Case No. 21-35896

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TEN BRIDGES, LLC, a foreign limited liability company,

Plaintiff–Appellant,

v.

MIDAS MULLIGAN, LLC, a Washington limited liability company, MADRONA LISA, LLC, a Washington limited liability company, DANIELLE GORE, an individual and MATTHEW A. TOTH,

Defendants–Appellees.

On Appeal From
United States District Court for the Western District of Washington
Honorable James L. Robart
Case No. 2:19-cv-01237-JLR

AMICUS CURIAE BRIEF OF NORTHWEST CONSUMER LAW CENTER SUPPORTING APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Northwest Consumer Law Center is a 501(c)(3) non-profit corporation with no affiliation to any other corporation.

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I. IDENTITY AND INTEREST OF THE AMICUS CURIAE

The Northwest Consumer Law Center ("NWCLC") zealously advocates, litigates, and promotes access to justice for low- and moderate-income clients, and through its education programs, empowers consumers with the knowledge and resources to protect their rights. Since opening its doors in January 2013, NWCLC has served thousands of Washingtonians facing foreclosure, unfair debt collection practices, and other consequences of financial hardship. NWCLC regularly brings claims on behalf of consumers under Washington's Consumer Protection Act ("CPA"). The district court's ruling that the "good faith" defense does not apply to per se violations of the CPA should be affirmed and will benefit future clients of NWCLC and consumers generally. NWCLC participated as amicus in the Washington State Court of Appeals in the related state court litigation. *See Ten Bridges, LLC v. Guandai*, 474 P.3d 1060, 1063 (Wash. Ct. App. 2020).

This brief was authored solely by NWCLC's counsel on a pro bono basis. No party's counsel authored any part of this brief or contributed money intended to fund preparation or submission of this brief. No person other than NWCLC and its counsel contributed any money

intended to fund preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E). Counsel for Appellees is a former member of the board of NWCLC and is a NWCLC donor, but has not contributed any money to NWCLC intended to fund the preparation or submission of this brief.

Appellant does not consent to the filing of this brief. Appellees do consent. NWCLC has filed a motion for leave to file the brief concurrent with the filing of the brief. Fed. R. App. P. 29(a)(3).

II. INTRODUCTION

Washington's Uniform Unclaimed Property Act makes it unlawful to charge more than five percent of any amount recovered as fees under a contract "for locating or purporting to locate any property" held by a county "that are proceeds from a foreclosure for delinquent property taxes, assessments, or other liens." Wash. Rev. Code § 63.29.350(1). The purpose of the statute is to "protect consumers" by "prohibiting fund-finders from using their knowledge of the location of surplus funds held by a county following foreclosure to enrich themselves at the expense of the individuals entitled to the funds." *Ten Bridges, LLC v. Guandai*, 474 P.3d 1060, 1068 (Wash. Ct. App. 2020). Violation of the Act is a criminal misdemeanor, *id.*, and is also a per se unfair or deceptive act or practice

under the Washington Consumer Protection Act ("CPA"). *See* Wash. Rev. Code § 63.29.350(2) (violation of the Act "is an unfair or deceptive act in trade or commerce and an unfair method of competition for the purpose of applying the consumer protection act, chapter 19.86 RCW.").

Washington's court of appeals held that Ten Bridges' contracts with Washington homeowners violated Washington's Uniform Unclaimed Property Act. *Guandai*, 474 P.3d at 1069–70. This case began with Ten Bridges' further attempt to enforce and profit from those unlawful contracts by suing Appellees. It is undisputed in this Court that Ten Bridges' conduct violated Washington's Uniform Unclaimed Property Act and was therefore a per se unfair or deceptive act under the CPA.

The determinative question before this Court is whether the district court was correct in predicting that the Washington Supreme Court would hold that Ten Bridges may not avoid liability for its per se CPA violations by claiming that it acted in good faith based on a reasonable interpretation of existing law. NWCLC offers additional authority and argument explaining why the district court's prediction on an unsettled question of Washington law was correct. NWCLC argues that if this Court has any question about the correctness of the district court's

prediction, that question should be certified to the Washington Supreme Court. NWCLC joins the Appellees' arguments that the attorneys' fees they were awarded below are a cognizable injury under the CPA.

III. ARGUMENT

A. The district court correctly resolved an unsettled question of state law when it ruled that there is no "good faith" defense to a per se CPA violation.

The Washington Supreme Court first held that "acts or practices performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law" in *Perry v. Island Saving & Loan Association*, 684 P.2d 1281, 1289 (Wash. 1984). A footnote at the end of the paragraph discussing the good faith defense suggests that application of the defense may differ when the plaintiff alleges a per se violation of the CPA. *See id.* at 1290 n.9 (explaining that the case does not involve alleged per se CPA violations: "Nor does [the defendant's conduct] constitute a per se violation of the consumer protection law" and "any claim of a per se violation is unfounded"). The *Perry* footnote does not resolve the question of whether per se CPA violations are subject to the good faith defense, but it shows that the question is unsettled.

There has been relatively little development of the good faith defense to CPA claims in the decades since the Washington Supreme Court adopted the defense. *Perry* was decided two years before the Washington Supreme Court's watershed decision in *Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Company,* 719 P.2d 531, 535 (Wash. 1986). *Hangman Ridge* is the decision that adopted the five elements of a CPA claim and in doing so it emphasized that the elements of the claim are "statutorily based." *Id.* ("Hereafter five elements, all statutorily based, must be established by a plaintiff in order that he or she prevail under a private CPA action."). *Hangman Ridge* says nothing about a good faith defense to CPA claims. And *Perry* does not identify any statutory text as the basis for a good faith defense. 684 P.2d at 1289.

Since *Perry*, the Washington Supreme Court has discussed the defense in only two cases, both of which involved alleged bad faith denials of insurance coverage. *See Mulcahy v. Farmers Ins. Co. of Wash.*, 95 P.3d 313 (Wash. 2004); *Leingang v. Pierce Cnty. Med. Bureau, Inc.*, 930 P.2d 288 (Wash. 1997).

The majority of appellate court decisions discussing the defense also arise in the insurance context. *See Courchaine v. Commonwealth*

Land Title Ins., Co., 296 P.3d 913, 924–25 (Wash. Ct. App. 2012) (discussing insurance bad faith and the CPA—not addressing any per se claim); *Shields v. Enterprise Leasing Co.*, 161 P.3d 1068, 1074 (Wash. Ct. App. 2007) (noting existence of defense but not applying it—finding no insurance coverage for plaintiff's claims); *Capeluoto v. Valley Forge Ins. Co.*, 990 P.2d 414, 422 (Wash. Ct. App. 1999) (concluding insurer did not act in bad faith); *Seattle Pump Co. v. Traders & Gen. Ins. Co.*, 970 P.2d 361, 366–67 (Wash. Ct. App. 1999) (no bad faith where insurer denied coverage because policy was cancelled before loss). There is very little guidance from Washington state courts on application of a good faith defense to CPA claims outside of the insurance bad faith context.

Contrary to Ten Bridges' argument (opening brief at 11-13), neither *Leingang v. Pierce County Medical Bureau, Inc.*, nor *Cox v. Lewiston Grain Growers, Inc.*, 936 P.2d 1191 (Wash. Ct. App. 1997) apply the good faith defense to per se violations of the CPA.

Dennis Leingang was injured in a car accident. *Leingang*, 930 P.2d at 290. He had both car insurance and a prepaid medical plan provided by a heath care service contractor. *Id.* Leingang challenged an exclusion in his health care service contract for medical expenses covered by a car

insurance policy. *Id.* at 290–91. After his health care service contractor denied coverage, the Washington Supreme Court held such exclusions could be enforced only to preclude double recovery for medical expenses. *Id.* at 292.

Leingang made three separate challenges under the CPA to the denial of coverage. First, he claimed per se violations based on failure to follow insurance regulations. The court held that some of the cited regulations do not apply to the health care service contractor and that the service contractor did not violate any of the regulations that did apply to it. The opinion contains no discussion of the good faith defense applying to those alleged per se CPA violations. *Id.* at 297–298. Second, Leingang claimed the service contractor failed to comply with directives of the Insurance Commissioner. The court disagreed, again without any discussion of good faith. *Id.* at 298–99. Third, Leingang argued that the service contractor failed to make a reasonable investigation before denying coverage, a non-per se CPA claim. *Id.* at 299–300. Indeed, the court was clear that "Mr. Leingang has cited no statute which prohibited the use of such an exclusion." *Id.* at 299. Statutes are the source of per se CPA violations. *See Hangman Ridge*, 719 P.2d at 538 ("A per se unfair

trade practice exists when a statute which has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce has been violated."). The court's conclusion that the health care provider relied in good faith on a series of earlier court decisions ruling that its exclusion was valid and enforceable, *Leingang*, 930 P.2d at 299, has no bearing on the question here because that discussion was not related to any of the per se violations Leingang alleged.

In *Cox v. Lewiston Grain Growers*, the court of appeals concluded that Lewiston Grain Growers violated Washington's Seed Act, but the opinion does not say that the Seed Act contains a Legislative declaration that violations of it are per se unfair or deceptive acts under the CPA. 936 P.2d at 1200. That is because the Seed Act has no Legislative declaration that violations are per se unfair or deceptive, like the one that is found Washington's Uniform Unclaimed Property Act. Instead, the *Cox* decision says that the public interest element alone was satisfied per se as a result of the Seed Act violation. *Id.* ("Since LGG violated the Seed Act, the public interest element is met."). By its plain terms, the good faith defense applies to the unfair or deceptive acts or practices element of a CPA claim, not the public interest impact element. *See Perry*, 684

P.2d at 1289 ("acts or practices performed in good faith under an arguable interpretation of existing law *do not constitute unfair conduct* violative of the consumer protection law") (emphasis added).

In *Perry*, the court explained that whether the defendant's conduct was permitted was a question of first impression and that "such conduct *in a single case attempting to determine the legal rights and responsibilities of both parties* should not be considered unfair in the context of consumer protection law." *Perry*, 684 P.3d at 1289 (emphasis added). In contrast, here Ten Bridges persisted in seeking an outsized share of surplus funds to which homeowners were entitled, even after a state superior court ruled its contracts unlawful. The Washington Supreme Court's decision does not support application of the good faith defense adopted in *Perry* to the per se violations at issue here.

The district court correctly recognized that whether the good faith defense applies to per se violations of the CPA has not been resolved by the Washington Supreme Court. ER 25. The district court therefore predicted how the Washington Supreme Court would resolve the question, as required under this Court's precedent. ER 25 (citing

Gravquick A/S v. Trimble Navigation Int'l, Ltd., 323 F.3d 1219, 1222 (9th Cir. 2003)).

1. The district court's prediction that the Washington Supreme Court would rule the good faith defense does not apply to per se violations is correct.

Washington's Consumer Protection Act is construed "liberally" in order to "protect the public and foster fair and honest competition." Wash. Rev. Code § 19.86.920.

The court has reiterated this command in favor of statutory construction that favors CPA coverage in numerous recent cases. In *Thornell v. Seattle Service Bureau, Inc.* the court answered certified questions about extraterritorial application of the CPA in favor of coverage, explaining, "The language of the CPA evinces a broad, rather than narrow, lens through which we interpret the statute." 363 P.3d 587, 590 (Wash. 2015); *see also Young v. Toyota Motor Sales, U.S.A.*, 472 P.3d 990, 992 (Wash. 2020) (explaining: "'Buyer beware' is not the law in the State of Washington," and holding plaintiff is not necessarily required to show unfair or deceptive practice was material).

As a result of the CPA's liberal construction requirement, exceptions to the statute—even those that are express in the text of that

statute—are construed "narrowly." *Vogt v. Seattle-First Nat'l Bank*, 817 P.2d 1364, 1370 (Wash. 1991) ("'Liberal construction' is a command that the coverage of the act's provisions in fact be liberally construed and that its exceptions be narrowly confined."). The Washington Supreme Court's command that express exceptions be narrowly confined must apply with equal if not greater force to the judge-made good faith defense, which is not rooted in the text of the statute.

Indeed, when faced with an argument that would have expanded the good faith defense, the Washington Supreme Court refused to do so, holding that it is error to imply that "acts under an arguable interpretation of existing law are, as a matter of law, always performed in good faith." *Mulcahy v. Farmers Ins. Co. of Wash.*, 95 P.3d 313, 320 2004). The court clarified that the defense essentially has two elements: (1) that there is an "arguable interpretation of existing law"; and (2) that the defendant acted in good faith on the basis of the arguable interpretation, which is a question of fact. *Id.*

There is no Washington authority suggesting that a defendant may simply rely on its own interpretation of state law and offer the good faith defense if its conduct is ultimately deemed unfair or deceptive under the

CPA. And for good reason. Such a rule would be in significant tension with the Washington Supreme Court's repeated admonition that because the CPA does not define unfair or deceptive, the court has "allowed the definitions to evolve through a gradual process of judicial inclusion and exclusion." *Klem v. Wash. Mut. Bank*, 295 P.3d 1179, 1186 (Wash. 2013). Allowing a defendant to claim the benefit of the good faith defense simply because an act or practice is included in the definition of unfair for the first time would create a gaping hole in the CPA. And allowing a defendant to claim the defense when the defendant has committed a per se violation of the CPA would create a canyon in the statute's protections that is not warranted by anything in its text or purpose.

For all those reasons, the district court was correct in concluding as a matter of law that the good faith defense does not apply to alleged per se violations of the CPA. Accordingly, NWCLC requests that this Court affirm the district court's ruling that there is no good faith defense to a per se violation of the Washington Consumer Protection Act.

2. <u>If this Court questions the correctness of the district court's prediction, it should certify the question to the Washington Supreme Court.</u>

As discussed, there is no Washington Supreme Court authority addressing whether the good faith defense applies to a per se violation of the CPA. Because that is a question of Washington state law and is a pure question of law dispositive of this litigation, it should be certified to the Washington Supreme Court if this Court has any question about the answer. Indeed, the fact that federal district court judges have ruled both ways on whether per se violations of the CPA are subject to the good faith defense demonstrates the need for a definitive ruling from the Washington Supreme Court on the question.

Under Washington Revised Code section 2.60.020:

> When in the opinion of any federal court before whom a proceeding is pending, it is necessary to ascertain the local law of this state in order to dispose of such proceeding, and the local law has not been clearly determined, such federal court may certify to the supreme court the question of local law involved . . . .

Washington Revised Code section 2.60.030 sets out the certification procedure. A federal court should certify a question of state law to the Washington Supreme Court to obtain a definitive answer where the question is (1) necessary to dispose of the federal court proceeding and

(2) "not entirely settled" under Washington law. *Cornhusker Cas. Inc. Co. v. Kachman*, 514 F.3d 982, 988–89 (9th Cir. 2008); *Keystone Land & Dev. Co. v. Xerox Corp.*, 353 F.3d 1093, 1098 (9th Cir. 2003). The federal court may also consider whether the answer to the question "will have far-reaching effects" on individuals subject to Washington law. *Keystone*, 353 F.3d at 1098. All of these factors favor certification of the following important and unsettled question regarding the scope of any "good faith" defense to claims under Washington's CPA: Does the good faith exception to the CPA apply when the alleged unfair or deceptive act or practice is a per se violation of the Consumer Protection Act, Wash. Rev. Code § 19.86 *et seq*.?

In *Perry*, the court explained that whether the defendant's conduct was permitted was a question of first impression and that "such conduct *in a single case attempting to determine the legal rights and responsibilities of both parties* should not be considered unfair in the context of consumer protection law." *Perry*, 684 P.3d at 1289 (emphasis added). In contrast, Ten Bridges persisted in seeking to redeem homeowners' equity even after a state superior court ruled its contracts unlawful.

B. The attorneys' fees Madrona incurred defending itself from Ten Bridges' improper attempt to seize a homeowner's equity are an injury under the CPA.

NWCLC agrees that Ten Bridges waived any argument that Madrona's attorney fees are not an injury cognizable under the CPA. *See* ER 22–23 ("Ten Bridges does not dispute Madrona's proof of any of the five elements of its WCPA claim"). If the Court considers the issue, it should affirm the district court for the reasons set out in Madrona's brief. *See* Resp. at 33-37.

IV. CONCLUSION

For the foregoing reasons, amicus respectfully requests that the Court affirm the district court's ruling that there is no "good faith" defense to a per se violation of the Washington Consumer Protection Act and the judgment.

RESPECTFULLY SUBMITTED AND DATED this 20th day of April, 2022.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 3,056 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook.

DATED this 20th day of April, 2022.

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CERTIFICATE OF SERVICE

I, Blythe H. Chandler, certify that on April 20, 2022, I electronically filed the document entitled *AMICUS CURIAE* BRIEF OF NORTHWEST CONSUMER LAW CENTER with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF System.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 20th day of April, 2022.

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