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No. 75913-2-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This is one of hundreds of actions by investors in residential mortgage-backed securities, or RMBS, against the investment banks that created and sold trillions of dollars of such securities in the few years immediately before the financial crisis of 2008. Defendants-appellees, all subsidiaries of the investment bank Barclays, sold four RMBS to plaintiff-appellant, Federal Home Loan Bank of Seattle (Seattle Bank). CP 2772, 3051, 3182, 3403. Barclays sold those securities by means of offering documents called prospectus supplements, which federal law required Barclays to deliver to investors and to file with the United States Securities and Exchange Commission.[2]

Seattle Bank brought this action against Barclays in December 2009 for violation of the Washington State Securities Act, RCW 21.20.010(2), which makes it "unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly … [t]o 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." Seattle Bank

[2] Section 5(b)(2) of the Securities Act of 1933 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 sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 10" of that Act. Section 5(c) of the 1933 Act makes it "unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security . . . ." *See also* 17 C.F.R. § 230.424.

alleged that Barclays made untrue or misleading statements about material facts in the prospectus supplements that it sent to Seattle Bank and filed with the SEC. CP 8–23, 28–47, 50–56.

The trial court held that a plaintiff in an action under the WSSA must prove that it relied on an untrue or misleading statement in deciding to buy a security, even though the WSSA says nothing of any such requirement. CP 352. The trial court then granted summary judgment to Barclays on two of the four RMBS on the ground that Seattle Bank acted unreasonably as a matter of law in relying on the statements that Barclays made in its prospectus supplements. CP 5339–5341. The trial court gave no reasons for its conclusion.

Even if there is a reliance requirement in the WSSA, the trial court erred by ignoring genuine issues as to many material facts about whether Seattle Bank acted reasonably in relying on Barclays's statements. The trial court reached its conclusion even though (to take just a few examples) Barclays directed readers of its prospectus supplements to rely on the prospectus supplements, and only on the prospectus supplements, in deciding whether to buy the RMBS (CP 4270, 4275); Barclays assured investors, including Seattle Bank, that it took meticulous care to ensure that no statement in its prospectus supplements was untrue or misleading (CP 4579–4586); and Seattle Bank had no access to information from which it could learn that Barclays's statements were untrue or misleading (CP 4294, 4298, 4300, 4304, 4308, 4320). And the trial court seemingly ignored that, as required by federal law, Barclays filed its prospectus supplements with the SEC. The trial court thereby became, as far as Seattle Bank's research has revealed, the only court ever to hold that it was unreasonable as a matter of law to rely on a disclosure document filed with the SEC pursuant to federal law.

The trial court also erred in concluding that there is a reliance requirement in the WSSA at all. The court followed a decision by a previous panel of this Court, *Stewart v. Estate of Steiner*,[3] which in turn relied on the earlier decision in *Guarino v. Interactive Objects, Inc.*[4] Respectfully, the decisions of the other panels in *Guarino* and *Stewart* misinterpreted the WSSA. This panel is not required to follow those decisions[5] and should decline to do so for at least the following reasons:

1. The Legislature intended liability under the WSSA to be strict, with no requirement to prove elements of common-law fraud such as reliance. The decisions in *Guarino* and *Stewart* contradict that intent.

2. The WSSA requires, and the Washington Supreme Court has long held, that the WSSA is to be interpreted consistently with the similar statutes that nearly all sister states have adopted. At least 20 other

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[3] 122 Wn. App. 258, 261, 264 & n. 7 (2004) (plaintiff must prove "that the seller and/or others made material misrepresentations or omissions about the security, and the purchaser relied on those misrepresentations or omissions."). The trial court first ruled that Seattle Bank had to prove reliance when it denied defendants' motions to dismiss in 2011. CP 352.

[4] 122 Wn. App. 95, 109 (2004) ("The WSSA also requires reliance upon the alleged misrepresentations or omissions.").

[5] In *Grisby v. Herzog*, 190 Wn. App. 786, 806–811 (2015), this Court concluded that one panel of the Court is not required to follow the decision of an earlier panel.

states have rejected any requirement to prove reliance in actions under their counterparts of the WSSA. In nine of those 20, that result was reached by the state's supreme court. Only one or possibly two states require proof of reliance; in neither state was that result reached by the state's supreme court.

3. The Washington Supreme Court and this Court have long held that the WSSA is to be interpreted to protect investors.[6] The decisions in *Guarino* and *Stewart* hurt investors by making it dangerous to rely on statements made by sellers of securities, including statements in documents filed with the SEC, because a court may later think that their reliance was unreasonable.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by holding that there is no genuine issue as to any material fact about whether Seattle Bank acted reasonably in relying on statements that Barclays made in offering documents for the RMBS that it sold Seattle Bank and that Barclays is entitled to judgment as a matter of law.

2. The trial court erred by holding that, in an action under

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[6] *Go2Net, Inc. v. Freeyellow.com, Inc.*, 158 Wn.2d 247, 253 (2006) ("When interpreting this remedial legislation, the court is guided by the principle that remedial statutes are liberally construed to suppress the evil and advance the remedy.") (internal citation omitted); *Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 145 (1990) ("[T]he State Securities Act is to be broadly construed in order to maximize protection for the investing public."); *Hoffer v. State*, 113 Wn.2d 148, 152 (1989) ("[T]he WSSA . . . endeavors to protect investors, not just the integrity of the marketplace.").

RCW 21.20.010(2), a plaintiff must prove that it relied on an untrue or misleading statement of a material fact that the defendant made in connection with its sale of a security to the plaintiff.[7]

III. STATEMENT OF THE CASE

A. THE UNTRUE OR MISLEADING STATEMENTS OF MATERIAL FACT THAT BARCLAYS MADE IN CONNECTION WITH ITS SALE OF RMBS TO SEATTLE BANK

Barclays sold four RMBS to Seattle Bank, two of which are the subjects of this appeal. CP 2772, 3051, 3182, 3403, 5342–5345. RMBS are not backed by the promise of an entity such as a corporation to pay interest and repay principal 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 behind in their mortgage payments and their payments are not enough to make the promised payments to investors in an RMBS, then those investors may 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 mortgage loans that back the securities. SCP 15532–15536, 15538–15542, 15627–15636, 23610–23614, 23616-23620, 23700–23713. These statements are material to investors in RMBS because payments on the mortgage loans are the sole source of payments to investors. SCP 14310, 14315–14316, 15530, 23608.

[7] This same issue is presented to this Court in *Fed. Home Loan Bank of Seattle v. Credit Suisse Secs. (USA) LLC et al.,* No. 75779-2-I.

An investment bank that creates and sells RMBS buys mortgage loans, usually from the lenders that made the loans (called *originators*). CP 1965–1966. To create an RMBS, the investment bank chooses the mortgage loans that are to back the new RMBS from among the loans that it owns. CP 1966, 1974. It devises various technical aspects of the RMBS, such as the relative rights of different RMBS that are being sold in the same transaction. CP 1966–1968, 1974. Having created the new RMBS, the investment bank then sells them to investors, a process known as *underwriting* those securities. CP 1973–1974. To do so, the investment bank solicits investors like Seattle Bank to buy the forthcoming RMBS. 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 contents of the prospectus supplement are prescribed by regulations of the Securities and Exchange Commission.[8] Under federal law, the investment bank must both deliver the prospectus supplement to potential investors before they buy an RMBS and also file it with the SEC so it is available to the investing public at large.[9] There is no dispute that Barclays delivered the prospectus supplement to Seattle Bank before Seattle Bank bought each RMBS.

The four RMBS that Barclays sold Seattle Bank were:

[8] 17 C.F.R. § 229.1100 *et seq.*

[9] *See* note 1 above.

Date	Name of Transaction	Amount Paid	Originator of Underlying Mortgage Loans	No. of Mortgage Loans that Backed the RMBS
3/29/07	BCAP 2007-AA2[10]	$100,000,000	Countrywide	1,196
9/21/07	BCAP 2007-AA5[11]	$140,000,000	Countrywide	324
2/13/08	BCAP 2008-IND1[12]	$189,416,000	IndyMac	951
4/15/08	BCAP 2008-IND2[13]	$232,438,000	IndyMac	692
				3,163

The trial court granted summary judgment dismissing Seattle Bank's claims on the third and fourth RMBS, BCAP 2008-IND1 and BCAP 2008-IND2, which are the subjects of this appeal. CP 5339–5341. Barclays and Seattle Bank have since resolved their dispute about the first and second RMBS.

Barclays bought all of the mortgage loans that backed IND1 and IND2 from IndyMac Bank. SCP 15532–23610. All of them were so-called *alternative-A* loans. CP 1546, 1560. Mortgage loans are categorized by the creditworthiness of the borrowers and the amount of equity that they have in their homes. The highest quality mortgage loans are prime loans; the

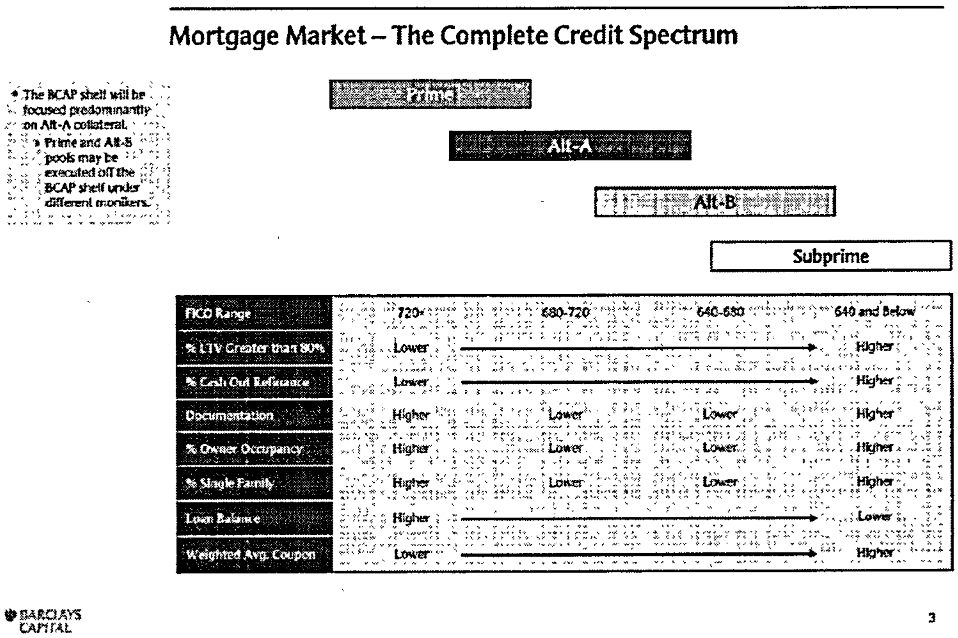
[10] CP 3051; SCP 11489.

[11] CP 3182; SCP 11827.

[12] CP 2772; SCP 23700.

[13] CP 3403; SCP 15627.

lowest quality are subprime. As Barclays described them, alternative-A mortgage loans overlap in quality with prime loans (so the best quality alternative-A loans are superior to lower quality prime loans), but they do not overlap with subprime loans (so all alternative-A loans are of better quality than all subprime loans). Barclays depicted this graphically in a presentation to investors in mid-2007:



CP 4575.

In 2006 and 2007, Barclays created and sold over $4 billion of RMBS backed by alternative-A loans. SCP 23614.

In its prospectus supplements for IND1 and IND2, Barclays stated that the mortgage loans that backed those RMBS were made according to IndyMac's mortgage underwriting[14] guidelines and procedures:

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

CP 1554, 1564.

This statement was material to potential investors in IND1 and IND2 because the credit quality of the mortgage loans—and therefore the risk of an RMBS that they backed—depended on whether the lender followed its own guidelines and procedures in making the loans. SCP 12381–12385. Seattle Bank relied on these statements in deciding to buy IND1 and IND2. CP 3043.

Barclays also made statements about the loan-to-value ratios of the mortgage loans, that is, the ratio of the amount of the mortgage loans to the value of the properties that secured those loans. SCP 15633, 23712–23713. The loan-to-value ratio tells investors how much equity borrowers have in their homes. For example, an $80,000 mortgage loan secured by a

[14] As applied to individual mortgage loans, the term "underwriting" denotes the process of deciding whether or not to make a loan. As applied to securities like RMBS, the term denotes the process of purchasing securities from the entity that issues them (in this case, a special-purpose subsidiary of Barclays) and then reselling them to investors.

house valued at $100,000 has a loan-to-value ratio of 80%, which tells investors that the homeowner has 20% equity in her house. An appraisal of the value of a mortgaged property is an important step in determining the loan-to-value ratio because the appraisal provides the denominator in that ratio.[15] In its prospectus supplements for both IND1 and IND2, Barclays stated that the appraisals of the mortgaged properties were made in accordance with the Uniform Standards of Professional Appraisal Practice, 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. This statement was material to potential investors in IND1 and IND2 because it assured them that the denominators in loan-to-value ratios, a critical factor in the credit quality of mortgage loans, were reached in accordance with professional standards. Seattle Bank also relied on these statements in deciding to buy IND1 and IND2. CP 3043.

B. SEATTLE BANK'S ACTION AGAINST BARCLAYS UNDER THE WSSA

Seattle Bank sued Barclays under the WSSA, which provides in RCW 21.20.010(2) that "[i]t is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly: ...

[15] If a property is being purchased (rather than a mortgage loan being refinanced), the purchase price is the denominator if it is lower than the appraised value. CP 1987.

[t]o 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." Seattle Bank alleged that Barclays's statements quoted above were untrue or misleading because many mortgage loans that backed IND1 and IND2 were not made according to the guidelines and procedures of IndyMac and because many appraisals that determined the loan-to-value ratios were not made in accordance with the Uniform Standards. CP 17–23, 28–36, 45–47, 50–56. Thus, if any of Barclays's statements about either IND1 or IND2 was materially untrue or misleading, then Barclays is liable to Seattle Bank under the plain language of RCW 21.20.010(2).

C. THE DECISION OF THE TRIAL COURT

In an order in 2011, in which it denied motions to dismiss the complaints in this and 10 related actions, the trial court held that a plaintiff in an action under the WSSA must prove that it reasonably relied on an untrue or misleading statement that the defendant made in connection with its sale of a security to the plaintiff. CP 352. As noted above, the court relied on the decision of an earlier panel of this Court in *Stewart v. Estate of Steiner*, which in turn relied on the decision of a previous panel in *Guarino v. Interactive Objects*. (For the reasons given in point IV.B of the argument below, this Court should decline to follow the decisions in *Guarino* and *Stewart*, hold that there is no requirement to prove reliance in actions under the WSSA, and reverse the judgment below for that reason.)

In 2015, Barclays moved for summary judgment "as to plaintiff's alleged reasonable reliance," arguing that it was unreasonable as a matter of law for Seattle Bank to rely on the statements that Barclays made in its offering documents, including the prospectus supplements that Barclays filed with the SEC. CP 441–488. The principal grounds of its motion were that (i) public information about the mortgage market in general and IndyMac in particular made it unreasonable as a matter of law for Seattle Bank to rely on those statements and (ii) with respect only to the IND1 and IND2 transactions, that Seattle Bank, not Barclays, structured those RMBS and chose the mortgage loans to back them. By amended order dated March 7, 2016, the trial court denied the motion with respect to the first two RMBS (BCAP 2007-AA2 and BCAP 2007-AA5) and granted the motion with respect to the latter two, IND1 and IND2. CP 5339–5341. The court gave no explanation for its decision.

D. BARCLAYS BOTH DIRECTED AND INDUCED SEATTLE BANK TO RELY ON THE STATEMENTS IN ITS PROSPECTUS SUPPLEMENTS

In its prospectus supplements for IND1 and IND2, Barclays specifically directed potential investors like Seattle Bank to rely on those prospectus supplements and *only* on the prospectus supplements. "You should rely *only* on the information contained in this prospectus and the accompanying prospectus supplement." CP 4270, 4275 (emphasis added). This direction was sufficient in itself to create genuine issues as to material facts about whether Seattle Bank acted reasonably in relying on those prospectus supplements.

Moreover, Barclays induced Seattle Bank to rely on its statements by touting the care that it took to ensure that none of those statements would be untrue or misleading. Under the federal Securities Act of 1933 and the WSSA and its counterpart statutes in nearly all other states,[16] the seller of a security is strictly liable to the buyer if any material statement that it made in connection with its sale of the security was untrue or misleading. Investment banks like Barclays therefore make at least some effort to investigate the truth of the statements they make in prospectus supplements and other offering documents. This investigation is the investment bank's "due diligence."

As part of its effort to sell RMBS to Seattle Bank, Barclays touted the thoroughness of its due diligence. For example, in a presentation that it sent Seattle Bank in May 2007 (CP 4661), Barclays stated that, "[p]rior to purchasing loans, Barclays will perform a thorough credit and operational on-site due diligence review *of each seller*, focusing on" six aspects of the seller's policies and operations. CP 4579 (emphasis added). Barclays then presented a "Current Originator/Seller List." CP 4580. IndyMac Bank was among the seven sellers listed. IndyMac was also listed among Barclays's five "Strong Servicing Partners." CP 4581. Barclays went on to explain that it did three types of due diligence before it purchased loans to put into

[16] *See* point IV.B below.

its RMBS transactions: Appraisal, Credit, and Compliance. CP 4582. Barclays stated that its appraisal review "is among the most thorough in the industry" and described it in no fewer than 28 bullet points. CP 4583–4584. The credit (or underwriting) component of its due diligence process, wrote Barclays, "highlights whether the loan has been underwritten ... in accordance with the seller's guidelines"; the description of that process required 12 bullet points. CP 4585. Barclays then described the compliance review in another six bullet points. CP 4586. Finally, Barclays gave an overview of its recent RMBS transactions. Two included more than $1.75 billion of mortgage loans that Barclays had purchased from IndyMac. CP 4593–4599.

E. SEATTLE BANK DID NOT HAVE ACCESS TO ANY INFORMATION THAT WOULD HAVE REVEALED THAT BARCLAYS'S STATEMENTS WERE UNTRUE OR MISLEADING

The underwriting of a mortgage loan and the appraisal of the property that secures the mortgage loan are both documented in a mortgage loan file. When Seattle Bank bought certificates in IND1 and IND2, only information from the loan files would have revealed that many mortgage loans that backed those RMBS actually were not underwritten according to IndyMac's guidelines and procedures and that many appraisals actually were not conducted in accordance with the Uniform Standards. Seattle Bank had no access to any of the mortgage loan files (which Barclays does not dispute). CP 4294, 4298, 4300, 4304, 4308, 4320. Thus, there was no way for Seattle Bank to investigate whether the statements that Barclays made to it were untrue or misleading; it had no choice but to rely on those statements.

F. PUBLIC INFORMATION ABOUT THE MORTGAGE MARKET AND INDYMAC

The first ground of Barclays's motion in the trial court was that various news stories, reports by analysts of RMBS, and other public information made it unreasonable as a matter of law for Seattle Bank to rely on the statements that Barclays made in its offering documents about the 951 IndyMac mortgage loans that backed IND1 and the 692 that backed IND2. CP 465–470. Not one of the stories and reports that Barclays cited said a word about whether those 1,643 IndyMac loans were underwritten according to IndyMac's guidelines and procedures or whether the appraisals of the properties that secured those loans were made in accordance with the Uniform Standards. Indeed, they said nothing about whether lenders in general (much less IndyMac in particular) were making mortgage loans that did not comply with their underwriting guidelines and processes or relying on appraisals that were not done in accordance with the Uniform Standards. Some of the stories and reports noted that mortgage lenders were relaxing their underwriting standards.[17] But as many courts have noted, relaxing underwriting standards is quite

[17] *E.g.*, CP 2060–2080.

different from making loans not according to even those relaxed standards.[18]

Rather, the news stories and analyst reports discussed the effect of the deteriorating economy on the performance of mortgage loans in general. Many discussed subprime, not alternative-A, mortgage loans.[19] And even on alternative-A mortgage loans, the reports were equivocal. Barclays itself, for example, stated that "[w]hile delinquencies in the Alt-A market have doubled since 2005, their overall level is not cause for alarm, in our view." CP 4538. Other investment banks similarly wrote that RMBS backed by alternative-A mortgage loans were good investments.[20]

The public information that Barclays adduced that was specific to IndyMac consisted of three reports that analyzed the common stock of mortgage lenders, not RMBS backed by their loans. CP 469–470. Two of the reports covered numerous mortgage lenders, IndyMac among them

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[18] In *In re IndyMac Mortg.-Backed Secs. Litig.*, 718 F. Supp. 2d 495, 509 (S.D.N.Y. 2010), the court made this point about IndyMac loans in particular:

> The crux of plaintiffs' claims, however, is that IndyMac Bank ignored even those watered-down underwriting standards, including the standards for granting exceptions to the guidelines, in order to originate as many loans as possible. Disclosures regarding the risks stemming from the allegedly abandoned standards do not adequately warn of the risk the standards will be ignored.

[19] *E.g.*, CP 1786–1866.

[20] To take just two examples, in early 2008, UBS reaffirmed the health of Alt-A RMBS, stating that the Alt-A sector had "been unfairly tarnished, due to credit concerns" (CP 5092), and Lehman Brothers wrote that "[f]undamentally, super senior triple-As in the prime/Alt-A sector are the most attractive high quality assets" (CP 3656).

(CP 591–642, 2061–2080); one covered just IndyMac (CP 654–660). Like the information about the mortgage market in general, none of the reports even hinted that IndyMac mortgage loans were not being made according to its underwriting guidelines and procedures, or that the related appraisals were not being done in accordance with the Uniform Standards. And the three reports all reached different conclusions about IndyMac stock: one in March 2007 recommended that investors buy IndyMac stock (CP 2061–2062); another in the same month recommended that investors sell the stock (CP 591–592); and a third in November 2007 did not recommend either buying or selling and concluded just that "investors should remain cautious on the stock" (CP 656).

G. SEATTLE BANK'S ROLE IN THE CREATION OF IND1 AND IND2

The second ground of Barclays's motion was that IND1 and IND2 were different in kind from typical RMBS transactions because Joel Adamo, the trader at Seattle Bank who bought RMBS, and Reed Newkirk of IndyMac (Adamo and Newkirk were professional friends) conceived the IND deals while on a ski trip in December 2007. CP 453–457. Barclays claims that they then worked directly with each other and "structured the deals and picked the collateral before Barclays was even involved." CP 448. According to Barclays, these were "reverse inquiry" transactions, in which potential customers approach an investment bank with a proposed transaction, rather than the investment bank approaching potential customers. CP 470–475. But the documents before the trial court—mainly Barclays's own internal emails—revealed a host of genuine issues as to material facts. (Indeed, although not necessary to decide this appeal, those documents showed that Barclays's description of IND1 and IND2 was largely fictitious.)

The IND1 and IND2 transactions were conceived not by Adamo and Newkirk in December 2007, but by IndyMac and Barclays in October 2007. (By then, of course, Barclays and IndyMac were experienced business partners. As described above, IndyMac was one of seven originators on Barclays's "Current Originator/Seller List" and was one of its five "Strong Servicing Partners." CP 4580–4581.) Barclays had already purchased nearly $1.75 billion of mortgage loans from IndyMac and put them into two previous RMBS transactions. CP 4593–4599. On October 11, 2007, IndyMac alone (without so much as a mention of Seattle Bank) first approached Barclays about selling it mortgage loans to bundle into RMBS. CP 4845–4846. It was clear from the start that IndyMac would sell mortgage loans to Barclays and that Barclays would structure an offering of RMBS backed by those loans, just as it had done twice before. Thus, the "reverse inquiry" was made by IndyMac alone, not by Seattle Bank. As recorded in an internal Barclays email at 3:44 p.m. that day: "We have had some reverse inquiry lately on AAA securities off MTA [moving treasury average]. *IndyMac* has sent us seasoned loans they have inhouse and would be interested in doing a deal with us." CP 4845–4846 (emphasis added).

Three minutes after this initial email, a transaction manager at Barclays directed its structuring group to provide various technical documents required to analyze possible financial structures for a transaction. CP 4845. At 4:06 p.m., a senior manager directed the structuring group that "[t]his one would be a high priority item as we are looking to get back to them tomorrow." CP 4848. Some of the technical documents were completed at 7:08 p.m. CP 4845. Apparently not satisfied, the transaction manager wrote at 8:06 p.m.: "Indimac [*sic*]: Need as soon as possible since we would like to take advantage of the opportunity. This is not an open bid so the sooner we get back to Indimac [*sic*], the better." CP 4852.

Barclays courted IndyMac assiduously for its business. In November 2007, a sales manager at Barclays summarized its "very warm" relationship with IndyMac and directed her colleagues at Barclays to wine and dine the people there: "Indymac – the relationship is very warm on both the origination and portfolio sides. Will need to continue to build upon. On the origination side it's nearly 100% relationship driven. Get down there *regularly* to have dinner with [them]. . . . They LOVE going to dinner." CP 4868.

On December 27, 2007, Barclays and IndyMac resumed their discussions of the idea that Barclays had greeted so enthusiastically on October 11, that IndyMac would sell mortgage loans to Barclays, which would structure an offering of RMBS backed by those loans. CP 4888. As in October, Seattle Bank was neither involved in the approach to Barclays nor even mentioned. In fact, it was not until January 16, 2008, 20 days later (and three months after IndyMac made its "reverse inquiry" to Barclays), that Barclays first learned that "[t]he buyer on the indymac deal" "is fhlb seattle." CP 4893. This deal became IND1.

Contrary to what Barclays told the trial court, it—not IndyMac and certainly not Seattle Bank—structured IND1. When IndyMac first proposed such a transaction on October 11, 2007, the very first email from Barclays's transaction manager to his co-workers asked, "Can we look at 3 Structures for now"? CP 4845–4846. And the structuring group did just that before the day was out. Precisely the same happened when work on IND1 resumed in January 2008. An employee of Barclays wrote to Barclays's manager of that transaction: "Keith, are we structuring this deal?" The transaction manager replied simply: "Yes." CP 4911.

Barclays is also wrong about whether Seattle Bank chose the loans for the collateral pool in IND1. In fact, IndyMac chose the loans with advice from Barclays. Seattle Bank did not choose a single loan, nor even know which loans IndyMac and Barclays were choosing. CP 3044. On January 16, 2008, IndyMac sent Barclays a list of 1,088 mortgage loans, with a total balance of approximately $431 million, that it wanted Barclays to purchase and put in the collateral pool. CP 4890. Neither IndyMac nor Barclays sent that list to Seattle Bank. On January 18, IndyMac told Barclays that it had "removed 33 loans from the population totaling $15,153,003" because the credit scores of those borrowers had dropped. CP 4895. Again, neither IndyMac nor Barclays informed Seattle Bank. On

January 22, IndyMac told Barclays that it was removing 36 more loans because their terms had been modified without IndyMac's knowledge. CP 4921. No one informed Seattle Bank. On January 22, in order to get more favorable ratings from Standard & Poor's, Barclays recommended "dropping S&P's viewed riskiest loans," or another 17 loans. CP 4918, 4947. IndyMac apparently agreed, and Barclays informed Standard & Poor's that "[w]e are re-evaluating the BCAP 2008-IND1 trade by dropping the following 17 loans." CP 4951. Neither IndyMac nor Barclays ever told Seattle Bank that these 17 loans would be dropped. On February 1, IndyMac informed Barclays that "[t]he [11] loans at the bottom highlighted in red have been pulled from the deal by Reed [Newkirk]." CP 5033. No one told Seattle Bank. On February 2, IndyMac sent Barclays the final list of loans that would go into the collateral pool. CP 5040. Yet again, no one told Seattle Bank. Thus, it was IndyMac, with advice from Barclays, that chose the loans for the collateral pool of IND1.

As part of its work structuring the IND1 transaction (and as it described to investors in its presentation in mid-2007), Barclays did due diligence on the loans that IndyMac put in the collateral pool. Barclays kept IndyMac closely informed of the results of its due diligence. Barclays sent Newkirk copies of numerous reports from the outside firms that it used for due diligence. CP 4949, 4969, 5024, 5026. Neither Barclays nor IndyMac sent Seattle Bank even one of these due diligence reports or any other information about the results of the due diligence.

Also as part of the customary work of a securities underwriter in structuring an offering of RMBS, Barclays submitted the details of the proposed transaction to three rating agencies: Moody's, Standard & Poor's, and Fitch. CP 4899, 4937–4939, 5020–5022, 5015–5018, 4916, 4951–4954, 4962–4967, 4914, 4927, 5029, 5042–5043. Barclays actively withheld information from at least Moody's. Barclays's transaction manager stated: "Moody's plans to penalize this pool heavily for not receiving updated valuation results. We have AVM data. But over half the pool [has] greater than a 10% negative variance. Therefore, I don't think it would be prudent to share this data." CP 4929.[21] His boss replied: "I agree with your approach." CP 4932. There is no evidence that Barclays ever sent the damaging data to Moody's—or to Seattle Bank.

On January 22, 2008, Barclays prepared a "working group list" for the transaction. CP 4902–4909. The working group included 12 organizations and a total of 55 persons. Seattle Bank was not among them.

Barclays also coordinated the drafting and signature of the dozens of legal documents required to complete that transaction. Seattle Bank did not review, comment on, or sign even one of those many documents. Barclays's law firm distributed drafts of the legal documents to the members of the working group for their comment. Never once did it send

[21] An AVM is an automated valuation model, a computer model that values properties. As part of its due diligence, Barclays ran an AVM on the properties that secured the mortgage loans in IND1. According to this email, for more than half of those properties, the AVM reported a value 10% or more below the value used to compute the loan-to-value ratio.

a draft to Seattle Bank. For example, the law firm sent many drafts of the disclosure documents, including the prospectus supplement, to a total of 66 people in those 12 organizations, but never to a single person at Seattle Bank. CP 4971, 4973, 5035, 5038, 5045, 5048, 5050–5051, 5053–5054, 5056, 5058–5059, 5061–5062, 5080–5081.

Clients of Barclays were required to indemnify it against certain claims, including claims under federal or state securities laws that Barclays made any untrue or misleading statement in its offering documents for the transaction for that client. In both the IND1 and IND2 transactions, IndyMac agreed to indemnify Barclays. CP 5065–5078, 5251–5259. Seattle Bank signed no agreement to indemnify Barclays. Indeed, there is no evidence that Seattle Bank even knew that such agreements existed.

As if to confirm that Barclays was working for IndyMac, not Seattle Bank, when Barclays's transaction manager on IND1 wrote that "[the] [t]rade is complete. I sincerely thank everyone for their efforts on [] this trade," he addressed his email only to IndyMac, not to anyone at Seattle Bank. CP 5083.

*

BCAP 2008-IND2 came about in much the same way as IND1. Newkirk of IndyMac—not Seattle Bank—told Barclays that he was interested in a second transaction much like the first. CP 5086, 5134. On February 28, 2008, Newkirk sent Barclays a "[r]eal rough" version of the "[s]ecuritization [p]opulation" (CP 5142), that is, the list of mortgage loans that IndyMac proposed to sell Barclays and then to be used to back a new RMBS. As it did on October 11, 2007, for IND1, Barclays began immediately to structure a transaction. CP 5144. As with IND1, IndyMac chose the loans for the collateral pool with advice from Barclays. Seattle Bank had nothing to do with it. On March 11, moving beyond the "real rough" list of loans that Newkirk had sent on February 28, IndyMac sent Barclays "the initial tape [list]" of mortgage loans for the collateral pool of IND2. CP 5148. On March 12, Barclays recommended to IndyMac that it drop $51 million of the loans because they would be "viewed harshly by the [rating] agencies and investors." CP 5150. On March 13, IndyMac sent Barclays a revised list of loans. CP 5153. On March 20, Barclays advised IndyMac that it needed "to kick $5.4M of the following [16] loans since they breach your Reps and Warrants" that the borrowers were current in their payments. CP 5155. On March 24, IndyMac sent Barclays the "final population" of loans. CP 5158. On March 26, however, Newkirk of IndyMac called Barclays and suggested that Barclays remove from the pool the 78 loans in Barclays's due diligence sample in order to achieve more favorable treatment from the rating agencies. CP 5171. Later that day, Barclays removed 93 loans from the pool. CP 5173. Still later on March 26, IndyMac added more loans. CP 5181. Finally, after still more additions and deletions, IndyMac sent the final list of mortgage loans on April 10, 2008. CP 5261. Seattle Bank was not copied on a single one of these communications. Nor did it play any other role whatsoever in selecting individual loans for the collateral pool of IND2. CP 3044.

As it did in IND1, Barclays commissioned due diligence work; Seattle Bank was copied on none of those communications. CP 5214, 5236, 5238, 5132, 5212, 5219, 5216–5217, 5221, 5231, 5240, 5248, 5244, 5223–5225, 5227–5229. Again, as in IND1, Seattle Bank was not on the "working group list," and no one at Seattle Bank was among the 64 people in 12 different organizations who received drafts of the disclosure documents for review or comment. CP 5160–5167, 5183–5184, 5186–5187, 5193–5194, 5196–5197, 5199–6000, 5202–5203, 5205–5207, 5209–5210, 5233–5234, 5263–5264, 5266–5267, 5271–5272, 5281–5282, 5284–5285, 5294–5295. And, as discussed above, IndyMac signed a very broad indemnity agreement in favor of Barclays, and Seattle Bank did not.

Again confirming that Barclays was working for IndyMac, not Seattle Bank, a senior employee of Barclays wrote on April 9, 2008: "The trade being reported on Bloomberg is actually the second agented deal we have done *for Indymac* in the last few months. BCAP 08-IND1 and BCAP 08-IND2 are the deal names." CP 5242 (emphasis added).

Adamo and Newkirk did communicate about various technical requirements for IND1 and IND2 (CP 3502, 3506, 3512, 3516, 3522, 3530, 3565, 3569), but in not even one of those communications did Adamo and Newkirk discuss the selection of loans for either IND1 or IND2. CP 3044.

Before it agreed to purchase the senior certificates in IND1 and IND2, Seattle Bank did exactly the same analysis on those certificates that it did on every mortgage-backed certificate it was offered. CP 3042–3043.

It had no access to the loan files and thus was completely dependent on the accuracy of the information that Barclays presented in its offering documents. CP 3043. In no way did Seattle Bank truncate its normal process or lower its standards for evaluating and purchasing RMBS. CP 3042–3043. At no time in the IND1 and IND2 transactions did Seattle Bank tell Barclays to waive or dispense with any of the normal practices or duties of a securities underwriter, including due diligence and the preparation of offering documents free of untrue or misleading statements. CP 3045.

IV. ARGUMENT AND AUTHORITY

A. THERE ARE GENUINE ISSUES AS TO MANY MATERIAL FACTS ABOUT WHETHER IT WAS REASONABLE FOR SEATTLE BANK TO RELY ON STATEMENTS THAT BARCLAYS MADE IN OFFERING DOCUMENTS

Appellate courts review grants of summary judgment *de novo.* *Volk v. De Meerleer*, 386 P.3d 254, 262 (Wash. 2016). "When engaging in this inquiry, [courts] construe all facts and all reasonable inferences 'in the light most favorable to the nonmoving party.'" *Id.* (internal citations omitted). "A genuine issue of material fact exists when reasonable minds could differ on the facts controlling the outcome of the litigation." *Dowler v. Clover Park School District No. 400*, 172 Wn.2d 471, 484 (2011). Here there are both (i) undisputed facts that could lead a reasonable mind to conclude that it was reasonable for Seattle Bank to rely on the statements that Barclays made in its prospectus supplements and (ii) genuine issues as to other material facts, which, if construed most favorably to Seattle Bank, could lead a reasonable mind to the same conclusion.

The following facts are undisputed. Each could lead a reasonable mind to conclude that Seattle Bank acted reasonably in relying on Barclays's statements.

(1) The statements were made in prospectus supplements filed with the SEC for public offerings of securities. The reliability of disclosure documents filed with the SEC is a foundation of the American capital markets. Underwriters face strict civil liability if any of their statements are untrue or misleading. (*See* point B.1(b) below.) If it can be unreasonable as a matter of law to rely on such statements, then investors will be reluctant to invest based on those statements for fear that they will have no opportunity even to prove that it was reasonable for them to rely on the statements. Indeed, as far as Seattle Bank's research has revealed, the trial court was the first ever to hold that it was unreasonable as a matter of law to rely on a disclosure document filed with the SEC in connection with a public offering of securities.

(2) Barclays directed readers of its prospectus supplements to rely on those documents and only on those documents. CP 4270, 4275.

(3) Barclays assured investors, including Seattle Bank, that it took meticulous care to ensure that no statement in its prospectus supplements would be untrue or misleading. CP 4579–4599.

(4) Barclays's statements were specifically about the 1,643 loans that backed IND1 and IND2. CP 1554, 1555, 1564, 1566; SCP 15633, 23712–23713.

(5) Seattle Bank had no access to loan files, without which it was impossible to detect that Barclays's statements were untrue or misleading.[22] CP 3043, 4294, 4298, 4300, 4304, 4308, 4320.

Any one of these undisputed facts, and certainly all of them in combination, could lead a reasonable mind to conclude that Seattle Bank acted reasonably in relying on Barclays's statements.

There are also genuine issues as to other material facts. If any of these is resolved favorably for Seattle Bank, as all of them must be, then a reasonable mind could conclude that Seattle Bank's reliance was reasonable. With respect to public information, was that information so clear and unequivocal that it was unreasonable to rely on statements that Barclays made about 1,643 specific IndyMac loans? Most of the public information concerned the mortgage market in general or subprime, not alternative-A, mortgage loans. CP 1786–1866. And it was equivocal; Barclays itself saw no "cause for alarm" in alternative-A mortgage loans. CP 4538. None of the public information even hinted that IndyMac was making mortgage loans not according to its underwriting guidelines and

[22] Thus, at least three of the factors that the previous panel of this Court listed in *Stewart v. Estate of Steiner* favor Seattle Bank: access (or lack thereof) to the relevant information, the opportunity (or, again, the lack thereof) to detect that Barclays's statements were untrue or misleading, and the specificity of Barclays's statements. 122 Wn. App. at 274.

processes, nor that it was using appraisals that were not done in accordance with the Uniform Standards. Especially given Barclays's assurances that it would conduct extensive due diligence on all mortgage loans that backed its RMBS, a reasonable mind easily could conclude in favor of Seattle Bank.

With respect to Seattle Bank's role in IND1 and IND2, there are genuine issues as to virtually all material facts:

(1) Were the IND deals conceived in December 2007 by IndyMac and Seattle Bank, as Barclays contends, or in October 2007 by IndyMac and Barclays, as Barclays's emails prove?

(2) Who made the "reverse inquiry," Seattle Bank or IndyMac?

(3) Who structured IND1 and IND2, Seattle Bank, as Barclays contends, or Barclays itself, as its transaction manager stated clearly ("are we structuring this deal? Yes.")?

(4) Did Seattle Bank choose any, much less all, of the mortgage loans to back IND1 and IND2?

(5) If Barclays was acting on behalf of Seattle Bank, rather than on behalf of IndyMac alone, in IND1 and IND2, then why:

a. Was IndyMac, but not Seattle Bank, on Barclays's "working group" lists for the two transactions?

b. Did Barclays send IndyMac, but not Seattle Bank, the results of its due diligence on the mortgage loans, including the adverse information that Barclays decided to withhold from Moody's?

c. Did Barclays send IndyMac, but not Seattle Bank, drafts of the legal documents for the two transactions?

d. Did IndyMac, but not Seattle Bank, indemnify Barclays from any liability for untrue or misleading statements about the mortgage loans? Indeed, why did Barclays not ask Seattle Bank to indemnify it, or even tell Seattle Bank that IndyMac was indemnifying it?

The trial court erred when it glossed over these many genuine issues as to material facts and held that Barclays was entitled to judgment as a matter of law.

B. IN AN ACTION UNDER RCW 21.20.010(2), A PLAINTIFF NEED NOT PROVE THAT IT RELIED ON AN UNTRUE OR MISLEADING STATEMENT OF A MATERIAL FACT THAT THE DEFENDANT MADE IN CONNECTION WITH ITS SALE OF A SECURITY TO THE PLAINTIFF

In addition to its error in ignoring these many genuine issues of material fact, the trial court erred in concluding that a plaintiff in an action under the WSSA need even prove that it relied on an untrue or misleading statement by the defendant or that it was reasonable to do so. In reaching that conclusion, the trial court relied on the decisions of the earlier panels of the Court in *Guarino* and *Stewart.* But those decisions misinterpreted the WSSA for at least four reasons.[23]

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[23] The trial court held that a claim under RCW 21.20.010(2) requires proof of reliance. CP 352, 5339–5341. Like all questions of law, a trial court's interpretation of a statute is reviewed *de novo*. *State v. Engel*, 166 Wn.2d 572, 576 (2009); *Hartson P'ship v. Goodwin*, 99 Wn. App. 227, 231 (2000).

1. IN THE WSSA, THE LEGISLATURE INTENDED TO ELIMINATE, NOT TO IMPOSE, REQUIREMENTS TO PROVE ELEMENTS OF COMMON-LAW FRAUD LIKE RELIANCE

(a)

When the Legislature enacted the WSSA in 1959, there had already been for a quarter-century two separate and distinct remedies for making an untrue or misleading statement of a material fact in connection with the sale of a security. One, grounded in the federal Securities Act of 1933, was a strict-liability remedy. The plaintiff was required to prove only that the defendant made an untrue or misleading statement in connection with the sale of a security, but not that it relied on that statement in deciding to buy the security. The other remedy, grounded in the federal Securities Exchange Act of 1934, was a fraud-based remedy. The plaintiff had to prove the elements of the tort of fraud, including that it relied on the untrue or misleading statement. In the WSSA, the Legislature intended to preserve the strict-liability remedy and to broaden the fraud-based remedy by omitting the common-law requirements that apply to actions under the 1934 Act. Thus, the decisions in *Guarino* and *Stewart* erred in grafting the reliance requirement from the federal fraud-based statute onto the WSSA, a strict-liability statute.

(b)

The strict-liability remedy was created by section 12(2) of the Securities Act of 1933 (later renumbered section 12(a)(2)). Congress provided that:

> Any person who –
>
> . . .
>
> (2) offers or sells a security ... by means of a prospectus or oral communication, which includes 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 (the purchaser not knowing of such untruth or omission) and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, 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 12(a)(2) expressly creates a private right of action for the purchaser of a security. Moreover, under section 12(a)(2), liability is strict. The plaintiff must prove only that the defendant sold the security by means of one or more untrue or misleading statements of material fact. A plaintiff need not prove any element of fraud other than falsity. In particular, the courts are unanimous and always have been that under section 12(a)(2), a plaintiff need not prove that it relied on the untrue or misleading statement. The Supreme Court of the United States and the federal Courts of Appeals for the First, Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have all so held.[24]

The fraud-based remedy was created by section 10(b) of the Securities Exchange Act of 1934. It states:

> 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.

In 1942, the SEC adopted its Rule 10b-5 under section 10(b). Rule 10b-5 states:

> 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

[24] *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561 (1995); *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194 (1st Cir. 1996); *Tongue v. Sanofi*, 816 F.3d 199 (2d Cir. 2016); *Caviness v. Derand Res. Corp.*, 983 F.2d 1295 (4th Cir. 1993); *Rosenzweig v. Azurix Corp.*, 332 F.3d 854 (5th Cir. 2003); *Wright v. Nat'l Warranty Co., L.P.*, 953 F.2d 256 (6th Cir. 1992); *In re NationsMart Corp. Secs. Litig.*, 130 F.3d 309 (8th Cir. 1997); *Miller v. Thane Int'l, Inc.*, 519 F.3d 879 (9th Cir. 2007); *United Food and Commercial Workers Union Local 880 Pension Fund v. Chesapeake Energy Corp.*, 774 F.3d 1229 (10th Cir. 2014); *Currie v. Cayman Res. Corp.*, 835 F.2d 780 (11th Cir. 1988).

(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.

Unlike section 12(a)(2) of the 1933 Act, section 10(b) of the 1934 Act does not expressly create a private right of action. Starting in 1946, however, courts began to imply a private right of action under section 10(b) and Rule 10b-5.[25] Liability under section 10(b) and Rule 10b-5 is not strict. In *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197, 212–13 (1976), the Supreme Court held that, because section 10(b) uses the terms "manipulative" and "deceptive," that section (and Rule 10b-5, which cannot be broader than the section that authorized the SEC to promulgate it) proscribes only "knowing or intentional misconduct." In succeeding years, the Supreme Court "has drawn on the common-law action of deceit to identify six elements a private plaintiff must prove" in an action under section 10(b) or Rule 10b-5.[26] "Reliance upon [the] ... misrepresentation or omission" is one of those elements.

(c)

In 1956, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Securities Act (which, with some changes,

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[25] *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975).

[26] *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, n. 1 (2014). Those elements are: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Id.* (internal citations omitted).

the Legislature adopted as the WSSA in 1959). The Act maintained the two separate and independent remedies—one strict-liability, the other fraud-based—for making an untrue or misleading statement of a material fact in connection with the sale of a security. Section 410(a) of the Uniform Act is the counterpart of section 12(a)(2) of the 1933 Act and provides the strict-liability remedy.[27] Section 101 is the counterpart of

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[27] Section 410(a) states:

> Any person who ... (2) offers or sells a security by means of any untrue statement of a material fact or any omission 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 buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at (x) percent per year 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 and any income received on it, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at (x) percent per year from the date of disposition.

section 10(b) of the 1934 Act and Rule 10b-5 and provides the fraud-based remedy.[28]

(d)

The Legislature treated liability for untrue or misleading statements in two sections of the WSSA:

> **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

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[28] Section 101 states:

> 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.

> 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.

Barclays may argue that, because RCW 21.20.010 is identical to SEC Rule 10b-5, the Legislature intended to provide only the fraud-based remedy for untrue or misleading statements found in the 1934 Act and to omit the strict-liability remedy of the 1933 Act. But that argument is wrong for at least three reasons.

First, the Washington Supreme Court has held repeatedly that these sections of the WSSA are based not only on section 10(b) of the 1934 Act and SEC Rule 10b-5, but also on section 12(a)(2) of the 1933 Act and the Uniform Securities Act, both of which provide for strict liability.[29]

Second, the language of RCW 21.20.010(2) (and of Rule 10b-5(b) and section 101(2) of the Uniform Securities Act) is identical to the language of section 12(a)(2) of the 1933 Act.

Section 12(a)(2) of the 1933 Act	**RCW 21.20.010(2); Rule 10b-5(b)[30]; Section 101(2) of the Uniform Securities Act**
Any person who – … offers or sells a security … by means of a prospectus or oral communication, which includes 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 …	It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly … [t]o 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 Legislature used this language only once not because it intended to provide only a fraud-based remedy, but rather because it intended to make clear that there was a private right of action for the violation of all three

[29] *See Kinney v. Cook*, 159 Wn.2d 837, 843 (2007) (1934 Act); *Go2Net,* 158 Wn.2d at 257 (Uniform Securities Act); *Cellular Eng'g, Ltd. v. O'Neill*, 118 Wn.2d 16, 23–24 (1991) (same); *Hoffer*, 113 Wn.2d at 151–52 (section 12(a)(2) of the 1933 Act); *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 125 (1987) (section 12(a)(2) of the 1933 Act and section 410 of the Uniform Securities Act); *Clausing v. DeHart*, 83 Wn.2d 70, 72 (1973) (1934 Act).

[30] The quoted text in the chart above is from RCW 21.20.010(2) and Section 101(2) of the Uniform Securities Act. The very minor differences between SEC Rule 10b-5(b) and the language quoted in the chart are immaterial to this appeal.

subparts of RCW 21.20.010, not just RCW 21.20.010(2), which is the counterpart of section 12(a)(2). As the Legislature provided in RCW 21.20.430(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 …" (emphasis added). Thus, it was not necessary to use the language quoted above in two separate sections, one that created a private right of action and a second that did not.

Third and most important, the Legislature actually did the opposite of omitting the strict-liability remedy in favor of a fraud-based remedy. It turned the fraud-based remedy of section 10(b) and Rule 10b-5 into a strict-liability remedy by omitting requirements based on the common law of fraud, such as scienter, reliance, causation, and loss. In *Ludwig v. Mutual Real Estate Investors*, 18 Wn. App. 33, 40–41 (1977), Division Two held on the strength of the United States Supreme Court's decision in *Ernst & Ernst v. Hochfelder* that the WSSA prohibits common-law fraud and thus that all elements of common-law fraud, including scienter, are also elements of claims under the WSSA. The Washington Supreme Court overruled *Ludwig* in *Kittilson v. Ford*, 93 Wn.2d 223, 225–27 (1980). The rationale of *Hochfelder*, it noted, was that the terms "manipulative" and "deceptive" in section 10(b) of the 1934 Act limit the scope of SEC Rule 10b-5 thereunder to "knowing or intentional misconduct." *Hochfelder*, 425 U.S. at 197. But the WSSA contains no counterpart to section 10(b), so the scope of RCW 21.20.010 is not so limited.

> We believe the holding in Ernst & Ernst v. Hochfelder, supra, inapplicable to our Securities Act. 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.

Kittilson, 93 Wn.2d at 226.

Since the decision in *Kittilson*, the Washington Supreme Court has held that various other elements of common-law fraud, such as loss and causation, do not apply in actions under any section of the WSSA. Ironically, one of these decisions is *Hines v. Data Line Systems, Inc.*, 114 Wn.2d 127, 134 (1990), on which the earlier panels of this Court relied in their decisions in *Guarino* and *Stewart. See* point IV.B(4) below. What the Supreme Court actually decided in *Hines* was that the common-law requirements of loss and causation do not apply to actions under the WSSA. 114 Wn.2d at 134–35. In an opinion after the 2004 decisions in *Guarino* and *Stewart*, the Supreme Court again rejected the imposition of common-law requirements on actions under the WSSA. In *Go2Net,* it wrote that "[t]he Act thus requires only proof of the seller's material, preclosing misrepresentation or omission." 158 Wn.2d at 253. It said nothing about any requirement to prove reliance. On the contrary, the Supreme Court held that the common-law elements of intent to defraud, loss, and causation have no place in actions under the WSSA. Rather, it held, the Legislature intended "to hold violators strictly accountable." *Id.* at 254 (internal quotation marks omitted).

2. THE VAST MAJORITY OF STATES REJECT ANY REQUIREMENT TO PROVE RELIANCE IN ACTIONS UNDER THEIR SECURITIES LAWS. THE DECISIONS IN *GUARINO* AND *STEWART* CONTRADICT THE SETTLED LAW THAT THE WSSA SHOULD BE INTERPRETED CONSISTENTLY WITH THE LAWS OF SISTER STATES

At least 21 states have rejected a reliance requirement under their counterparts to the WSSA; only two states impose that requirement. The supreme courts of California,[31] Connecticut,[32] Massachusetts,[33] Nebraska,[34] New Jersey,[35] South Carolina,[36] Tennessee,[37] Utah,[38] and Wisconsin[39] all have rejected any requirement to prove reliance in actions under the counterpart statutes of the WSSA in their states.

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[31] *Diamond Multimedia Sys., Inc. v. Superior Ct. of Santa Clara Cnty.*, 968 P.2d 539 (Cal. 1999).

[32] *Conn. Nat'l Bank v. Giacomi*, 699 A.2d 101 (Conn. 1997).

[33] *Marram v. Kobrick Offshore Fund, Ltd.*, 809 N.E.2d 1017 (Mass. 2004).

[34] *DMK Biodiesel, LLC v. McCoy*, 859 N.W.2d 867 (Neb. 2015).

[35] *Kaufman v. i-Stat Corp.*, 754 A.2d 1188 (N.J. 2000).

[36] *Bradley v. Hullander*, 249 S.E.2d 486 (S.C. 1978).

[37] *Green v. Green*, 293 S.W.3d 493 (Tenn. 2009). Interestingly, the Tennessee Supreme Court criticized the decision of a lower court that had relied on *Guarino* to hold that there is a reliance requirement. *Green v. Green*, No. M2006-02119-COA-R3-CV, 2008 WL 624860 (Tenn. Ct. App. Mar. 5, 2008), *aff'd*, 293 S.W.3d 493 (Tenn. 2009).

[38] *Gohler v. Wood*, 919 P.2d 561 (Utah 1996).

[39] *Esser Distrib. Co., Inc. v. Steidl*, 437 N.W.2d 884 (Wis. 1989).

Intermediate state appellate courts and federal courts have decided the same under the laws of Arizona,[40] Colorado,[41] Illinois,[42] Indiana,[43] Kentucky,[44] Missouri,[45] Ohio,[46] Oklahoma,[47] Oregon,[48] Pennsylvania,[49] Texas,[50] and Virginia.[51] Other than Washington (as its law was interpreted by the earlier panels in *Guarino* and *Stewart*), only Georgia[52] and North Carolina[53] law require a plaintiff to prove reliance, and those interpretations were reached not by the supreme courts of those states but by an intermediate appellate court 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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[40] *Rose v. Dobras*, 128 Ariz. 209 (1981); *Facciola v. Greenberg Traurig LLP*, 281 F.R.D. 363 (D. Ariz. 2012).

[41] *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). *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095 (Colo. 1995), which was relied on in *Huffman v. Westmoreland Coal Co.*, 205 P.3d 501 (Colo. Ct. App. 2009), is not to the contrary for the reasons explained in *FDIC v. Countrywide Fin. Corp.*

[42] *Nat'l Credit Union Admin. Bd. v. RBS Secs. Inc.*, 112 F. Supp. 3d 61 (S.D.N.Y. 2015); *JJR, LLC v. Turner*, No. 1–14–3051, 2016 WL 3569867 (Ill. App. Ct. June 30, 2016).

[43] *Arnold v. Dirrim*, 398 N.E.2d 426 (Ind. Ct. App. 1979); *Wisconics Eng'g, Inc. v. Fisher*, 466 N.E.2d 745 (Ind. Ct. App. 1984); *Landeen v. PhoneBILLit, Inc.*, 519 F. Supp. 2d 844 (S.D. Ind. 2007); *Supernova Sys., Inc. v. Great American Broadband, Inc.*, Cause No. 1:10–CV–319, 2012 WL 860408 (N.D. Ind. Mar. 12, 2012).

[44] *Carothers v. Rice*, 633 F.2d 7 (6th Cir. 1980).

[45] *Alton Box Board Co. v. Goldman, Sachs & Co.*, 560 F.2d 916 (8th Cir. 1977).

[46] *Murphy v. Stargate Defense Sys. Corp.*, 498 F.3d 386 (6th Cir. 2007); *Stuckey v. Online Res. Corp.*, 909 F. Supp. 2d 912 (S.D. Ohio 2012).

[47] *Midamerica Fed. Sav. & Loan Ass'n v. Shearson/American Express Inc.*, 886 F.2d 1249 (10th Cir. 1989).

of those states which enact it and to coordinate the interpretation and administration of this chapter with the related federal regulation." The Washington Supreme Court has often done just that. *Kinney*, 159 Wn.2d at 843; *Cellular Engineering*, 118 Wn.2d at 23–24; *Kittilson*, 93 Wn.2d at 227. By putting Washington in the tiny minority of states that imposes a reliance requirement, the decisions in *Guarino* and *Stewart* did the opposite.

3. THE DECISION OF THE TRIAL COURT VIOLATES THE LONG-STANDING JURISPRUDENCE OF THE WASHINGTON SUPREME COURT AND THIS COURT THAT THE WSSA IS TO BE INTERPRETED TO PROTECT INVESTORS

The most fundamental principle in the jurisprudence of the WSSA is that the Act is to be interpreted to protect investors. *See FutureSelect*

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[48] *Everts v. Holtmann*, 667 P.2d 1028 (Or. Ct. App. 1983).

[49] *Kronenberg v. Katz*, 872 A.2d 568 (Del. Ch. 2004); *Gilliland v. Hergert*, No. 2:05-cv-01059, 2008 WL 2682587 (W.D. Pa. July 1, 2008); *Fulton Fin. Advisors v. NatCity Invs., Inc.*, Civil Action No. 09–4855, 2013 WL 5635977 (E.D. Pa. Oct. 15, 2013).

[50] *Wood v. Combustion Eng'g, Inc.*, 643 F.2d 339 (5th Cir. 1981); *Granader v. McBee*, 23 F.3d 120 (5th Cir. 1994); *Weatherly v. Deloitte & Touche*, 905 S.W.2d 642 (Tex. Ct. App. 1995), *abrogated on other grounds by Tracker Marine, L.P. v. Ogle*, 108 S.W.3d 349 (Tex. Ct. App. 2003); *Hendricks v. Thornton*, 973 S.W.2d 348 (Tex. Ct. App. 1998); *Geodyne Energy Income Prod. P'ship I-E v. The Newton Corp.*, 97 S.W.3d 779 (Tex. Ct. App. 2003), *rev'd in part on other grounds*, 161 S.W.3d 482 (Tex. 2005).

[51] *Dunn v. Borta*, 369 F.3d 421 (4th Cir. 2004); *Kin-Sing Au. M.D. v. ADSI, Inc.*, 74 Va. Cir. 219 (2007).

[52] *Patel v. Patel*, 761 F. Supp. 2d 1375 (N.D. Ga. 2011); *Keogler v. Krasnoff*, 601 S.E.2d 788 (Ga. Ct. App. 2004); *GCA Strategic Inv. Fund, Ltd. v. Joseph Charles & Assocs., Inc.*, 537 S.E.2d 677 (Ga. Ct. App. 2000).

[53] *Jadoff v. Gleason*, 140 F.R.D. 330 (M.D.N.C. 1991).

Portfolio Management, Inc. v. Tremont Group Holdings, Inc., 180 Wn.2d 954, 970–71 (2014) (collecting authorities). By imposing a reliance requirement that is nowhere to be found in the WSSA itself, *Guarino* and *Stewart* do not protect investors, but rather burden them with a requirement that the Legislature intended not to impose.

4. THE STATEMENT OF THE WASHINGTON SUPREME COURT THAT *GUARINO* AND *STEWART* RELIED ON WAS DICTUM, WHICH THE PREVIOUS PANELS OF THIS COURT WERE NOT REQUIRED TO FOLLOW AND SHOULD NOT HAVE FOLLOWED

The decisions of the previous panels of this Court in *Guarino* and *Stewart* rest entirely on the following sentence in the opinion of the Washington Supreme Court in *Hines v. Data Line Systems, Inc.*: "The investors need only show that the misrepresentations were material and that they relied on the misrepresentations in connection with the sale of the securities." 114 Wn.2d at 134. This statement was dictum only. The quoted sentence was neither necessary to decide the case, nor relevant to the issues before the Supreme Court. "Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed." *In re Domingo*, 155 Wn.2d 356, 366 (2005) (internal citation omitted). Indeed, as was argued above, what the Supreme Court actually decided in *Hines* was inconsistent with any requirement to prove reliance in an action under the WSSA.

V. CONCLUSION

The trial court overlooked a host of genuine issues as to material facts about whether Seattle Bank acted reasonably in relying on the statements that Barclays made in its offering documents. It therefore erred in granting summary judgment to Barclays. Moreover, there is no requirement to prove reliance in an action under RCW 21.20.010(2). For either or both of these reasons, this Court should reverse the judgment of the trial court and remand this action for trial.

Dated: February 23, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, I caused a copy of the foregoing Appellant's Opening Brief to be served *via email* upon the attorneys of record listed below:

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I hereby certify, under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

DATED: February 23, 2017 at Seattle, Washington.

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