Less than a month after joining Wells Fargo, the Guardian filed a summary judgment motion for liability on her claims against Wells Fargo. CP 692, 698. Wells Fargo filed its own motion to dismiss the Guardian and Barry's claims against it. CP 717-33. The supporting evidence included testimony by the notary of the POAs, Dr. Stump, and a bank employee. CP 745-59, 818-20.

On December 12, 2008, Judge Downing granted Wells Fargo's motion, denied the Guardian's motion against the bank, but granted her summary judgment against Barry. CP 824-28. Later, judgment was entered against Barry for the full amount of the reverse mortgage balance, plus pre-judgment interest, costs and statutory attorney fees. CP 845-46. Before Wells Fargo was joined as a defendant, the court had already dismissed Barry Brown's girlfriend, Beverly Hogg. CP 665-66. The Guardian now appeals the dismissal of her claims against Wells Fargo and Hogg. CP 852-60.

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<sup>3</sup>[http://dw.courts.wa.gov/index.cfm?fa=home.casesummary&casenumber=06-2-39751-7&searchtype=sName&crt\\_itl\\_nu=S17&cc=MSC&fd=2006-12-20&token=29B7C90B3CB6F9DE4F31A265C97BE8CD&dt=2271C3E9B98FEA19A139A3B02CAB5509](http://dw.courts.wa.gov/index.cfm?fa=home.casesummary&casenumber=06-2-39751-7&searchtype=sName&crt_itl_nu=S17&cc=MSC&fd=2006-12-20&token=29B7C90B3CB6F9DE4F31A265C97BE8CD&dt=2271C3E9B98FEA19A139A3B02CAB5509).

#### IV. ARGUMENT

A. Summary Judgment Orders Are Reviewed De Novo and the Evidence Involved Is Viewed Through the Prism of the Substantive Evidentiary Burden.

This Court reviews *de novo* a trial court's decision to grant or deny a summary judgment motion. Cox v. O'Brien, 150 Wn. App. 24, 33, 206 P.3d 682 (2009). "The facts required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient. Likewise, conclusory statements of fact will not suffice." Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).

When this Court reviews a case in which the standard of proof is clear, cogent, and convincing evidence, the court "must view the evidence presented through the prism of the substantive evidentiary burden."<sup>4</sup> Mental incapacity must be established by clear, cogent and convincing evidence.<sup>5</sup> Thus, issues related to Dottie Brown's competency must be viewed in light of the Guardian's burden of proving incompetency.

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<sup>4</sup> Adams v. Allen, 56 Wn. App. 383, 393, 783 P.2d 635 (1989) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

<sup>5</sup> See, e.g., State v. Simms, 95 Wn. App. 910, 916, 977 P.2d 647 (1999); In re Guardianship of Atkins, 57 Wn. App. 771, 775, 790 P.2d 210 (1990).

B. The Guardian Relies on Alleged Violations of the National Housing Act (“NHA”) for Which There Is No Private Cause of Action.

The Guardian’s claim that Wells Fargo violated federal law is based on the subsection of the NHA which sets forth the requirements a reverse mortgage must meet to be eligible for federal mortgage insurance. Appellant’s Br. at 6-8 (citing 12 U.S.C. § 1715z-20(d) and 24 C.F.R. § 206.41).

“The meaning of a statute is a question of law reviewed de novo.” Dep’t of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). “The court’s fundamental objective is to ascertain and carry out the Legislature’s intent, and if the statute’s meaning is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent.” Id. at 9-10. The same objective applies when construing a federal statute.<sup>6</sup>

To create a claim for damages, § 1715z-20(d) must expressly or impliedly confer a private cause of action to a reverse mortgage borrower. But there is no express private cause of action in § 1715z-20 or elsewhere in the NHA.<sup>7</sup> The burden of proving a cause of action exists rests upon

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<sup>6</sup> See, e.g., Tahara v. Matson Terminals, Inc., 511 F.3d 950, 953 (9th Cir. 2007) (stating analysis begins with plain language of statute); United States v. Mohrbacher, 182 F.3d 1041, 1048 (9th Cir. 1999) (stating “[i]n interpreting a statute, we look first to the plain language of the statute”).

<sup>7</sup> See, e.g., City of Rohnert Park v. Harris, 601 F.2d 1040, 1045-47 (9th Cir. (continued . . .))

the party asserting it.<sup>8</sup> The Guardian has not tried to make this showing, and there is no legal basis for her to do so.<sup>9</sup>

1. Congress enacted the NHA to benefit the federal government and establish a national program of mortgage insurance. It is well-recognized that “[t]he legislative history of the [NHA] does not disclose or intimate any intent on the part of Congress to benefit or protect anyone but the Government.”<sup>10</sup> The NHA created a “mortgage insurance program . . . to encourage the development of housing throughout the United States.”<sup>11</sup> The Congressional purpose remains the same today and applies to subsequently enacted provisions of the NHA, such as § 1715z-20.

2. Congress enacted §1715z-20 of the NHA to establish a national program of insurance for reverse mortgages. Section 1715z-20 is a 1988 amendment to the NHA and governs the insurance of reverse

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1979) (holding that the “Housing Act does not expressly provide that private persons may sue to enforce its terms,” and reasoning that “[a]ll four criteria [of Cort] militate against implying a cause of action”); Falzarano v. United States, 607 F.2d 506, 509 (1st Cir. 1979) (same).

<sup>8</sup> Birkholm v. Wash. Mut. Bank, F.A., 447 F. Supp. 2d 1158, 1162 (W.D. Wash. 2006).

<sup>9</sup> See Burroughs v. Hills, 741 F.2d 1525, 1532 (7th Cir.1984) (“Efforts to enforce implied causes of action under the National Housing Legislation or the HUD Handbook, have frequently come under consideration of appellate courts, and have always failed”), cert. denied, 471 U.S. 1099, 105 S. Ct. 2321, 85 L. Ed. 2d 840 (1985).

<sup>10</sup> United States v. Lawrence Towers, Inc., 236 F. Supp. 208, 210 (E.D.N.Y. 1964).

<sup>11</sup> United States v. Chelsea Towers, Inc., 295 F. Supp. 1242, 1247 (D. N.J. 1967).

mortgages. As set forth in subsection (a), the statute's purpose is "to authorize the Secretary [of HUD] to carry out a program of mortgage insurance" for reverse mortgages, in order "to meet the needs of elderly homeowners," and "to encourage and increase the involvement of mortgagees" in this market. § 1715z-20(a)(1)-(2). This statute is part of the NHA's general program for federal insurance of eligible mortgages.

3. Courts have long held no implied private cause of action exists for the violation of other provisions of the NHA. Whether a statute creates an implied private cause of action is analyzed under the test in Cort v. Ash, 422 U.S. 66, 78, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975) and its progeny. The Cort test examines whether (1) the plaintiff is one of the class for whose benefit the statute was enacted; (2) there is indication of legislative intent to create a private remedy; (3) a private right of action would be consistent with the legislative scheme as a whole; and (4) the cause of action is one traditionally left to state law.<sup>12</sup>

Here, as courts have previously recognized when construing other NHA statutes, three of the four Cort factors weigh strongly against finding a private cause of action. See Falzarano, 607 F.2d at 509-11 (stating that the NHA does not provide expressly for a cause of action and concluding

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<sup>12</sup> Washington courts apply the same test, minus the fourth factor, which is not relevant when analyzing state statutes. Bennett v. Hardy, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990).

that no implied private right of action exists based on the factors set forth in Cort). The regulatory scheme enforced by the HUD Secretary's administrative remedies also weighs heavily against finding an implied private right of action. Falzarano, 607 F.2d at 509-11.<sup>13</sup> As many courts have recognized, the NHA gives the mortgagor no claim for the mortgagee's alleged failure to follow these laws.<sup>14</sup> The administrative penalties provided under 24 C.F.R. Part 206, where the reverse mortgage insurance regulations are set forth, are also framed in terms of affecting the mortgagor's eligibility for insurance.<sup>15</sup>

Because three of the four Cort factors weigh heavily against finding an implied private cause of action under the NHA, it is not surprising that the overwhelming majority of courts to consider the issue have failed to find a private right of action,<sup>16</sup> with the exception of one

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<sup>13</sup> See, e.g., 12 U.S.C. §§ 1731a; 1735f-14; 1735f-17 (civil penalties, revocation of a mortgagee's participation in a program, and impose other sanctions).

<sup>14</sup> See, e.g., Roberts v. Cameron-Brown Co., 556 F.2d 356, 360-61 (5th Cir. 1977); In re Miller, 124 Fed. Appx. 152, 155 (4th Cir. 2005); Baker v. Northland Mortgage Co., 344 F. Supp. 1385 (N.D. Ill. 1972).

<sup>15</sup> See, e.g., 24 C.F.R. § 206.201. Accord, Birkholm, 447 F. Supp. 2d at 1163 (administrative penalties may discourage non-compliance).

<sup>16</sup> See, e.g., Perry v. Hous. Auth. Of the City of Charleston, 664 F.2d 1210, 1215-17 (4th Cir.1981) (rejecting a private right of action); Shivers v. Landrieu, 674 F.2d 906, 910-12 (D.C. Cir.1981) (ruling that the NHA does not provide for an implied private right of action); Falzarano, 607 F.2d at 509-11 (concluding that no implied private right of action exists); Cedar-Riverside Assocs., Inc. v. City of Minneapolis, 606 F.2d 254, 258-59 (8th Cir.1979) (holding that no private cause of action is created in the NHA for a violation of its competitive bidding provisions); Krell v. Nat'l Mortgage Corp., 214 Ga.App. 503, 448 S.E.2d 248, 249 (1994) (holding that a defaulting FHA mortgagor had no private right of action); Prudential Ins. Co. of Am. v. Jackson, 270 N.J. Super. 510, 637 A.2d 573, 576 (1994) (reiterating that no private cause of action is derived from the

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very distinguishable case which actually involves the prevailing wages on federally funded projects.<sup>17</sup>

4. There is no “clear indication” that Congress intended to imply a cause of action for the violation of § 1715z-20. Such a cause of action is inconsistent with the statutory terms, the NHA’s statutory framework, and the prior decisions construing the NHA. The second Cort factor (the “indication of legislative intent to create a private remedy”) is “the key inquiry in this calculus,” and “in the absence of **clear evidence of Congressional intent**, [the court] may not usurp the legislative power by unilaterally creating a cause of action.” (Emphasis added.)<sup>18</sup> The statute under scrutiny is interpreted “to determine whether it displays an intent to create a private right but also a private remedy.”<sup>19</sup>

There is no explicit or implicit “**clear indication**” of intent to create a private right in § 1715z-20. Nothing in § 1715z-20 has “rights-

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provisions of the HUD regulations concerning foreclosure avoidance);

<sup>17</sup> See Bodrick v. Mayfair Constr. Corp., 44 A.D.2d 520, 353 N.Y.S.2d 158 (1974) (memorandum decision regarding laborers suing for prevailing wages on NHA project and citing 12 U.S.C. § 1715, Labor standards provision); see Irwin Co. v. 3525 Sage Str. Assocs. Ltd., 37 F.3d 212 (5th Cir. 1994) (describing the expansion of prevailing wage requirements under the “Davis Bacon Act and its Related Acts, the National Housing Act” in the 1950s).

<sup>18</sup> In re Digimarc Corp. Derivative Litig., 549 F.3d 1223, 1230-31 (9th Cir. 2008).

<sup>19</sup> Alexander v. Sandozal, 532 U.S. 275, 286, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) (“Having sworn off the habit of venturing beyond Congress’s intent [in holding that private causes of action exist], we will not accept [plaintiff’s] invitation to have one last drink”).

creating” language that would grant loan applicants special rights to be enforced through private legal action. The statutorily-created program is for “mortgage insurance.” 12 U.S.C. 1715z-20(a). Section 1715z-20(d)’s “eligibility requirements” are framed as “to be eligible *for insurance under this section*” and not as “to be eligible *for rights or entitlements under this section.*” (italics added). The absence of both “any person” and “no person” language weighs against the granting of an implied right to persons and thus against an implied cause of action.<sup>20</sup>

Implying a cause of action against a mortgagee for negligent counseling would also be inconsistent with the statutory framework that expressly delegates the counseling function to a third party.<sup>21</sup> Similarly, implying a cause of action for negligent reliance on a POA would be inconsistent with the release provision in the Power of Attorney statute and the common law.<sup>22</sup> Here, the statute’s plain language weighs against implication of a private remedy. “The fact that there is no suggestion whatsoever in the legislative history that [the NHA] may give rise to suits for damages,” confirms Congress’ decision not to imply a private cause of

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<sup>20</sup> In re Digimarc Corp. Derivative Litig., 549 F. 3d at 1232.

<sup>21</sup> Birkholm, 447 F. Supp. 2d at 1163 (implying a claim would be extending the statute beyond its purpose).

<sup>22</sup> Adams v. King County, 164 Wn.2d 640, 655-56, 192 P.3d 891 (2008) (ruling that implying a cause of action for family members under Washington Uniform Anatomical Gift Act (WAGA) would be inconsistent with the release provision and the common law would provide a remedy for bad faith actions); see infra at 36-39.

action. Falzarano, 607 F.2d at 510. Consistent with the absence of a “clear indication” from Congress, and the decades of decisions construing the NHA, no court has ever implied a cause of action under § 1715z-20, during the twenty-one years since it was enacted. The court need look no further than to the plain language of the statute.<sup>23</sup> Because there is no private cause of action for the violation of § 1715z-20, the Guardian’s claims based on the alleged violations of federal law fail. See Appellant’s Br. at 6-9 (“Failed to Comply with Federal Law” and citing § 1715z-20(d)<sup>24</sup>

The absence of such a cause of action is an alternative ground to affirm the dismissal of the “Violation of Banking Laws” claim.<sup>25</sup>

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<sup>23</sup> Rogers v. Central Locating Service, Ltd., 412 F. Supp. 2d 1171, 1177 (W.D. 2006) (“Accordingly, in the absence of ambiguity in the plain language of the statute, the courts need look no further for interpretive aids. See Hertzberg v. Dignity Partners, Inc., 191 F.3d 1076, 1081 (9th Cir. 1999). Moreover, the need for legislative history is particularly low when the courts have applied a consistent interpretation to the statute in question.”).

<sup>24</sup> The Guardian’s brief at page 7 quotes the definition of “reverse mortgage” in 12 C.F.R. § 226.33(a). 12 C.F.R. Part 226 is commonly known as “Reg Z,” which contain the implementing regulations for the Truth in Lending Act (“TILA”). TILA and Reg Z impose certain disclosure requirements on mortgage loans and other forms of credit that are designed to inform consumers of the true cost of credit, as discussed more fully in footnote 33. In this case, there are no allegations that any of the disclosures were inadequate.

<sup>25</sup> Bennett v. Hardy, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990) (holding in implied private right of action case that an appellate court can consider issues not raised below “when the question raised affects the right to maintain the action”).

C. Even if § 1715z-20 Contained a Private Cause of Action, the Guardian Could Not Establish a Violation of Subpart (d)'s Counseling and Residency Requirements and Any Resulting Injury or Damage.

As the basis for her claim that Wells Fargo violated federal law, the Guardian asserts Wells Fargo approved the loan without valid proof of the required consumer credit counseling and the bank ignored the requirement that a reverse mortgage loan be secured by the borrower's primary residence. Appellant's Br. at 8-9 (citing § 1715z-20). Subsection (2)(B) requires that the mortgagor receive "adequate counseling" on enumerated topics by an independent third party approved by HUD. § 1715z-20(d)(2)(B), (f)(1)-(5). Subsection (d)(3) requires that the loan "be secured by a dwelling occupied by the mortgagor. § 1715z-20(d)(3). The evidence and law do not support her claim that there was a violation of either subsection.

1. The certificate from Consumer Credit Counseling Northwest satisfied the statutory requirement for credit counseling. Section 1715z-20(e)(1) requires a lender to provide the names and addresses of HUD approved credit counseling agencies when a prospective buyer inquires about a reverse mortgage. See also 24 C.F.R. § 206.41(a). The February 1, 2006 letter that Wells Fargo sent to Dottie's residence complied with this requirement. CP 370. Section 1715z-20(d)(2) further requires the mortgagee "receive adequate counseling by a

third party (other than the lender) as provided by subsection (f) of this section.” Here, the “Certificate of HECM Counseling” certifies there was a 60 minute interview by Dallas Dehaas, CP 392, for “Mrs. Dottie L. Brown/POA Barry Brown” on February 26. Id. The certificate identifies the topics on which counseling was provided and concludes:

I hereby certify that the homeowner(s) listed above have received counseling according to the requirements of this certification and the standards of the U.S. Department of Housing and Urban Development, as described in mortgagee letters, handbooks, regulations and statute. . .

CP 392. The certificate is prima facie evidence of the compliance with the statutory requirements. Wells Fargo had no statutory duty to second-guess the adequacy of that counseling or to reject a certified agency’s representation that it had provided the required counseling in a manner HUD expressly deemed appropriate.

2. The specific representations in the application and affidavit, that were further corroborated by other records, satisfied the requirement for residency at the property. The loan application stated that Dottie intended to occupy the condominium as her primary residence and the Certificate of Counseling listed the condominium as her home address. CP 373, 392. Approximately three months later, when the loan closed, Barry signed the application as attorney-in-fact and certified that his mother’s condominium would be her primary residence. CP 185. The

deeds of trust also contained express covenants that Dottie would occupy the property as her primary residence. CP 976, 987. Barry also signed an Occupancy Affidavit in which he made the same certification. CP 192.

Although Dottie was admitted to a nursing home approximately a month after the reverse mortgage application was taken, CP 76, there is no evidence that Wells Fargo was notified of this fact. The Guardian's complaint, CP 686-90, discovery responses, CP 738-39, and the later pleadings do not allege the "when or how" the bank received actual notice of the change of residency, and those pleadings do not identify any legal authority that would impose upon the bank a duty to investigate, especially after receiving the certifications. CP 738-39. There was no allegation in compliance with CR 9(b) alleging fraud and no general allegation of "malice, intent, knowledge, and other condition of mind" by the bank. CR 9(b).

The Guardian is essentially arguing that every lender has the duty to verify occupancy not only through traditional means such as an occupancy affidavit, but also by monitoring the residency status during the application process for each and every borrower. There is no statutory basis for imposing such a duty.

The Guardian implies that the use of the POAs rendered the application and closing process invalid and not in compliance with federal

and state law. Appellant's Br. at 8-9, 15-17. But neither the facts nor the law establish a violation of § 1715z-20(d) on that basis.

3. The reliance on the durable general powers of attorney does not violate § 1715z-20(d).

a. Durable powers of attorney do not terminate upon disability. When construing § 1715z-20(d) in conjunction with the common law and the Washington Power of Attorney statute, there are two applicable canons of construction. First, the Court "will read statutes as complementary rather than in conflict with each other." Waste Mgmt of Seattle, Inc. v. Wash. Utils. & Transp. Com'n, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994). Second, it is also a well settled rule that "the common law must be allowed to stand unaltered as far as consistent with the reasonable interpretation of the new law," and the legislature's intent to innovate on the common law must be clearly manifest. Green Mountain Sch. Dist. No. 103 v. Durkee, 56 Wn.2d 154, 161, 351 P.2d 525 (1960).<sup>26</sup>

Based on these two canons, there is a presumption that § 1715z-20(d) does not conflict with either the Washington Power of Attorney statute or the common law of agency. Thus, any implied obligations under

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<sup>26</sup> See also Potter v. Wash. St. Patrol, 165 Wn.2d 67, 76-78, 196 P.3d 691 (2008) (declining to recognize the abrogation of a common law cause of action in absence of explicit statement or clear evidence of legislature's intent).

§ 1715z-20(d) should be construed as being consistent with the existing law regarding the use of POAs.<sup>27</sup>

There are different categories of POAs given the breadth and variety of powers a principal can confer, and given the duration of those powers. While “[a] general power of attorney gives an agent power to act for the principal in all personal, business and legal affairs,” a limited power of attorney “restricts the type of transaction and/or time period in which the agent might act.”<sup>28</sup> “A regular power of attorney becomes void immediately if the principle becomes disabled or incompetent,” but “[a] durable power continues in force even if the principal becomes disabled or incompetent.”<sup>29</sup>

In this case, Dottie signed two POAs, a non-springing (immediately effective), general durable POA, which was provided to the credit counseling service, CP 747-48; and a springing durable POA, which became effective upon disability and was provided to Wells Fargo. CP 749-54. Regardless of which POA was given to Wells Fargo, Barry

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<sup>27</sup> “A ‘power of attorney’ is an ‘instrument in writing by which one person, as principal appoints another as his agent and confers upon such agent the authority to act in the place and stead of the principal for the avowed purpose, or purposes, set forth in the instrument.’” Arcweld Mfg. Co. v. Burney, 12 Wn.2d 212, 221, 121 P.2d 350 (1942).

<sup>28</sup> 1 Kelly Kunsch, Wash. Pract.: Methods of Practice at 849 (1997) (Ch. 32, the Power of Attorney, § 32.2 Powers of Attorney—General Limited); State v. Wallace, 97 Wn.2d 846, 851, 651 P.2d 201 (1982) (“limited power of attorney conveys only the power expressed therein”); RCW 11.94.010.

<sup>29</sup> 1 Wash. Pract.: Methods of Practice at 849 (1997); RCW 11.94.010.

had actual authority that bound both Dottie, and subsequently her guardian, when Barry dealt with third persons like Wells Fargo.

b. The Guardian failed to offer any specific evidence rebutting the strong presumption and the prima facie evidence of competency. Therefore, the durable general powers of attorney were enforceable. Adults such as Dottie are presumed competent to testify and make choices. The Guardian, therefore, bears the burden of proving Dottie was incompetent when the POAs were signed.<sup>30</sup> The Guardian must overcome the presumption of competency by clear, cogent and convincing evidence.<sup>31</sup>

Below, the Guardian turned the presumption of competency on its head. She created a presumption of incompetency and that “the bank failed to obtain any evidence that Dottie was competent when she signed the power of attorney form.” CP 780. That was not the bank’s burden. Furthermore and to the contrary, Wells Fargo received self-authenticating evidence of competency. Two individuals witnessed the signing of the “springing” POA and both swore she was competent and that Dottie was “of sound mind and not acting under . . . undue influence.” CP 754. The

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<sup>30</sup> State v. Johnston, 143 Wn. App. 1, 13-14, 177 P.3d 1127 (2007); RCW 5.60.050 (an adult is incompetent only if he or she is of “unsound mind,” or appears incapable of receiving and relating accurate impressions of the facts.).

<sup>31</sup> Page v. Prudential Life Ins. Co. of Am., 12 Wn.2d 101, 109, 120 P.2d 527 (1993); Tecklenburg v. Wash. Gas & Elect. Co., 40 Wn.2d 141, 144, 241 P.2d 1172 (1952).

notary public also testified to the same effect. CP 746. The notary's certification and the testimony is prima facie evidence of competency. RCW 64.08.50, entitled "Certificate of Acknowledgement—Evidence," states: "[s]uch certificate shall be prima facie evidence of the facts therein recited." "The statutory presumption which attaches to a properly accomplished notarial or other certificate of acknowledgment can be overcome only by evidence that is clear and convincing."<sup>32</sup>

In addition to this prima facie evidence, there was "ample extrinsic evidence supporting" the presumption, including Dr. Ory's opinion, the other providers, and "the after-the-fact analysis by Dr. Stump" and "the conclusion that the stroke of February 22nd, 2006 was the immediate cause of her subsequent incompetence." 12/12/08 RP at 22:15-24; CP 736, 758. Also on the same day the POAs were signed, a Wells Fargo employee met Dottie during the "Face to Face" meeting. CP 389-90.

In response to this evidence, the Guardian offered no specific evidence to rebut the presumption and the sworn testimony. Her conclusory allegation of "highly suspicious circumstances" was merely an extrapolation from the subsequent incompetence which was "sufficiently explained by the medical occurrence that intervened" — the stroke. RP at 22:22-23:6; CP 783. Therefore, the Guardian failed to carry her burden of

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<sup>32</sup> Whalen v. Lanier, 29 Wn.2d 299, 308, 186 P.2d 919 (1947).

producing specific evidence that rebutted the presumption of competency and extrinsic evidence and which would have satisfied the clear, cogent and convincing standard of proving incompetency.

Unable to invalidate the POAs, the Guardian next challenges the effective date of the springing durable POA.

c. Dottie Brown's undisputed disability triggered the springing durable power of attorney. The Guardian has argued that Wells Fargo “failed to rebut the evidence that it negligently relied on a power of attorney form that expressly required a written determination of incompetency before it became effective” and it “approved the loan without any determination by either Dottie’s regular physician, or a court.” Appellant’s Br. at 6, 15-17. Yet, neither the law nor the facts support this conclusory claim, which also ignores the basic principles of agency law.

In 1984, Washington amended its Power of Attorney statute (Ch. RCW 11.94) to be more similar to the Uniform Durable Power of Attorney Act, 1979 Act, Chapter 11.94.<sup>33</sup> The “Prefatory Note to the Uniform Act states: “The general purpose of the act is to alter the

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<sup>33</sup> Unif. Durable Power of Attorney Act (1979 Act), 8A U.L.A at 233-45 (2003) (“While the Washington act is a substantial adoption of the major provisions of the Uniform Act, it departs from the official text in such manner that the various instances of substitution, omission and additional matter cannot be clearly indicated in by statutory notes.” Id. at 244); Laws of 1984 at 672-674 (ch. 149, §§ 26-31). Throughout the nation, there were these and other statutory exceptions to the termination or suspension of agency upon the principal’s mental incapacitation, and a purpose of these exceptions was to reduce litigation. See generally W. Alfred Mukatis, Does Agency Die When the Principal Becomes Incapacitated? 7 Univ. of Puget Sound L. Rev. 105, 124-34 (1983).

common law rules that created traps for the unwary by voiding powers on the principal's incompetency or death.”

Subsection (2) in RCW 11.94.010(2) is not part of the uniform act and grants third persons the express right to rely upon a power of attorney's method for determining disability.<sup>34</sup> Here, the springing POA's § 2 “Effectiveness” stated: “This power of attorney shall become effective upon disability or incompetence of the principal. (Emphasis added). Section 2 defined disability as:

Disability shall include the inability to manage the principal's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age . . . .

CP 749 (emphasis added). Section 2's standard for evidence of disability is relaxed:

Disability may be evidenced by a written statement of a qualified physician regularly attending the principal and/or other qualified persons with knowledge of any confinement, detention or disappearance . . . .

CP 749. In this case, the disability was “evidenced by a written statement” from Dr. Franceschina, who was Dottie's orthopedic surgeon. The POA does not require a statement “by . . . Dottie's regular physician,” but rather from “a qualified physician regularly attending the principal.”

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<sup>34</sup> “Persons shall place reasonable reliance on any determination of disability or incompetence as provided in the instrument that specifies the time and the circumstances under which the power of attorney document becomes effective.” RCW 11.94.010(2), Laws of 1984 at 673, ch. 149, § 27(4).

Compare Appellant’s Br. at 15 with CP 749-754. Dr. Franceschina was a “qualified physician regularly attending her” – he was treating her for the fractures she sustained in December 2005 (an event sufficient to trigger the springing POA under its disability provisions). CP 867, 972.

Dr. Franceschina made two written statements, but only the first letter is relevant to the disabling event, while the second letter is relevant to competency at the time of signing the POA. Dr. Franceschina’s first letter reported that Dottie “was also recently diagnosed with a cerebral vascular stroke which resulted in expressive aphasia,” CP 763, and Dottie’s condition satisfied the contractual definition of a disability, which is “the inability to **manage the principal’s property and affairs effectively.** CP 749. Wells Fargo’s understanding was Dottie “can’t sign, cannot hear, cannot express herself.” CP 820 (emphasis added). The Guardian also admits that “[o]n February 22, 2006, Barry Brown took Dottie Brown to the hospital where she was diagnosed as suffering from aphasia and severe dementia.” CP 688.<sup>35</sup>

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<sup>35</sup> After receiving the first statement, Wells Fargo sent the doctor an April 18 fax asking two questions: “(1) when did Ms. Brown develop Expressive Aphasia? (2) Ms. Brown signed the Power of Attorney February 15, 2006, please clarify if she was competent at that time to sign a Power of Attorney.” CP 764. The doctor responded in an April 18 letter that clarified that he was the orthopedic surgeon treating Ms. Brown, and that “specific questions regarding her expressive aphasia and her level of competence should be addressed either to her family doctor or internist.” CP 765. The doctor’s failure to offer an opinion about Dottie’s competence when she signed the POA did not raise a red flag regarding the validity of the POA. Wells Fargo was entitled to rely upon the prima facie evidence of competency resulting from the notarized and witnessed POA.

The Guardian argues that Wells Fargo should have “inquire[d] further.” Appellant’s Br. at 16. Yet, if Wells Fargo had inquired further, the likely result would have been additional confirmation that one week after signing the POAs, Dottie suffered a new and disabling stroke. CP 755-59.<sup>36</sup> Similarly, if Wells Fargo had made further inquiry with the credit counseling service, it would have received the non-springing, general POA which would have avoided any inquiry into the triggering of the springing POA. As Judge Downing concluded: “[T]he bank fulfilled its duties to satisfy itself . . . as to the springing power of attorney.” RP at 23:20-25.

d. Regardless of when the springing durable power of attorney was triggered, Dottie is bound by the non-springing durable general power of attorney and its legal consequences.

The status of the springing POA is also a red herring. The springing POA merely granted Barry additional powers to make decisions on “informed consent to health care” and for “residential placement.”<sup>37</sup> But those additional health care powers were not necessary to effectuate

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<sup>36</sup> “Although detailed mental status assessment is not documented the information available from Dr. Ory and the personnel through Heartland home care would suggest that she functioned adequately from a cognitive standpoint prior to the stroke of 2/22/2006.” CP 759.

<sup>37</sup> CP 751; see also RCW 11.94.010(3)(a) (expressly authorizing the appointment of an agent for informed consent purposes).

the loan transaction, when the non-springing, general POA granted express powers to bind Dottie in a loan transaction. CP 747-48.

Barry had both actual and apparent authority.<sup>38</sup> The express powers in the non-springing, general POA bound Dottie and the Guardian. Alternatively, the instruments and actions estop them from denying that Barry had authority to bind her in the loan transaction.<sup>39</sup>

e. Section 1715z-20(d) does not express the intention to displace the existing public policy that allocates to a principal the risk of loss from the misconduct of his or her general agent, unless the third person has actual knowledge of the agent's misconduct. As stated above, the Guardian argues that Wells Fargo's "acceptance of Barry's authority was negligent and self-serving." Appellant's Br. at 6, 15. Yet, the Guardian did not plead a "negligence" claim, and as part of her "Banking Laws" claim, she failed to identify a provision in § 1715z-20(d) that

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<sup>38</sup> "[A]ctual authority itself affects a principal's legal relations with the third parties separately without reference to apparent authority. . . . [B]y conferring actual authority a principal consents to the agent's power to act with legal consequences for the principal regardless of the belief of third parties concerning the existence or extent of that authority." Rest. (3d) Agency § 2.01, cmt. c (2006) ("Actual Authority," Rationale). "A principal is not only bound by an agent acting . . . within the authority given to him, but he is also by his agent's acts within the apparent authority. . ." Petersen v. Pac. Am. Fisheries, 108 Wash. 63, 68, 183 P. 79 (1919). "An agent's exercise of either type of authority [actual or apparent authority] results in the principal being bound." Smith v. Hansen, Hansen, & Johnson, Inc., 63 Wn. App. 355, 363-63, 818 P.2d 1127 (1991), review denied, 118 Wn.2d 1023 (1992).

<sup>39</sup> Haner v. N. Pac. Ry. Co., 39 Wash. 122, 125, 81 P. 98 (1905) (estoppel by representation); Walker v. Pac. Mobile Homes, Inc., 68 Wn.2d 347, 351-52, 413 P.2d 3 (1966); Page, 12 Wn.2d at 109-113 (widow was estopped from claiming her husband was mentally incompetent to surrender life insurance policies where she allowed him to keep the policies).

imposes a special duty regarding the acceptance of POAs. The Guardian's brief also conspicuously ignores the Power of Attorney statute and the common law of agency, which are material to any meaningful construction of the federal statute and her hypothetical cause of action.<sup>40</sup>

Under the common law of agency, an agent is directly liable to the principal for breach of fiduciary duty, when the agent embezzles funds, commits an intentional tort, or fails to follow specific instructions.<sup>41</sup> The rule is a principal bears the risk of loss unless the third person has actual notice that the agent is acting solely for the agent's own purposes.<sup>42</sup> The

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<sup>40</sup> Waste Management of Seattle, Inc., 123 Wn.2d at 630; Potter v. Wash. St. Patrol, 165 Wn.2d at 76-78.

<sup>41</sup> "Any use of the funds in a manner inconsistent with [principal's] instructions would constitute a breach of petitioner's fiduciary duty." State v. Wallace, 97 Wn.2d 846, 851, 651 P.2d 201 (1982); Nelson v. Smith, 140 Wash. 293, 248 P. 798 (1926) (affirming judgment against agent for violation of instructions); In re Estate of Palmer, 145 Wn. App. 249, 263-64, 187 P.3d 758 (2008) (ruling a POA creates a fiduciary duty with a duty to account for all benefits from breach).

<sup>42</sup> See, e.g., Dickson v. Phillips, 131 Wash. 633, 636-37, 230 P. 630 (1924) ("the principal is bound the acts of his agent . . . even to fraudulent acts . . . within the apparent scope of the authority of the agent" and ruling property owners were liable to an innocent purchaser despite the forgery of a deed and embezzlement by the owner's agent.); Bayley v. Paris, 106 Wash. 248, 179 P. 795 (1919) (ruling the seller having placed in the agent the power to make the terms of the sale, deliver the contracts, and collect money from the purchaser should bear the loss caused by the agent); Kucher v. Scott, 96 Wash. 317, 165 P. 82 (1917); accord, Gleason v. Seaboard Air R. Co., 278 U.S. 349, 356, 49 S. Ct. 161, 73 L. Ed. 415 (1929); see generally 3 Am. Jur. 2d Agency § 288 at 660 (2002) ("Generally, however, the third person is not liable to the principal for the agent's breach of duty if he or she did not participate in the agent's wrongful act." Id. "Persons who knowingly participate in an agent's use of his or her authority for personal ends are not protected by the authority conferred on the agent." Id. § 86 at 500); Rest. (2d) Agency § 261 ("Agent's Position Enables Him to Deceive"); § 262 ("Agent Acts for His Own Purposes"); § 257 ("Misrepresentations; in General"). See also Harris v. Northwest Motor Co., 116 Wash. 412, 420, 199 P. 993 (1921) (where an agent had actual or apparent authority to sell principal's automobile, a sale was valid even though agent embezzled the proceeds); Dimension Funding, LLC v. D.K. Assocs., Inc., 146 Wn. App. 653, 659-62, 191 P.3d 923 (2008).

policy behind the general rule is that the agent's intention is something the third person "normally cannot ascertain and something therefore, for which it is rational to require the principal, rather than the other party to bear the risk. The underlying principle based upon business expediency – the desire that third persons should be given reasonable protection in dealing with agents finds its expression in many rules . . ." Restat. (2d) Agency § 262 cmt. a. (1958).<sup>43</sup>

The rule's corresponding effect is straightforward – a bank, or other third person, has no liability unless there is actual notice of the fiduciary's misconduct.<sup>44</sup> The Uniform Commercial Code adopts the same rule that there is no duty to inquire and discover the misconduct of another's agent. For example, § 3-307 (RCW 62A.2-307) provides that a bank's duty to alert trust beneficiaries "cannot be triggered unless the bank

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<sup>43</sup> Accord, Heine v. Newman, Tannebaum, Helpern, Syracuse & Hirschtritt, 856 F. Supp. 190, 196 (S.D.N.Y. 1994) ("It would be untenable if [Dottie Brown] were permitted to give [Barry Brown] a power of attorney, and then when that power was misused, contend other parties were negligent in relying upon it.").

<sup>44</sup> See, e.g., Gen. Cas. Co. of Am. v. Seattle-First Nat'l Bank, 42 Wn.2d 433, 441-41, 256 P.2d 287 (1952) ("The general rule is that, when a trustee draws a check upon the trust account payable to himself or to a third person, in the absence of further circumstances known to the bank indicating that the trustee is committing a breach of trust, the bank is not liable for the breach of trust" and affirming the "actual knowledge" standard under the common law and a now repealed statute); Rest. (2d) Agency § 314 (person who receives principal's property "with notice that the agent is thereby committing a breach of contract holds the property thus acquired as a constructive trustee" but "one who receives such property, non-tortiously and without notice, but who is not a bona fide purchaser, is subject to liability to the extent to which he has been unjustly enriched."). The bank's loan was not a donative transfer transaction, so there was not an avoidable transfer. See, e.g., Bryant v. Bryant, 125 Wn.2d at 119 (gift of community property).

. . . ‘knows of the breach of fiduciary duty.’” Heilig Trust & Beneficiaries v. First Interstate Bank of Wash., 93 Wn. App. 514, 518, 969 P.2d 1082 (1999) (quoting RCW 62A.3-307).<sup>45</sup>

The “actual notice” standard also applies when banks are dealing with an agent holding a general power of attorney. For example, Justice Holmes, in Empire Trust Co. v. Cahan, 274 U.S. 473, 47 S. Ct. 661, 71 L. Ed. 1158 (1927), wrote an opinion that reversed lower court decisions and on appeal ruled that a bank was not liable, where a father had granted his son a general POA, and the son later misappropriated funds withdrawn from his father’s account and deposited checks at another bank.<sup>46</sup>

f. Washington’s Power of Attorney Act codifies these common law principles and contains a special release provision that applies in this case. RCW 11.94.040(1)<sup>47</sup> provides: “Any person acting

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<sup>45</sup> Accord, Estate of Freitag v. Frontier Bank, 118 Wn. App. 222, 75 P.3d 596 (2003) (affirming summary judgment dismissing claims against bank; ruling the execution of pay order presented by a personal representative to transfer estate funds into his personal account did not breach RCW 62A.4A-202, when the personal representative had apparent authority and bank neither knew nor should have known of his intention to steal funds).

<sup>46</sup> In addition to the policy that the father had granted his son general powers and thus bore the risk of loss, another policy supporting the decision was that “[t]he transactions of banking in a great financial center are not to be clogged, or their pace slackened, by over-burdensome restrictions.” 274 U.S. at 480. Another policy supporting the Empire Trust Co. decision was the delay in asserting the claim. CP 676-83. Each of those policies applies in this case. See also Milner v. Milner, 395 S.E.2d 517, 521 (W. Va. 1990) (“when a competent adult grants a power of attorney to another, an agency relationship between the two is created, and the principal and agent are ultimately responsible for the actions arising out of the power of attorney and not some third party who is without knowledge of any wrong doing.”).

<sup>47</sup> Laws of 1984 at 673-74, ch. 149, § 29. The Section of the law was called  
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without negligence and in good faith reasonable reliance on a power of attorney[,] shall not incur any liability.” This broad release has two limited exceptions that are consistent with the common law: (1) a person acting “negligently,” or (2) a party not acting “in good faith reliance” on the POA. RCW 11.94.040(1).

RCW 11.94.040(1)’s acting “negligently” exception is consistent with the common law rule that: “A third person must use due care and exercise reasonable diligence to discover the nature and scope of an agent’s powers, or else suffer the consequences if they are exceeded.” 2A C.J.S. Agency § 151 at 427.<sup>48</sup> This general rule requiring a preliminary inquiry is inapplicable where the scope of the agent’s authority is shown by a written contract, where an agent acts within the scope of his or her actual authority, or where by reason of the conduct of the principal there is no ground for inquiry.”<sup>49</sup> The Court of Appeals has ruled that when a

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“Release of Liability.” Laws of 1984 at 673. This broad release language is not present in the Uniform Act. 8 A U.L.A. at 246-59.

<sup>48</sup> 3 Am. Jur. 2d Agency § 81, at 495.

<sup>49</sup> 2A C.J.S. Agency § 150 at 426-27. Washington follows this policy. “[A]fter a third person has ascertained an agent’s apparent authority, ‘he is under no further obligation to inquire into the agent’s actual authority . . . .’” W.L. Feely Lumber Co. v. Bookstaver-Burns Lumber Co., 181 Wash. 503, 510, 43 P.2d 953 (1935). A third person must “use reasonable diligence and prudence to ascertain whether the agent is acting and dealing within the scope of his [or her] powers” which “requires a preliminary inquiry sufficient to disclose apparent authority . . . and imposes on one dealing with [the agent] no further obligation to inquire into the agent’s actual authority.” Miller & Miller Auctioneers, Inc. v. Mersch, 442 F. Supp. 570, 576 (W.D. Okla. 1977). “[A]scertainment of the authority of the agent to deal as to the particular manner in which he or she does (continued . . . )

power of attorney gave express powers, a third person “is not negligent in failing to question that authority” and has no duty to inquire further regarding authority to execute.<sup>50</sup> For these reasons, Wells Fargo acted “without negligence” as the phrase is used in RCW 11.94.040(1), when the bank relied on the notarized and acknowledged instrument where a mother made her adult son her attorney-in-fact.

RCW 11.94.040(1)’s lack of “good faith reliance” exception also does not apply. Good faith means honesty and lawfulness of purpose.<sup>51</sup> A third person is not “acting . . . in good faith in reasonable reliance on a power of attorney” if the third person has actual notice of limited powers and ignores them or affirmatively colludes with the agent and thus acts in bad faith.<sup>52</sup> Wells Fargo did not allege bad faith, so RCW 11.94.040(1)’s

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deal represents the full extent of the obligation imposed on third persons to make an inquiry concerning the agent’s authority.” 2A C.J.S. Agency § 151 at 428 (2003).

<sup>50</sup> Stroud v. Beck, 49 Wn. App. 279, 285, 742 P.2d 735 (1987) (rejecting argument that escrow agent negligently breached his fiduciary duty by relying on power of attorney that granted power to execute documents relating to real estate transaction).

<sup>51</sup> Sattler v. Northwest Tissue Center, 110 Wn. App. 689, 695, 92 P.3d 992 (2002) (construing immunity section of Uniform Anatomical Gift Act and adopting definition of good faith as “honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage,” Black’s Law Dictionary (6th Edition 1979)).

<sup>52</sup> This is not a case where the third party was warned by an expert that the agent has no authority, but the third party then “completely and deliberately ignores” the information. See Am. Savings Bank & Trust Co. v. Bremerton Gas Co., 99 Wash. 18, 29-30, 168 P. 775 (1917). In the absence of such notice, the bank “had the undoubted right to rely upon the power of attorney, . . .” Id. at 29. The springing POA’s terms also created a presumption that Barry’s actions were binding so long as the third person had no actual or written notice that the POA was terminated. See POA’s § 8, “Reliance” (stating actions “shall be binding on the Principal . . . guardians” when action taken (continued . . .)

broad release applies. Therefore, based on POAs and the Washington Power of Attorney Act, Wells Fargo did not violate any duty imposed by § 1715z-20(d).

4. The Guardian also failed to establish causation and damage which would be required elements of any claim under § 1715z-20(d). Even if there were a statutory cause of action, the Guardian cannot establish the causation element. Wells Fargo was not the “cause in fact” (but for cause) of the misappropriation of funds. Wells Fargo is also not the legal cause. “The legal causation prong of proximate cause involves the policy considerations of how far the consequences of a defendant’s acts should extend. It concerns whether liability should attach as a matter of law given the evidence of causation.” Christen v. Lee, 113 Wn.2d 479, 508, 780 P.2d 1307 (1989) (emphasis in original). Because the well-established public policy is that a principal bears this kind of risk, the Guardian could not establish legal causation. Dottie’s injury was caused by her son’s breaches of fiduciary duties and her other son’s failure to act after his suspicions were raised. The bank had no actual or constructive notice that Barry intended to violate his duties or had violated his duties.<sup>53</sup>

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“without actual knowledge or written notice of revocation or termination” of the POA). CP 752.

<sup>53</sup> The disclosed purpose for the loan was “home improvements.” Statement of Borrower’s Benefits, CP 193. The removal of equity occurred over time solely as the  
(continued . . .)

The bank has no general duty to monitor and intervene in the family relations of its borrowers.

D. The Guardian Failed to Offer Specific Evidence to Satisfy Four of the Five Requirements for a Consumer Protection Act Claim.

While § 1715z-20(d) grants no private cause of action, RCW 19.86.090 does grant a private cause of action for unfair or deceptive acts or practices that are injurious to the public interest.<sup>54</sup> To establish a CPA claim, a private plaintiff must prove five elements: (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) a public interest impact; (4) injury to the plaintiff; and (5) causation. Hangman Ridge, 105 Wn.2d at 780. The failure to establish even one of these elements is fatal to a plaintiff's claim. Id. at 793. The Guardian failed to establish "specific and material facts to support each element of her prima facie case." Sangster v. Albertson's, Inc., 99 Wn. App. 156, 160, 991 P.2d 674 (2000).

1. The Guardian has failed to establish an unfair or deceptive act or practice with a capacity to deceive a substantial portion of the public. The Guardian concedes that she has not alleged a per se violation of the CPA. Appellant's Br. at 10. Instead, she makes a broad allegation

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result of Barry's actions.

<sup>54</sup> The 2009 amendments to Chapter 19.86 RCW do not apply to this claim which accrued before July 2009. Laws of 2009, ch. 371 § 3.

about Wells Fargo’s “failure to comply with the federal reverse mortgage requirements” to establish the unfair or deceptive act or practice element of the claim. Id. at 12. But she has not satisfied the requirement for proving an “unfair” act – one that was “previously considered unlawful, or offends public policy established by statutes or some common law” and causing substantial injury to consumers, which consumers could not have reasonably avoided.<sup>55</sup> Here, there was no unlawful act by Wells Fargo and the injury could have been readily avoided, if Stanley Brown had pursued his reservations about his brother having a POA for his mother, which he and his wife knew of two months before the loan closed. CP 231, 238.

The Guardian also did not prove that the bank committed a deceptive act – one that had the “capacity to deceive a substantial portion of the public.” Hangman, 105 Wn.2d at 785. Wells Fargo did not provide a misleading form to consumers which, in Dwyer v. Kislak Mortgage Corp., 103 Wn. App. 542, 13 P.3d 240 (2000), satisfied the “capacity to deceive a substantial portion of the public” standard for the deceptive act element. See Appellant’s Brief at 19.

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<sup>55</sup> Blake v. Federal Way Cycle Ctr., 40 Wn. App. 307, 310, 698 P.2d 578 (1985) (referring to the FTC’s three part test for unfairness: “(1) . . . offends public policy as it has been established by statutes, the common law or otherwise-whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other business men).” Id. (omitting citations). Under that test, the injury to consumers must be “substantial . . . it must not be outweighed by any countervailing factors; and the injury must be one that consumers reasonably could not have avoided.” Id.).

This case is more akin to another decision cited by the Guardian, Shields v. Morgan Fin., Inc.,<sup>56</sup> which affirmed a summary judgment dismissing a CPA claim against a lender which had mailed an applicant a good faith estimate but the applicant/borrower did not receive the estimate. Appellant's Br. at 21. There, the borrower unsuccessfully argued that the statute required the lender to "take more steps" to ascertain that the estimate had been actually delivered, even though the applicable regulation did not require actual receipt of the disclosure.<sup>57</sup>

Here, the Guardian makes a similar argument that Wells Fargo should have "taken more steps" to ensure that the credit counseling was adequate, when the applicable statute did not even permit the bank's involvement in the counseling. The Guardian argues that the bank should ensure "an elderly person whose equity will be mortgaged receive *independent* consumer counseling, at a time the bank argues she was fully competent." Appellant's Br. at 11 (italics added). But the statute itself does not use the phrase "*independent* consumer counseling;" rather § 1715z-20(d)(2)(B) requires "adequate counseling by a third party (other than the lender)." Consumer Credit Counseling Northwest was clearly "a third party other than" Wells Fargo, and Wells Fargo received copies of

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<sup>56</sup> 130 Wn. App. 750, 752, 125 P.2d 164 (2005), review denied, 157 Wn.2d 1025 (2006).

<sup>57</sup> Shields, at 756-57.

the certificate as required by 24 C.F.R. § 206.41(c). The statutory structure delegates the counseling responsibility to “a third party” and not to Wells Fargo.<sup>58</sup>

Next, in support of the deceptive act element, the Guardian offers two arguments based on the springing POA: (1) Wells Fargo “failed to produce evidence that Dottie was competent when she signed the form” POA and (2) Wells Fargo “never obtained the written determination of incompetence required by the form itself.” Appellant’s Br. at 11-12. Those two arguments ignore the self-authenticating instrument, the extrinsic evidence and letter discussed in detail in Section, IV.C.3.c, supra,

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<sup>58</sup> Further, unlike the two federal decisions cited by the Guardian, there is documentary evidence of compliance with the statutory disclosure requirements – the Certificate from the independent credit counseling agency. Pierce v. Novastar Mortgage, Inc., 238 F.R.D. 624, 627 (W.D. Wash. 2006) (per se violation); Appellant’s Br. at 10. The Guardian’s reliance on Anderson is misplaced. There is no allegation here that Wells Fargo violated the mandatory disclosure requirements of either the Truth in Lending Act (“TILA”) or RESPA. Anderson v. Wells Fargo Home Mortgage, Inc., 259 F. Supp. 2d 1143, 1147-48 (W.D. Wash. 2003) (granting partial summary judgment that “the failure to provide RESPA-required disclosure within three days of her loan application was a deceptive act, or the purpose of her . . . CPA claim” but stating she “retains the burden of proving the remaining elements of her CPA claim at trial.”). The Guardian’s reliance on the statute and regulations cited at pages 18 to 20 of her brief is misplaced. The TILA and its implementing regulations, 12 C.F.R. § 226 *et. seq.* (“Reg Z”) promote the informed use of consumer credit. 15 U.S.C. § 1602; 12 C.F.R. § 226.1. To accomplish this purpose, TILA and Reg Z impose requirements designed to give the borrower the necessary information to determine the true cost of a loan, such as interest rate, whether the loan has an adjustable rate feature, the annual percentage rate, and other items. *See, e.g.*, 12 C.F.R. §§ 226.17, 226.18, 226.20, 226.22, 226.33(b). Here, there has been no allegation that any disclosure of credit terms was inadequate.

Similarly, any reliance on Washington’s Mortgage Broker Practices Act (“MBPA”), is misplaced because the Guardian failed to plead a specific violation of its prohibitions and requirements and because Respondent is a federally-insured depository banking institution and it and its subsidiaries are exempt from the chapter. RCW 19.146.020(1)(a).

and they also ignore the legal effect of the non-springing POA. Furthermore, the Guardian's speculations about "every other consumer in her position" do not establish the "capacity to deceive" requirement.<sup>59</sup>

The Guardian argues that it was a deceptive act for Wells Fargo to "allow[] [Barry] to withdraw almost all the equity from" his mother's home and "to make an extraordinary gift to himself and his fiancé." Appellant's Br. at 17. But this Court has previously held that a bank has no duty to notify beneficiaries of a trustee's withdrawals unless the bank "knows of the breach of fiduciary duty."<sup>60</sup> Those duties should not be expanded under the guise of the CPA.<sup>61</sup> The essence of the Guardian's claims are unpled contractual defenses for avoidance and a claim for negligence. Those common law claims would fail as well and they also fail to satisfy the "capacity to deceive a substantial portion of the public" standard for the deceptive act element of a CPA claim.

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<sup>59</sup> Westmark Inv. Ltd. v. U.S. Bank, N.A., 133 Wn. App. 835, 854-55, 138 P.3d 638 (2006) (affirming summary judgment dismissing CPA claim, where plaintiff merely asserted "there was no reason to believe that [the bank] had not engaged in a similar course of conduct towards other contractors" and there was "no evidence or argument to support that position" and no evidence that the bank made any representations about using misappropriated funds as offset to loan default)[cited in Appellant's Br. at 21-22]; Micro Enhancement Int'l, Inc. v. Coopers & Lybrand LLP, 110 Wn. App. 412, 439, 40 P.3d 1206 (2002) (affirming summary judgment dismissing CPA claim, on appeal affirming on failure to prove the capacity to deceive requirement and stating "[n]othing in the record beyond [plaintiff]'s speculation that Coopers directed proposals with a capacity to decide substantial portion of the public" element.").

<sup>60</sup> Heilig Trust & Beneficiaries, 93 Wn. App. at 516, 519 (affirming dismissal of CPA and other claims).

<sup>61</sup> See supra (discussing agency and commercial law).

2. The Guardian also cannot establish the public interest impact and proximate causation elements of a CPA claim. Although the Guardian's citation to federal and state laws governing loans demonstrates that Wells Fargo operates in a highly regulated industry, the mere existence of those laws do not satisfy the CPA's requirement for proving that the disputed acts are injurious to the public interest. Appellant's Br. at 10, 18-19. The Guardian has not alleged the violation of a statute that constitutes per se evidence of the public interest requirement; therefore, she must prove a public interest impact under the private or consumer standard. 105 Wn.2d at 789-91. The claim fails under either standard.

a. This is primarily a private dispute among family members regarding fiduciary duties and not one that affects the public interest. A plaintiff must show that the allegedly unfair or deceptive act affects the public interest and is not merely a private dispute.<sup>62</sup> “[I]t is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest.”<sup>63</sup>

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<sup>62</sup> Pac. Nw. Life Ins. Co. v. Turnbull, 51 Wn. App. 692, 702, 754 P.2d 1261 (1988).

<sup>63</sup> Michael v. Mosquera-Lacy, 165 Wn.2d 595, 604-05, 200 P.3d 695 (2009) (quoting Hangman Ridge, 105 Wn.2d at 790).

If the loan transaction is analyzed as a private dispute,<sup>64</sup> “there must be shown a real and substantial potential for repetition, as opposed to a hypothetical possibility of an isolated unfair or deceptive act being repeated.”<sup>65</sup> Again, the three established factors weigh against the showing of a public interest.<sup>66</sup>

The record is clear that this case arises from Barry Brown’s actions and long-standing disputes among members of the Brown family regarding not only the powers of attorney but also gifts and joint accounts. See, e.g., CP 228-34, 235-39, 301-03, 436-39. Wells Fargo is present in this case only because it happened to be the institution from which the reverse mortgage was obtained. Its actions do not satisfy the standard that “there must be shown a real and substantial potential for repetition, as opposed to a hypothetical possibility of an isolated unfair or deceptive act’s being repeated.”<sup>67</sup> The ancillary conduct by the bank was not injurious to the public interest.

b. The Guardian cannot establish a public interest impact under the consumer standard. If the CPA claim is considered as

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<sup>64</sup> Bishop v. Jefferson Title Co., Inc., 107 Wn. App. 833, 28 P.3d 802 (2001) (escrow closing agent-client dispute evaluated under private transaction standard).

<sup>65</sup> Mosquera-Lacy, 165 Wn.2d at 604-05 (quoting Hangman Ridge, 105 Wn.2d at 790).

<sup>66</sup> There is no showing of: (1) advertising of this transaction, (2) “active solicitation of this particular plaintiff,” or (3) “unequal bargaining positions” except to the extent that Barry Brown may have deceived his mother and misappropriated her funds. Mosquera-Lacy, 165 Wn.2d 604-05.

<sup>67</sup> Mosquera-Lacy, 165 Wn.2d 595, at 604-05 (citation omitted).

one involving a consumer transaction, then the conduct of the bank does not satisfy four of the five factors relevant to proving the transaction impacts the public interest.<sup>68</sup> The Guardian claims “Wells Fargo’s ready acceptance of one person’s authority to drain another person’s equity” injured the public interest. Appellant’s Br. at 18. But the mere acceptance of a notarized and witnessed POA granting a family member general powers is not likely to be injurious to the public interest. Wells Fargo was not involved in the credit counseling session, and the Guardian offered no testimony from the counselor about the sixty-minute counseling session. She also did not seek a continuance to develop evidence to support her theories that were specific to this particular loan transaction.

Although the Guardian argues that Wells Fargo’s handling of the reverse mortgage caused it to be held to the standard of care of an attorney,<sup>69</sup> she offered no evidence of the applicable standard of care or of a specific violation of that standard. She also offered no evidence of a

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<sup>68</sup> The five factors are: (1) were the alleged acts committed in the course of defendant's business? (2) are the acts part of a pattern or generalized course of conduct? (3) were repeated acts committed prior to the act involving plaintiff? (4) is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? and (5) if the act complained of involved a single transaction, were many consumers affected or likely to be affected by it? Hangman, 105 Wn.2d at 790.

<sup>69</sup> Appellant’s Br. at 20 (citing Bishop v. Jefferson Title Co., Inc., 107 Wn. App. 833, 28 P.3d 802 (2001)) (an escrow agent violated APR 12(e)(2) and engaged in the unauthorized practice of law by selecting and preparing unauthorized legal forms to complete a real estate transaction without understanding them or advising the plaintiff about their legal ramifications. Id. at 843-46, 848-51.).

generalized pattern of misconduct or repeated prior or subsequent acts that have injurious public impact as required by the CPA.<sup>70</sup>

The Guardian also failed to establish cause in fact and legal causation to support this statutory claim.<sup>71</sup> In summary, the Guardian failed to establish four of the five required elements for a CPA claim, and summary judgment dismissing the claim was properly granted.<sup>72</sup>

## V. CONCLUSION

The banking laws and consumer protection act dictate the same result as the common law. A principal bears the risk of loss for the breach of fiduciary duty by his or her general agent. There is no statutory basis for imposing a new free floating duty of inquiry on lenders dealing with general attorneys-in-fact. Further, as Judge Downing stated, “a bank, and all of us, hopefully, can also presume children caring for their parents are doing so in good faith.” RP at 23:14-16. The summary judgment dismissal of the claims against Wells Fargo should be affirmed.

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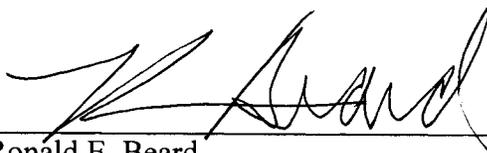
<sup>70</sup> Mosquera-Lacy, 165 Wn.2d at 602 (plaintiff “may not rely on speculation or argumentative assertions that unresolved factual issues remain.”).

<sup>71</sup> Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 83, 170 P.3d 10 (2007) (but/for proximate causation for CPA claims); see supra at.

<sup>72</sup> The Guardian did not assign error to the dismissal of the conversion claim against Wells Fargo and failed to make any argument regarding that claim against Wells Fargo. “The law is well established that ‘passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.’” Johnson v. Mermis, 91 Wn. App. 127, 136 & n.23, 955 P.2d 826 (1998).

RESPECTFULLY SUBMITTED this 11 day of DEC, 2009.

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