NOT FOR PUBLICATION

FILED

NOV 17 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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; et al., Defendants-Appellees.	No. 21-35896 21-35921 D.C. No. 2:19-cv-01237-JLR MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
James L. Robart, District Judge, Presiding

Argued and Submitted October 21, 2022
Seattle, Washington

Before: R. NELSON, FORREST, and SUNG, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Plaintiff-Appellant Ten Bridges, LLC ("Ten Bridges") appeals from the district court's order granting summary judgment and subsequent order granting fees to Defendant-Appellee Madrona Lisa, LLC ("Madrona Lisa") on its Washington Consumer Protection Act (WCPA) counterclaim, Washington Revised Code § 19.86.020. We review de novo the district court's determination of state law. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991). Whether Madrona Lisa sufficiently alleged the injury element of its WCPA claim is a mixed question of law and fact, *see Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982), which we review de novo because our inquiry is primarily legal, *see United States v. Lang*, 149 F.3d 1044, 1047 (9th Cir. 1998). We review the district court's decision to allow a party to file an amended pleading for abuse of discretion. *See Metrophones Telecomms., Inc. v. Glob. Crossing Telecomms., Inc.*, 423 F.3d 1056, 1063 (9th Cir. 2005). We affirm the district court on all grounds.[1]

1. We agree with the district court's conclusion that good faith is not a defense to Madrona Lisa's WCPA counterclaim.

---

[1] We grant the Northwest Consumer Law Center's (NWCLC) motion for leave to file an amicus brief over Ten Bridges' objection. NWCLC simply "takes a legal position and present[s] legal arguments in support of it, a perfectly permissible role for an amicus." *Funbus Sys. Inc. v. Pub. Utils. Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986) (citing *Miller-Wohl Co. v. Comm'r of Lab. & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982)).

A WCPA claim has five elements: (1) unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) public interest impact, (4) injury to plaintiff in their business or property, and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co*., 719 P.2d 531, 535 (Wash. 1986). A claimant may establish the first element by showing that the alleged act is a per se unfair practice. *Id.* "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." *Id.* If the alleged act is not a per se unfair practice, the claimant may alternatively establish the first element by showing that the alleged act is a de facto unfair practice, i.e., a practice that "has a capacity to deceive a substantial portion of the public." *Id.*

Madrona Lisa bases its WCPA counterclaim on Ten Bridges' violation of the Uniform Unclaimed Property Act (UUPA), Washington Revised Code § 63.29.350. Ten Bridges concedes that it violated the UUPA and that its UUPA violation is a per se unfair practice. *See* Wash. Rev. Code § 63.29.350(2). Ten Bridges only argues that it acted in good faith.[2]

[2] The parties did not address whether Madrona Lisa was within the class of people the UUPA sought to protect. *See Dempsey v. Joe Pignataro Chevrolet*, Inc., 589 P.2d 1265, 1270 (Wash. Ct. App. 1979). To the extent *Dempsey*'s reasoning applies here, we assume without deciding that Madrona Lisa satisfied this requirement.

Because the Washington Supreme Court has not addressed whether the good faith defense applies to a per se unfair practice, "we must predict as best we can" what it would hold. *Pacheco v. United States*, 220 F.3d 1126, 1131 (9th Cir. 2000). We predict that the court would find that the good faith defense does not apply in this context.

First, the Washington Supreme Court's reasoning in *Perry v. Island Savings and Loan Association*, 684 P.2d 1281, 1289–90 (Wash. 1984), indicates that it would not extend the good faith defense to a WCPA claim based on a per se unfair practice. In *Perry*, the plaintiff alleged that a savings and loan association attempted to enforce a due-on-sale clause "with full knowledge that the clause was unenforceable," and claimed that such conduct was a de facto unfair practice under the WCPA. *Id.* at 1289. The Washington Supreme Court explained that whether the alleged conduct was "unfair" under the WCPA depended on whether "the due-on-sale clause was, in fact, unenforceable," and found that the association attempted to enforce the due-on-sale clause in good faith under an arguable interpretation of existing law. *Id.* The court then reasoned that "[s]uch 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 the consumer protection law," and 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." *Id.* Importantly, the court then ruled out the claimant's alternative method for establishing the first element of its WCPA claim by noting that attempting to enforce a due-on-sale clause was not a per se unfair practice. *Id.* at 1290 n.9 ("Nor does the attempt to enforce the due-on-sale clause constitute a per se violation of the consumer protection law.").

In sum, the court in *Perry* needed to determine whether and under what circumstances a savings and loan association's enforcement of a due-on-sale clause was "unfair" because the legislature had not done so. The court's reasoning and footnote suggest that, if the legislature had declared such conduct to be per se unfair regardless of the actor's good faith, then that would have decided the issue and the association's good faith would have been irrelevant. Additionally, by considering whether the association's conduct was per se unfair even after finding that the association had acted in good faith, the court at least implied that good faith would not have been a defense if the conduct was per se unfair.

Second, section 19.86.920 of the WCPA supports our conclusion. It provides that the WCPA "shall not be construed . . . to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se." The legislature has declared that "any violation of [the UUPA] is an unfair or deceptive act in trade or commerce and an unfair method of competition for the purpose of applying the [WCPA]." Wash. Rev. Code § 63.29.350(2). The legislature did not make bad faith

an element of the UUPA violation at issue or a WCPA claim generally. Nor did the legislature provide for a good faith defense in either the UUPA or the WCPA. Because the legislature has declared that a UUPA violation is per se unfair without reference to the actor's good faith, we conclude that the Washington Supreme Court would not create a good faith exception. *See Hangman Ridge*, 719 P.2d at 536 (recognizing that the legislature "is the appropriate body to establish" the interaction between a statute and the WCPA "by declaring a statutory violation to be a per se unfair trade practice"); *see also* Wash. Rev. Code. § 19.86.920.

Lastly, general principles of per se liability also support our conclusion. A "per se" violation is one in which the outlawed act alone is sufficient "by itself" or "standing alone" to create liability, "without reference to additional facts" such as the actor's good faith. *Per se*, Black's Law Dictionary (11th ed. 2019); *see, e.g.*, *United States v. Brown*, 936 F.2d 1042, 1046 (9th Cir. 1991) ("Where *per se* conduct is found, a finding of intent to conspire to commit the offense is sufficient; a requirement that intent go further and envision actual anti-competitive results would reopen the very questions of reasonableness which the *per se* rule is designed to avoid." (citation omitted)). Washington appellate courts have generally recognized the principle that an actor's state of mind is irrelevant in the context of a per se violation. *See, e.g.*, *Bauman by Chapman v. Crawford*, 704 P.2d 1181, 1184 (Wash. 1985) ("A primary rationale for the negligence per se doctrine is that

the Legislature has determined the standard of conduct expected of an ordinary, reasonable person; if one violates a statute, he is no longer a reasonably prudent person." (citation omitted)); *see also Ballo v. James S. Black Co.*, 692 P.2d 182, 186 (Wash. Ct. App. 1984).

We disagree with Ten Bridges' contention that Washington courts have resolved this issue. Ten Bridges cites cases that apply the good faith defense to de facto (not per se) unfair practices. *See, e.g.*, *Leingang v. Pierce Cnty. Med. Bureau, Inc.*, 930 P.2d 288, 299 (Wash. 1997); *Cox v. Lewiston Grain Growers, Inc.*, 936 P.2d 1191, 1200 (Wash. Ct. App. 1997).[3] Ten Bridges also cites cases in which good faith was relevant only because it was an element of the violation (breach of good faith duty) upon which the WCPA claim was based. *See, e.g.*, *Mulcahy v. Farmers Ins. Co. of Wash.*, 95 P.3d 313, 320 (Wash. 2004); *Seattle Pump Co. v. Traders & Gen. Ins. Co.*, 970 P.2d 361, 366 (Wash. Ct. App. 1999); *Indus. Indem. Co. v. Kallevig*, 792 P.2d 520, 528–30 (Wash. 1990). Here, Madrona Lisa does not allege a de facto violation, and good faith is not an element of the UUPA violation upon which the WCPA claim is based. *See* Wash. Rev. Code § 63.29.350. Ten

[3] *Perry*, *Leingang*, and *Cox* can also be read more narrowly as applying the good faith defense only when the question of whether the defendant's practice is "unfair" depends on whether the defendant was acting unreasonably or in bad faith (not to *all* de facto unfair practices). For our purposes, it is enough that they all involve de facto unfair, and not per se unfair, violations.

Bridges' cases are thus inapposite.

2. The district court correctly held that Madrona Lisa satisfied the injury element of its WCPA claim.[4] Under Washington law, the attorney fees Madrona Lisa incurred defending against Ten Bridges' redemption action satisfy the injury element. *Panag v. Farmers Ins. Co. of Wash.*, 204 P.3d 885, 902 (Wash. 2009) ("Investigation expenses and other costs resulting from a deceptive business practice sufficiently establish injury." (citation omitted)); *see also Scott v. Am. Express Nat'l Bank*, 514 P.3d 695, 703 (Wash. Ct. App. 2022); *Blair v. Nw. Tr. Servs., Inc.*, 372 P.3d 127, 136 (Wash. Ct. App. 2016).

3. The district court neither committed legal error nor abused its discretion by permitting Madrona Lisa to assert its WCPA counterclaim in its answer to Ten Bridge's second amended complaint.[5] Amending pleadings and raising new claims constitute procedural questions, so federal law governs. *In re*

---

[4] We reject Madrona Lisa's argument that Ten Bridges waived its injury argument by failing to raise it in response to Madrona Lisa's motion for summary judgment. *Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 543 (9th Cir. 2016) ("[W]hen a party takes a position and the district court rules on it, there is no waiver.").

[5] We again reject Madrona Lisa's argument that Ten Bridges waived its procedural arguments because it did not raise them in the district court. Ten Bridges made these arguments in its motion to dismiss, and the district court ruled on them. There is no waiver. *Yamada*, 825 F.3d at 543.

Cnty. of Orange, 784 F.3d 520, 523–24 (9th Cir. 2015) (citing *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 419, 427 (1996)).

Federal Rule of Civil Procedure 13's preclusive effect applies only to claims that could have been brought in prior litigation, not claims that could have been brought earlier in the same litigation. *See Mitchell v. CB Richard Ellis Long Term Disability Plan*, 611 F.3d 1192, 1201 (9th Cir. 2010). The district court correctly concluded that Rule 13 did not preclude Madrona Lisa's counterclaim because Madrona Lisa had no right or opportunity to assert affirmative claims against Ten Bridges in any earlier action.

Nor did the district court abuse its discretion in allowing the counterclaim under Rules 15 and 16. The district court found that Madrona Lisa had good cause under Rule 16 because "Madrona filed its CPA counterclaim less than a month after [the Washington Court of Appeals] decision and within two weeks of Ten Bridges' filing of its second amended complaint." The district court allowed Madrona Lisa to bring its counterclaim under Rule 15 after properly considering the relevant factors. *See Allen v. Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990) (citing *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989)). Its decision to allow Madrona Lisa's counterclaim was not "beyond the pale of reasonable justification under the circumstances." *Estate of Diaz v. Anaheim*, 840

F.3d 592, 601 (9th Cir. 2016) (quoting *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000)).

4. The repeal of the provision of the UUPA on which Madrona Lisa bases its WCPA claim does not impact the disposition of this case. Although the Washington State Legislature acted to repeal that UUPA provision in 2022, the repeal is not effective until January 1, 2023. *See* Wash. Laws of 2022, ch. 225, §§ 1505(42), 1507. "[A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Sch. Bd.*, 416 U.S. 696, 711 (1974). Because none of the exceptions to the general rule apply here, we apply the UUPA as currently written.

AFFIRMED.