**No. 23-2835**

# In the United States Court of Appeals for the Ninth Circuit

CHARLES BOYD OLSON and JANINE OLSON,
*Plaintiffs-Appellants*,

v.

UNISON AGREEMENT CORPORATION,
*Defendant-Appellee.*

On Appeal from the United States District Court
for the Western District of Washington (Seattle)
Case No. 2:22-cv-01859-RAJ (Hon. Richard A. Jones)

## OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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## INTRODUCTION

For many older Americans who have spent their lives paying off their mortgages, their home is their financial anchor. Then, as they age, they often have trouble making ends meet as their income drops and medical or other expenses rise. That was the case for Charles Boyd Olson and Janine Olson, the plaintiffs in this case, who are in their seventies and live with an adult child with Down syndrome. Elderly homeowners in this precarious financial position—cash poor and equity rich—are often targeted for a risky financial product called a reverse mortgage.

With a reverse mortgage, a company offers to pay seniors a lump sum to cover their day-to-day expenses. The contract is secured by a deed of trust on their home, allowing the company to foreclose in the event of a default. While often advertised as "payment free," homeowners must carry insurance that meets the lender's specifications, pay for maintenance and repairs, and pay property taxes—with noncompliance resulting in a default. The reverse mortgage typically matures when one of three conditions is met: the homeowner (1) dies, (2) sells the house, or (3) moves out. At that point, the lender receives payment to recoup its investment, often in the form of equity or the appreciation of the home's value.

Reverse mortgages have shockingly high default rates. Some experts estimate that nearly *twenty percent* are at risk of default. That's because homeowners were often already having trouble making ends meet—which is why they took out the reverse

mortgage in the first place—and they can no longer cover repairs and insurance fees when the lump sum runs out. Or seniors don't understand that they are required to pay such fees because of misleading or high-pressure sales tactics. There are countless tragic stories of elderly Americans at risk of losing their homes because of a missed insurance payment, an unpaid $500 in repairs, or an unpaid municipal water bill. This is devastating not just for them, but for their children and grandchildren who will no longer inherit the family home.

Because mortgages like this are so risky, they are heavily regulated. Washington is no exception. To combat misleading advertising, homeowners must first receive independent counseling. Interest is capped, the companies must be licensed, their products must be pre-cleared by the state before they are sold to seniors, and lenders are prohibited from requiring the purchase of insurance.

Unison, the defendant here, found those regulations too burdensome. So it developed a product that is styled as a "shared investment" instead of a "reverse mortgage." This product offers homeowners a lump sum cash payment against the equity of their home. The product is secured by a deed of trust on the home. And while Unison claims you will "pay nothing until you decide to sell," homeowners must carry insurance that meets Unison's specifications, pay for maintenance and repairs, and pay taxes—with noncompliance resulting in a default. The product also matures when the homeowner (1) dies, (2) sells the house, or (3) moves out. The only

supposed difference is that when the product matures, it triggers an "option" for Unison to acquire a significant portion of the equity in the home. Based on that difference, Unison didn't obtain pre-approval before marketing its complex product directly to cash-strapped seniors, didn't ensure that they received independent counseling, didn't cap its returns, and required insurance coverage.

The Olsons purchased Unison's product after receiving a flyer in the mail. They are now trapped in a deteriorating financial situation where even selling their home would net them little to no money. As a result, the Olsons brought suit under Washington's Consumer Protection Act, on the grounds that Unison's product was either an illegal mortgage or an unlawful attempt to circumvent mortgage requirements, and that Unison's statements were deceptive.

Unison argued that because its products were "options," not mortgages, these claims failed as a matter of law. The district court, without a hearing and with only a page and a half of reasoning, agreed with Unison. That was incorrect. The Washington Consumer Protection Act's broad protections apply whether Unison's product meets the statutory definition of a mortgage or just "inventively evades regulation." *Panag v. Farmers Ins. Co. of Wash.*, 204 P.3d 885, 895 (Wash. 2009). And Unison's deceptive marketing includes exactly the kind of statements that have led federal agencies to take enforcement actions against other reverse mortgage lenders.

The judgment of the district court should be reversed.

## JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1332(a)(1) because the Olsons are citizens of Washington, while Unison is incorporated in Delaware and has a principal place of business in California. 1-ER-215. The district court granted Unison's motion to dismiss and subsequently entered judgment against the Olsons on October 6, 2023. 1-ER-3–7, 241. The Olsons timely appealed on October 17, 2023. ECF 1. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

1. Is Unison's product, which is secured by a deed of trust and carries the risk of foreclosure, an illegal unlicensed mortgage under the Washington Consumer Loan Act, RCW §§ 31.04.035, 31.04.505?

2. Even if Unison managed to avoid the letter of the Consumer Loan Act, did it violate the broader protections of the Consumer Protection Act, which prohibits practices not covered by statute that circumvent the safeguards the legislature determined were necessary to protect seniors from unfair contract terms and improper sales tactics?

3. Unison encourages consumers to purchase the product with reassuring statements such as "pay nothing until you decide to sell," "[y]ou make no payments to us until you sell," "**no interest**," "NO INTEREST CHARGES," and "you'll pay no interest with Unison," 1-ER-28—even though if homeowners fail to make

regular insurance or other payments, they must either repay Unison with interest or lose their homes. Are these and other statements likely to deceive a reasonable consumer?

4. Should the above questions, which have yet to be addressed by Washington courts and involve questions of Washington public policy, be certified to the Washington State Supreme Court—especially because these cases will inevitably be removed to federal court, depriving state courts of the chance to address these issues?

## STATEMENT OF THE CASE

### A. Reverse mortgages are risky financial products that too often result in seniors losing their homes or the equity they have spent their lives building.

Scholars, legislatures, and expert agencies have overwhelmingly concluded that reverse mortgages are risky financial products that pose a unique threat to seniors. This arises from a combination of misleading advertising practices, aggressive sales tactics, complex financial structures, and a particularly vulnerable target population who is already having trouble making ends meet. The result is that "[s]eniors face a significant risk of abuse by lenders, and the consequences of reverse mortgages can be unclear at the time of signing, but disastrous for mortgagors." *James B. Nutter & Co. v. Namahoe*, 528 P.3d 222, 236 (Haw. 2023) (citing *Reverse Mortgs.: Polishing*

*Not Tarnishing the Golden Years: Hearing Before the S. Spec. Comm. on Aging*, 110th Cong. 1 (2007)).[1]

**1.** To understand why reverse mortgages are so risky, it is necessary to understand how they work. Reverse mortgages are financial instruments that allow an individual to receive a cash payment in exchange for an interest in the equity they have developed in their homes. They are typically marketed to seniors who are "cash poor and equity rich"—usually because they have spent their lives paying their regular mortgages but are facing decreasing income and rising costs like medical bills. Reverse mortgages generally have the following key features:

**Cash advance against equity in home.** Though payout schemes can differ, a particularly risky form of reverse mortgage involves a lump sum up-front payment to an individual based on the value of their home. *See* Wash. State Dep't Fin. Insts., *How Reverse Mortgages Work*, https://perma.cc/N22N-UBN6; Nick Penzenstadler & Jeff Kelly Lowenstein, *Seniors were sold a risk-free retirement with reverse mortgages. Now they face foreclosure.*, USA Today (June 11, 2019), https://perma.cc/28FB-JSDS (describing the especially high risks of lump-sum reverse mortgages). This number will often seem high to cash-strapped seniors facing mounting bills, but the reason the number is so high is that their house is being put on the line.

[1] Unless otherwise noted, all internal quotation marks, citations, alterations, brackets, and ellipses have been omitted from quotations throughout this brief.

**Secured by a deed of trust.** A deed of trust or equivalent security in the home is used to secure the contract. *See, e.g.*, RCW § 31.04.505(5)(a). This will permit the company, in the event of a default, to effectuate a nonjudicial foreclosure of the home—in other words, without first passing through a court. 1-ER-220–22; *see also* 1-ER-141. This means that the risk to the homeowner of any default is extreme. *See, e.g.*, *Schroeder v. Excelsior Mgmt. Grp., LLC*, 297 P.3d 677, 682 (2013) (noting "the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales").

**Nonrecourse obligation.** Reverse mortgages are "nonrecourse" obligations because they are "an obligation that can be satisfied only out of the collateral securing the obligation and not out of the debtor's other assets." *Black's Law Dictionary* (11th ed. 2019); *see also* RCW § 31.04.505(5). The lender therefore cannot recoup more than the value of the individual's home. *See* Wash. State Dep't Fin. Insts., *How Reverse Mortgages Work*. If the home drops precipitously in value, such as in the wake of an economic crisis or housing market shock, the lender can lose money. To illustrate, if a lender in 2007 made an initial lump sum payment of $120,000 for a reverse mortgage on an individual's $200,000 home in Nevada, and the value of the home dropped by 60% to $80,000 during the 2008 crisis,[2] the lender

[2] CoreLogic, *Evaluating the Housing Market Since the Great Recession* 6 (Feb. 2018), https://perma.cc/8R46-RC83.

could be down $40,000 on the principal. In that sense, a reverse mortgage is a bet that a lender takes on the future value of the home.

**Triggering conditions on death, sale, or moving out.** Reverse mortgages reach maturity when the homeowner no longer lives in the home. That means there are three traditional triggering conditions: (a) the homeowner's death, (b) the homeowner's sale of the house, and (c) the homeowner no longer living in the house. At that point, the lender has a chance to recoup their investment through, for example, a certain amount of equity in the home or a share in the appreciation in the home's value. RCW § 31.04.505(5)(b); *see also, e.g.*, Kenneth R. Harney, *Beware of Appreciation-Sharing Reverse Mortgages*, L.A. Times (Jan. 20, 2002), https://perma.cc/4SBM-JYJ7. Here again, the lender could lose money based on a change in the value of the home; if repayment is structured to be contingent on the shared appreciation of the home, the lender could lose money if the home falls in value.

**Homeowners must pay for taxes, insurance, and repairs on the home, with failure to do so resulting in default.** Homeowners are required to continue paying property taxes, keep insurance on the home that meets the lender's specifications, and cover the cost of maintenance and repairs. *See How Reverse Mortgages Work*, Wash. Dep't Fin. Insts. If the homeowner fails to cover the lender's requirements, the lender can then make what are often termed "advances" to cover

these costs. *Namahoe*, 528 P.3d at 228; *see also* Sarah B. Mancini & Odette Williamson, *Reversing Course: Stemming the Tide of Reverse Mortgage Foreclosures Through Effective Servicing and Loss Mitigation*, 26 Elder L.J. 85, 100, 104 (2018). These advances can include a "force-placed" insurance policy that is "usually a lot more expensive" than what the homeowner could purchase themselves and provides even less protection for the homeowner. *See, e.g.*, N.Y. State Dep't Fin. Servs., *Force-Placed Insurance: What You Need to Know*, https://perma.cc/QBH7-7Y2F. These advances can then accrue interest in their own right. Mancini & Williamson, *Reversing Course*, 26 Elder L.J. at 104.

**2.** While reverse mortgages have some surface appeal, "[t]his transaction for cash at the expense of ownership of one's home — the largest and most significant asset most Americans possess — has significant ramifications for senior citizens, their families, and the communities in which they live." *Namahoe*, 528 P.3d at 236. That's because reverse mortgages carry serious risks—especially for seniors like the Olsons. And the risks are greatest for the most vulnerable communities of seniors. For example, "in the aftermath of the Great Recession," when "nearly one hundred thousand reverse mortgages ha[d] failed," the result was "black and working-class communities bearing the brunt of the hardship." Sam Brittingham, Note, *Aging Out of Place: The Toll of Reverse Mortgages and How to Fix the Program*, 29 Elder L.J. 149, 151 (2021). One "investigation found a sixfold increase in reverse mortgage failures

located in predominantly black neighborhoods compared to neighborhoods that are 80 percent white," "[e]ven when controlling for income." *Id.* at 158.

**a.** A significant part of the risk comes not from the loan itself but from the requirement that financially distressed homeowners continue paying for insurance, taxes, and repairs—coupled with the lender's power of foreclosure. Some experts have "projected that approximately 18% of currently outstanding federally-insured reverse mortgages will experience a property charge default." Mancini & Williamson, *Reversing Course*, 26 Elder L.J. at 87; *see also* Brittingham, *Aging Out of Place*, 29 Elder L.J. at 158.

There are several reasons for this. Reverse mortgages target seniors who are already struggling to pay mounting expenses with decreasing income, like the Olsons here. 1-ER-220. "Older adults who have taken out reverse mortgages are particularly resource-constrained" and "tend to take out these loans as a last resort, motivated by a lack of sufficient income to cover rising medical costs and other essential expenses." Mancini & Williamson, *Reversing Course*, 26 Elder L.J. at 119. Reverse mortgage companies have also disproportionately targeted homeowners in areas that have a "larger share of older homeowners [who] report difficulty covering regular expenses." Sharon E. Williams, *Reverse Mortgage Advertising Is On the Rise, CFPB Says*, Banking & Fin. Law Daily (Aug. 10, 2023), 2023 WL 5122278. Many seniors taking out reverse mortgages also have "a lack of understanding that they were required to pay

these charges." Mancini & Williamson, *Reversing Course*, 26 Elder L.J. at 102. As was the case here, "[o]lder adults being solicited for a reverse mortgage are often told that this loan is 'payment free.'" *Id.*

The shockingly high number of defaults reflects the dangerous nature of reverse mortgage products and the risk of permanent consequences. Take Willie and Rose Leland, who "had been married for over fifty years and took out a reverse mortgage" under which "[t]hey had an obligation to pay taxes and insurance on the home." Eric J. Brenner, *Reverse Mortgages and Elderly Americans: Protecting the Greatest Asset from Potentially Misleading Advertising Practices*, 80 Alb. L. Rev. 569, 573 (2017). "The Lelands defaulted on just one payment in 2013 and tried to work with the lender; however, the lender immediately sought to foreclose the home," meaning that "[a]fter working for forty-seven years, Willie Leland received a notice of eviction from his home." *Id.* Or take the "lender in New York State" that sought "to foreclose on a reverse mortgage (for a home valued at over $600,000), because the homeowner defaulted on the municipal water bill." *Id.* at 575. Or the company in Hawaii that "sought foreclosure based on [the homeowner's] alleged failure to complete $500.00 worth of repairs to his home." *Namahoe*, 528 P.3d at 227. Or the 86-year-old man who faced foreclosure of "his home of at least 55 years" where he had raised all of his children, simply because he forgot to renew his homeowner insurance. Penzenstadler & Lowenstein, *Seniors were sold a risk-free retirement with reverse mortgages.*, USA Today.

**b.** Reverse mortgages also have the risky feature that they offer a person in financial distress a cash payment today in exchange for a potentially disproportionate payout for the lender down the road. This risk is the basic reason for usury laws like those in Washington and many other states. *See, e.g.*, RCW § 19.52.020(1). The danger is especially acute if there are no caps on the return the company can receive—whether through regular interest or a payout pegged to the possible appreciation of the home.

For example, with a "shared appreciation" reverse mortgage, RCW § 31.04.505(5)(b), if the housing market improves significantly, in just a few years the company could receive equity in the home worth three or four times the initial sum it paid the homeowner—with the homeowner losing an equivalent amount of value in her home. People in financial distress are especially likely to value payments now over serious risk in the future, and research has found that the elderly are "a particularly vulnerable population" in this respect. Brenner, *Reverse Mortgages and Elderly Americans*, 80 Alb. L. Rev. at 575. Without safeguards in the form of interest caps or counseling, there is a serious risk that elderly homeowners will lose vast sums of equity in their homes in exchange for considerably smaller amounts of cash.

**c.** Not only are these products risky in themselves, but the companies that sell them often engage in misleading advertising practices and high-pressure sales tactics while targeting a particularly vulnerable population.

"Reverse mortgage agents are targeting seniors aggressively" through direct mail and door-to-door sales. *Namahoe*, 528 P.3d at 236. "The U.S. Department of Justice classifies the elderly as 'uniquely vulnerable to a broad range of exploitation and abuse.'" Brenner, *Reverse Mortgages and Elderly Americans*, 80 Alb. L. Rev. at 575. For example, the Consumer Financial Protection Bureau has repeatedly taken enforcement action against reverse mortgage lenders who "falsely told potential customers that they would have no payments" when the terms of the contract "require, among other things, paying property taxes, making homeowner's insurance payments, and paying for property maintenance." CFPB, *CFPB Takes Action Against Reverse Mortgage Companies for Deceptive Advertising* (Dec. 7, 2016), https://perma.cc/QGR4-FM28.

The result is tragic, if predictable: "many elderly individuals lose everything they have due to predatory reverse mortgage salespeople." Kerri Griffin, *Safeguarding Against Golden Opportunities*, 2 Est. Plan. & Cmty. Prop. L.J. 441, 445 (2010). This is not only devasting for older Americans themselves, but they "are deprived of the chance to pass on their homes and other property to their children and other heirs, leading to gutted city blocks, and less overall wealth." *Namahoe*, 528 P.3d at 236.

### B. Because these products jeopardize seniors' homes and equity, Washington and other states strictly regulate reverse mortgages.

"Due to the significant risks of abuse by lenders and inadequate understanding of reverse mortgage agreements by many senior citizens, reverse mortgages and foreclosures are subject to stringent rules and regulations promulgated by both federal and state authorities." *Namahoe*, 528 P.3d at 236. Washington is among those states. The 2008 financial crisis was devastating for homeowners with reverse mortgages, and the rates of foreclosure skyrocketed. Brittingham, *Aging Out of Place*, 29 Elder L.J. at 151. In the wake of the crisis, the Washington legislature passed an amendment to the Consumer Loan Act that regulates reverse mortgages. *See* 2009 Wash. Legis. Serv. Ch. 149 (H.B. 1311). The statute identifies a "[r]everse mortgage loan" through the same key features described above:

- **Cash advance against equity in home.** The consumer receives "one or more advances" against the equity in their home. RCW § 31.04.505(5).
- **Secured by a deed of trust.** The advance is secured by "[a] mortgage, deed of trust, or equivalent consensual security interest … in the borrower's dwelling." *Id.*
- **Nonrecourse.** It is "a nonrecourse consumer credit obligation." *Id.*
- **Triggering conditions on death, sale, or moving out.** Other than default, the reverse mortgage matures when: "(i) The consumer dies; (ii)

> The dwelling is transferred; or (iii) The consumer ceases to occupy the dwelling as a dwelling." RCW § 31.04.505(5)(b). This triggers the company's right to payment in the form of the "principal, interest, or shared appreciation or equity" in the home. *Id.*

When these conditions are met, Washington law provides protections that address some of the biggest risks of reverse mortgages.

*First*, the statute requires the company to connect the homeowner with counseling to guard against misleading advertising tactics and to ensure that she understands the consequences of entering into one of these complex financial arrangements. "Prior to accepting a final and complete application for a reverse mortgage loan or assessing any fees, a lender shall refer the prospective borrower to an independent housing counseling agency." RCW § 31.04.515(9). Further, the deal cannot be closed "without first receiving a certification from the applicant or the applicant's authorized representative that the applicant has received counseling." RCW § 31.04.515(10).

*Second*, the Consumer Loan Act also caps interest rates. *See* RCW §§ 19.52.020(1), 31.04.105(1). This helps ensure that when the triggering events occur, seniors do not lose vast amounts of the equity in their homes in exchange for a disproportionately small one-time payment up front. This also applies to exorbitant interest on "protective advances." 1-ER-111 § 8.10.

*Third*, the statute protects homeowners from requirements that all too often lead to default. "The borrower shall not be required, directly or indirectly, as a condition of obtaining a reverse mortgage under this section, to purchase any … insurance products." RCW § 31.04.515(8)(b); *see also* RCW § 31.04.515(7) (a lender "shall not require an applicant for a reverse mortgage to purchase … insurance … as a condition of obtaining a reverse mortgage loan"). This helps avoid the all-too-common situation where failing to keep up with such payments triggers default and the threat of foreclosure.

*Fourth*, the statute requires the lender to register and be licensed by the State. RCW § 31.04.035(1). On top of that, to make sure that the inevitably complex financial product is vetted before seniors are locked into it, there is a pre-approval requirement: "the lender of a proprietary reverse mortgage … must seek approval from the Department [of Financial Institutions] prior to offering or making a proprietary reverse mortgage." Wash. State Dep't Fin. Insts., *Proprietary Reverse Mortgages*, https://perma.cc/ZPP9-XJAE; *see also* RCW § 31.04.525.

It is important to note that Washington law does not prohibit reverse mortgages as categorically unfair. These products can, in some instances, provide a useful financial tool for seniors. Instead, Washington law makes clear that reverse mortgages sold *without certain key protections* are unfair and unlawful.

### C. Unison's "shared investment" product bears the hallmarks of a reverse mortgage and poses the same risk to homeowners.

Unison offers a "shared investment" product that is designed with almost surgical precision to have the key features of a reverse mortgage while evading Washington law. These features should by now be familiar:

- **Cash advance against equity in home**. This is called an "Investment Payment." 1-ER-80 § 1. Just like with a reverse mortgage, the payment is calibrated to the value of the homeowner's equity in their home. *Id.*
- **Secured by a deed of trust.** This means that Unison can pursue a nonjudicial foreclosure if the homeowner defaults. 1-ER-80, 88, 141, 220–22.
- **Nonrecourse obligation**. Unison's contracts create "nonrecourse obligations." 1-ER-218.
- **Homeowners must pay for taxes, insurance, and repairs on the home, with failure to do so resulting in default.** The homeowner must maintain insurance that is "acceptable" to Unison, and if they fail to do so, that is a "Default." 1-ER-99 § 7.1(c)(ix), 112 § 8.16(a). The same goes for requirements to pay for property taxes, maintenance, and repairs. 1-ER-99 § 7.1(c), 103 § 8.2. And Unison is permitted to make "Protective Advances" without notice to the homeowner to cover these fees, which must be repaid and accrue interest at a rate of nearly 20 percent a year. 1-ER-111 § 8.11.

Unison can also purchase insurance at the homeowner's expense that "significantly exceed[s] the cost of insurance" the homeowner would have obtained. 1-ER-113 § 8.16(c).

- **Triggering conditions on death, sale, or moving out**. Once again, maturity is triggered when the homeowner no longer lives in the home because of death, sale of the home, or moving out. 1-ER-90, 95, 99 § 7.1(c). At that point, Unison has a chance to cash in by exercising its option to acquire a significant percentage of the equity in the home, and through that a significant portion of the appreciation of the home's value. Unison also has this opportunity at the end of a 30-year term. 1-ER-80.

Because these core features are the same, Unison's product poses a similar risk of homeowners losing value in their home that is highly disproportionate to the amount of money that they receive from the company. And for the homeowners who fail to keep up with their taxes, insurance, or fees, Unison's product functions identically to a reverse mortgage and these individuals face the same risk of foreclosure.

However, Unison claims that it does not need to abide by what would otherwise be clear obligations under Washington law designed to protect homeowners. By Unison's account, when maturity is triggered, it is not receiving a repayment of a loan through the equity or shared appreciation in the home. 1-ER-190–91. Instead, Unison has an "option" to acquire a significant stake in the equity

and thus the shared appreciation in the home. *Id.* Accordingly, Unison considers itself exempt from all relevant lending laws, including the interest rate cap; the counseling requirement to avoid deceptive marketing practices; the prohibition on insurance requirements; the licensing requirement; and the preapproval requirement to ensure that this complex product is vetted before homeowners are locked into these agreements. *Id.*

### D. In dire financial straits because of family obligations and reduced income, the Olsons became locked into Unison's reverse-mortgage product.

Charles Boyd Olson is 70 years old, and his wife Janine is 72. 1-ER-219. Mr. Olson "began his career in the delivery business more than 40 years ago as a delivery driver and worked his way up to managing other drivers." *Id.* For the last two decades, he has worked managing logistics for a healthcare company. *Id.* In 1986, Mr. Olson purchased his home in Kent, Washington, taking out a mortgage from Valley Mortgage Corporation. *Id.* He and Mrs. Olson have lived together in this home continuously since 1990, when they were married. *Id.* Mrs. Olson is now the "mother of five grown children, including a son with Down syndrome; a grandmother of eleven; and a great-grandmother of five." *Id.* Mrs. Olson's disabled son, who is 40 years old, lives with them. *Id.* "The Olsons have also at times had custody of some of their grandchildren." 1-ER-219–20. In the nearly four decades

since Mr. Olson purchased the home, the Olsons "have never fallen more than a month behind on their mortgage payments." *Id.*

In 2019, the Olsons began facing financial difficulties. These included covering "the costs of caring for their children and grandchildren" who were living with them at the time. *Id.* Mrs. Olson also lost her Labor & Industry benefits payments. *Id.* They began to sink deeper into debt, and most of their wealth was tied up in their home. *Id.* "They feared they would not have enough money to pay their bills." *Id.*

At that point, they received a flyer in the mail. "Great News!" the flyer announced, "[y]ou're pre-approved to access the equity locked in your home." 1-ER-28. The flyer included a mock-up of a check made out to "Charles Olson" for $79,850 and signed by Unison's "Customer Success Manager." *Id.* "With Unison," the flyer explained, "you can receive $79,850 and use that money for any purpose you choose—**with no monthly payments and no interest**." *Id.* (emphasis in original). "Yes, you read that correctly," the flyer continued, "[i]t's almost too good to be true." *Id.*

Unfortunately, it was. Unison's contracts require homeowners to make insurance payments and pay for repairs on pain of foreclosure. But the flyer touted to homeowners: "pay nothing until you decide to sell." *Id.* Even though failing to make certain payments could lead to Unison making "Protective Advances" that the homeowner must repay to Unison, the flyer asserted that "[y]ou make no payments

to us until you sell." *Id.* And while the "Protective Advances" accrue interest of nearly 20% a year, 1-ER-111, the flyer reassured the reader that there were "NO INTEREST CHARGES" and that "you'll pay no interest with Unison," 1-ER-28.[3]

"Because they needed money" to cover their debts "and daily living expenses," the Olsons signed the HomeOwner Agreement with Unison in March 2019. 1-ER-220. The contract stated that the value of the property was $370,000. *Id.* Unison provided an "Investment Payment" of $64,750 in exchange for what was styled as an "option" to purchase "an undivided 70.00% interest" of the property when one of the triggering events occurred. 1-ER-80 § 1(a), (b). In addition, "Unison charged the Olsons $2,525.00 in 'transaction fees.'" 1-ER-220. "Unison recorded a deed of trust on the Olson Property in King County," which "granted Unison the right to foreclose and sell the Olson Property in the event of default by the Olsons." 1-ER-220–21.

In 2021, because of concerns about crime in their neighborhood, the Olsons began looking into selling their home and moving somewhere safer for themselves and their adult son. *Id.* However, given "the amount Unison would be owed under the HomeOwner Agreement … the Olsons realized that they would receive almost nothing from the sale of the Olson Property and would be unable to afford a down

[3] The contract rate of 1.5% per month adds up to 19.56% annually if compounded or 18% simple interest. *See APR Converter*, Stoozing, https://perma.cc/Z7UG-22JM.

payment on another home with the sale proceeds." *Id.* The couple were therefore trapped in their home and trapped in their contract with Unison, which would cost them hundreds of thousands of dollars to break. 1-ER-82 § 8.

### E. The district court grants Unison's motion to dismiss in a cursory opinion.

In 2022, the Olsons sued Unison in King County Superior Court under the Washington State Consumer Protection Act on behalf of themselves and other similarly situated homeowners in Washington who entered into agreements with Unison.[4] The statute provides claims for "[1] a per se violation of statute" such as the Consumer Loan Act, "[2] an act or practice that has the capacity to deceive substantial portions of the public, or [3] an unfair or deceptive act or practice not regulated by statute but in violation of public interest." *Klem v. Wash. Mut. Bank*, 295 P.3d 1179, 1187 (Wash. 2013). The Olsons sued because the contract was either an unlicensed mortgage that failed to comply with the Consumer Loan Act's express directives, or an unfair and unlawful attempt to circumvent the protections of the statute. 1-ER-225–29. The Olsons also pointed to the various ways in which Unison's communications were deceptive. 1-ER-229–30.

[4] Unison successfully compelled the other named plaintiff, Maggie Colin, to arbitrate her claim. 1-ER-241.

Unison removed to federal district court in the Western District of Washington, citing diversity jurisdiction. 1-ER-3, 238. Unison then moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). 1-ER-188.

The district court granted Unison's motion without oral argument and with barely a page and half of legal analysis. 1-ER-5–6. Relying entirely on another district court opinion interpreting only federal law, the court held that Washington's Consumer Loan Act did not apply because the contract was styled as an option, not a loan. 1-ER-5. The district court did not address the argument that styling a reverse mortgage as an option was an unfair attempt to "inventively evade[] regulation." *Panag*, 204 P.3d at 895.

As to deceptiveness, the district court—this time citing no caselaw, Washington or otherwise—held that there was nothing deceptive about Unison's communications because, for example, Unison was supposedly telling the truth that there were no required payments. 1-ER-6. The court also relied heavily on the notion that "allegations of deceptive conduct appear to be belied by the plain text of the HomeOwner Agreement and accompanying documents, which encourage potential customers to seek counsel on the financial product." *Id.*

The Olsons timely appealed.

## SUMMARY OF ARGUMENT

**I.** Unison's "shared investment" product not only functions as a reverse mortgage and poses the same risks to elderly homeowners, it is either a reverse mortgage as defined by the Washington Consumer Loan Act, or simply a mortgage as defined by state law. Unison offers consumers an advance in the form of a lump sum of money, secures the contract with a deed of trust that allows Unison to foreclose in the event of a default, requires the homeowners to regularly pay a variety of property-related fees on pain of foreclosure, and contains the same three triggering events that permit Unison to recoup its initial advance through a large share of the equity in the home. That is a reverse mortgage under the criteria established by Washington law, *see* RCW § 31.04.505(5)(a), (b), and the general meaning of the term. And beyond reverse mortgages specifically, no matter what a document may "purport to be" or the "form" it takes, "if the intent is to use the property as security, it will be a mortgage." *Kendrick v. Davis*, 452 P.2d 222, 225–26 (Wash. 1969). Unison's product secures the Olsons' obligations through a deed of trust to their home, and "a deed of trust is subject to all laws relating to mortgages on real property." RCW § 61.24.020.

Yet Unison's position is that it is not subject to any lending laws, and its product lacks any of the safeguards the legislature determined were necessary to protect vulnerable seniors like the Olsons. There's no independent counseling

requirement to protect against misleading marketing and ensure homeowners know what they're getting into. RCW § 31.04.515(9), (10). Unison requires the purchase of insurance, increasing the risk of a default. RCW §§ 31.04.515(8)(b), 31.04.515(7). Unison didn't get its complex product pre-approved before selling it to seniors in financial distress. RCW § 31.04.525. In fact, Unison isn't licensed to offer *any* type of mortgage in Washington. RCW § 31.04.035(1). And there's no interest rate cap to protect homeowners from losing a disproportionate value of their home. RCW §§ 19.52.020(1), 31.04.105(1). These violations of the Consumer Loan Act constitute per se unfair or deceptive practices under the Consumer Protection Act. RCW § 31.04.208.

The district court's cursory analysis relied entirely on uncritically accepting Unison's framing of its product and another district court opinion interpreting a federal statute. 1-ER-5–6. But Washington's statutes regulating mortgages govern here, and Washington law requires courts to look beyond the form of a financial instrument to its actual nature. *See, e.g.*, *Ten Bridges, LLC v. Guandai*, 474 P.3d 1060, 1063, 1068–69 (Wash. App. 2020). Finally, Unison's assertion that its product should be exempt from all lending laws because the company could lose money if housing prices fall is neither here nor there. Because they are nonrecourse obligations, reverse mortgage lenders risk losing the money they advanced if the value of the house falls.

**II.** Even if Unison has managed to creatively design its product to avoid the letter of the Consumer Loan Act, this would still violate the broader protections of

the Consumer Protection Act, which offer "sufficient flexibility to reach unfair … conduct that *inventively* evades regulation." *Panag*, 204 P.3d at 895 (emphasis added). This is a quintessential example of why such flexibility is necessary. In determining whether something is "an unfair or deceptive act or practice not regulated by statute but in violation of public interest," *Klem*, 295 P.3d at 1187, the Washington Supreme Court looks to whether the industry implicates the public interest, whether regulations in this area serve an important public policy, and whether the challenged practices resemble those that the legislature has determined are unfair or deceptive in related areas, *Panag*, 204 P.3d at 897–99.

All of these criteria are met here. A violation of the Consumer Loan Act "constitutes a per se violation of the [Consumer Protection Act], reflecting the public policy significance of this industry." *Id.* Reverse mortgages and mortgages generally are "subject to strict regulation" because of the public policy importance of protecting homeowners, and "[t]he strong public policy underlying state and federal law regulating" this area "also applies where [certain] practices do not fall within the laws' prohibitions." *Id.* Finally, the Washington legislature determined that because they are risky and hard to understand, reverse mortgages are unfair and deceptive in the absence of crucial safeguards for seniors. *See* RCW § 31.04.515(7), (8), (9), (10). Unison's product, no matter how it is styled, presents the same risks of default and foreclosure for failing to keep up with insurance payments, cover repairs, or pay

utility bills. 1-ER-99, 103, 111, 113. There is also the same risk that elderly homeowners in financial distress will accept a comparatively small amount of money in exchange for giving up a highly disproportionate share of the equity.

Accordingly, even if Unison's product manages to slip through the cracks of the Consumer Loan Act, it is an unfair practice under the Consumer Protection Act.

**III.** Unison's product also violates the Consumer Protection Act's prohibition on practices with "the capacity to deceive substantial portions of the public." *Klem*, 295 P.3d at 1187. And "[i]n evaluating the tendency of language to deceive," courts "should look not to the most sophisticated readers but rather to the least." *Panag*, 204 P.3d at 895.

The flyer that Unison sent the Olsons had a significant capacity to deceive through statements like "pay nothing until you decide to sell" and "[y]ou make no payments to us until you sell." 1-ER-28. In fact, the contract requires regular payment of various property-related fees on penalty of foreclosure. 1-ER-99, 103, 111–13. Indeed, scholars have singled out such "no payments" claims as having been particularly misleading to large numbers of seniors and having contributed to the strikingly high rates of reverse-mortgage defaults. Mancini & Williamson, *Reversing Course*, 26 Elder L.J. at 87. Indeed, the federal government has taken enforcement action against reverse mortgage lenders for precisely such claims. *See* CFPB, *CFPB Takes Action*.

Similarly, while Unison states that it will charge "**no interest**," that there are "NO INTEREST CHARGES," and that "you'll pay no interest with Unison," 1-ER-28, failure to pay various property-related fees will lead to interest-accruing debts with Unison, 1-ER-111. Unison also misleadingly asserts that its products are not loans, 1-ER-82, when they in fact operate as reverse mortgages.

**IV.** Finally, while the district court's misapplication of Washington state law warrants reversal, this case turns on state law questions that require analysis of Washington state "public policy," *Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 540 (9th Cir. 2011), and that are unlikely to be resolved in state court absent certification, *Yamashita v. LG Chem, Ltd.*, 48 F.4th 993, 1002–03 (9th Cir. 2022). Accordingly, this case also meets the criteria for certification to the Washington State Supreme Court, should this Court conclude that guidance from the state's highest court would be instructive.

## STANDARD OF REVIEW

In a diversity case, "it is the responsibility of the federal courts sitting in diversity to predict how the state high court would resolve" state law questions. *Albano*, 634 F.3d at 530. As to the district court's ruling, this Court reviews "de novo the district court's order granting a motion to dismiss for failure to state a claim, taking as true all allegations of material fact and construing them in the light most favorable to the nonmoving party." *Ass'n des Éleveurs de Canards et d'Oies du Quebec v.*

*Bonta*, 33 F.4th 1107, 1113 (9th Cir. 2022). A court will consider "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012). In this case, that includes the flyer Unison sent to the Olsons and the various documents that comprise the contract between the parties.

## ARGUMENT

Unison's product and practices violate the Washington Consumer Protection Act in three ways. *First*, Unison's product is either a reverse mortgage or mortgage that violates several express statutory protections for consumers under the Consumer Loan Act, and this statutory violation constitutes a "per se violation" of the Consumer Protection Act. *Klem*, 295 P.3d at 1187. *Second*, even if Unison's product manages to slip through the cracks of the Consumer Loan Act, it would still violate the Consumer Protection Act's broader prohibition on any "unfair … act or practice not regulated by statute" that creatively circumvents the laws necessary to protect consumers. *Id. Third*, several of Unison's marketing statements have "the capacity to deceive substantial portions of the public." *Id. Finally*, although this Court can conclude that Unison violated state law, this appeal also meets the criteria for certification to the Washington Supreme Court, as it involves an outcome-determinative question of state law that implicates Washington public policy and that will otherwise not be addressed by state courts.

## I. Unison's "shared investment" product is an unlicensed and unlawful mortgage under Washington law.

Although Unison's product is styled as an option contract to avoid state regulation of reverse mortgages, it meets Washington's statutory definition of a reverse mortgage. As a result, Unison's product plainly violates several Consumer Loan Act requirements because (1) Unison isn't licensed, (2) homeowners must purchase insurance, and (3) there's no counseling requirement. And even if the product doesn't meet the specific definition of a reverse mortgage, it is still an unlicensed mortgage—which itself is illegal under the Consumer Loan Act and, therefore, constitutes a per se violation of the Consumer Protection Act. RCW § 31.04.208.

**A.** Unison's product is a reverse mortgage under Washington law. Through the Consumer Loan Act, Washington's legislature provided a specific definition of a "reverse mortgage loan." RCW § 31.04.505(5). It consists of a "nonrecourse consumer credit obligation" defined as a financial product where: (1) a homeowner is given "one or more advances"; (2) the company receives security through "[a] mortgage [or] deed of trust"; and (3) any "shared appreciation or equity is due and payable, other than in the case of default, only after: (i) The consumer dies; (ii) The dwelling is transferred; or (iii) The consumer ceases to occupy the dwelling as a dwelling." RCW § 31.04.505(5)(a), (b). The extent of repayment may also be "contingent on the value

of the property upon execution of the loan or at maturity, or on changes in value between closing and maturity." RCW § 31.04.515(2).

Unison's product meets that definition. (1) The company provided the Olsons with what was expressly described as "an advance of funds in the amount of $64,750.00." 1-ER-80 § 1(a). (2) In exchange, the Olsons provided "a deed of trust (or mortgage)" as security for a nonrecourse obligation. 1-ER-88 § 1.1(d), 135–48. And (3) Unison's ability to access the equity in the Olsons' home is triggered by "death," the "sale of [the] property," use of the home "as anything other than a residential dwelling," any other "default," or the 30-year term runs out. 1-ER-91 § 3, 95 § 5, 99 · 7.7. That qualifies as a reverse mortgage under the Consumer Loan Act.

That Unison's product meets the statutory definition for a reverse mortgage is not surprising. It possesses all the features that both characterize reverse mortgages and make them so risky to elderly homeowners:

| **Reverse Mortgage** | **"Shared Investment"** |
|---|---|
| Nonrecourse obligation. | Nonrecourse obligation. |
| Primary residence. | Primary residence. |
| Secured by deed, default results in foreclosure. | Secured by deed, default results in foreclosure. |
| Cash advance against equity in home. | Cash advance against equity in home. |
| Triggering conditions for maturity:<br>1. Death<br>2. Sale<br>3. Moving out.<br>4. Default. | Triggering conditions for maturity:<br>1. Death<br>2. Sale<br>3. Moving out.<br>4. Default.<br>5. 30-year term. |

| | |
|---|---|
| Requirement to keep paying property charges such as taxes, insurance, and repairs. | Requirement to keep paying property charges such as taxes, insurance, and repairs. |
| Company can make "protective advances" that accrue interest. | Company can make "protective advances" that accrue interest. |
| Company's returns can be tied to the appreciation of the value of the home. | Company's returns are tied to the appreciation of the value of the home. |
| Profitability varies with value of home. | Profitability varies with value of home. |

These same key elements create the same risk of homeowners in financial distress accepting lump sums of money as a "last resort" to cover immediate "essential expenses," in exchange for losing vastly greater amounts of equity in their homes. Mancini & Williamson, *Reversing Course*, 26 Elder L.J. at 119. These similar features also pose the same danger of property-charge defaults that result in as many as 18 percent of reverse mortgages being at risk of default. *See id.* at 87; *see also* Brittingham, *Aging Out of Place*, 29 Elder L.J. at 158. It makes no difference to the homeowner who loses her homes because of missed insurance payments, repair costs, or utility bills whether a product is styled as an "option" instead of a reverse mortgage. Either way, the home she spent her life paying off can be lost because she hit a financial rough patch, had an unexpected medical bill, or made a small mistake.

**B.** Against all of this, Unison hangs its hat on a single distinction to argue that its product does not constitute a reverse mortgage. According to the company, under a traditional reverse mortgage, when one of the triggering conditions occurs, the homeowner must pay back the money she received, often through a percentage of

the shared appreciation or equity in the home. Under Unison's "investment" product, in contrast, Unison asserts that it has the "option" of recouping its initial investment when one of the triggering conditions occurs—by acquiring a percentage of the equity in the home (which includes but is not limited to the shared appreciation in the value of the home). 1-ER-195–96, 200.

But that distinction is irrelevant for determining whether the product operates as a reverse mortgage. Unison provides money up front and, in exchange, receives a deed-secured contract, which includes continuing homeowner obligations and the same triggering conditions that allow the company to seek repayment out of the equity in the home.

To illustrate, in the Olsons' case, if the triggering event of a home sale were to occur today, Unison would receive a total repayment of $229,143 on its advance payment to the Olsons of $64,750 in 2019. That is because at this point the Olsons would be required to do one of two things. *First*, they could buy Unison out of the contract by just paying Unison $229,143. *See* 1-ER-92 § 3.3(b). This amount comes from taking $423,393 (which is 70% of the home's current estimated value of $604,847) and subtracting Unison's "Option" payment of $194,250. *See* 1-ER-80 § 1(c); 1-ER-92 § 3.3(a).[5] *Second*, if the Olsons do not do so, the company can "exercise its

[5] *See* Redfin, https://perma.cc/T7JW-3MCA (estimating current value at $604,847).

Option … simultaneously with closing" of the home sale, purportedly exchanging $194,250 for $423,393 of the sale proceeds. *See* 1-ER-92 § 3.3(c); *see also* 1-ER-80 § 1(a), (c). Either way, at the point of the triggering event, the company receives $229,143. This functions just like a reverse mortgage where repayment is tied to the shared appreciation of the home—one for which the interest rate is over 50.77% annually, more than *four times* the 12% rate that Washington permits for unlicensed loans. RCW § 19.52.020(1).[6]

On the other side of the balance sheet, in the course of just a few years, the Olsons would have lost $164,393 in wealth in their home.[7] Not only that, but the Olsons have already paid Unison an initial $2,525 "transaction fee," 1-ER-164, and will also be required to pay what are likely tens of thousands of dollars in closing costs, including "[a]ll broker fees," "federal, state, local and documentary, transfer taxes" and "recording fees and costs, reconveyance fees, Escrow fees, [and] title insurance fees." 1-ER-92–93 § 3.3(e), (f); 1-ER-95 § 4.3(d); 1-ER-96 §5.3(d); 1-ER-127. Although these closing costs will reflect a percentage of the total sale price of the home, the Olsons will cover 100% of these costs—even though Unison will be getting

[6] To receive a total $229,143 repayment on an initial lump sum payment of $64,750 in just five years, a reverse mortgage would have to charge approximately 50.778% in simple interest. *See Simple Interest Calculator*, Calculator.net, https://perma.cc/HE98-MDLA.

[7] This is the difference between the value of the 70% equity stake ($423,393) and the combination of the initial Unison payment and the "option payment" ($64,750 + $194,250).

70% of the sale price. 1-ER-80, 121 § 10.4(a). The Olsons would thus have lost value in their home that is highly disproportionate to the amount of money they received from Unison.

**C.** Even if Unison's product did not meet the specific definition of a reverse mortgage, it would still be subject to the general rules governing mortgages. And under Washington law, companies offering and servicing mortgages must be licensed by the state. RCW § 31.04.035(1). Unison is not. 1-ER226.

The contract here was secured by a "deed of trust," 1-ER-128, and under Washington law, generally, "a deed of trust is subject to all laws relating to mortgages on real property," RCW § 61.24.020. It is "well established in Washington and elsewhere[] that a deed that is given as security for an obligation is a mortgage." 18 Wash. Prac., Real Estate § 20.2 (2d ed. 2004). No matter what a document may "purport to be" or the "form" it may take, "if the intent is to use the property as security, it will be a mortgage." *Kendrick*, 452 P.2d at 225–26. Indeed, Unison's own contract states that, in the event of an uncured default, the company can "require immediate performance in full" and "without further demand commence an action to foreclose this Unison Homeowner Security Interest *as a mortgage*." 1-ER-68 (emphasis added).

This makes sense. Products like Unison's that are secured by a deed of trust pose the risk of foreclosure that led Washington to regulate mortgages. That's why

the Washington State Department of Financial Institutions has determined that "shared appreciation" products like Unison's, which "generally do not require interest or monthly payments," are "generally a silent second mortgage in exchange for a share of the home's future appreciation or future value." Wash. State Dep't Fin. Insts., *Product Spotlight: Shared Appreciation Mortgages* (2023), https://perma.cc/MY5V-UAEL. In other words, they could qualify as "residential mortgage loans under the Consumer Loan Act." *Id.*

Even beyond the statutes, Washington courts look past the name of a particular product into its true nature to determine if it is, in fact, a mortgage. For example, the Washington Supreme Court in *Hoover v. Bouffleur* scrutinized a contract that "was careful to refrain from the use of the words 'loan' and 'mortgage.'" 133 P. 602, 603 (Wash. 1913). Yet it was the court's "duty to go beyond his spoken words, and review and consider every material circumstance." *Id.* And "[v]iewing the case at bar from all its angles, and taking it by its four corners … [t]he record shows what seems to be a studied effort on the part of the defendant to bring himself within certain expressions of this court, as he has gathered them from our written opinions" to avoid usury laws. *Id.* The Court declined to permit this "path around the statutes designed to protect the necessitous borrower." *Id.* at 604.

That century-old approach remains in effect today. Washington courts continue to ensure that what are functionally mortgages are not able to skirt laws

designed to protect those who put up their homes as security. *See Phillips v. Blaser*, 125 P.2d 291, 293–94 (Wash. 1941); *Hernandez v. Carpenter*, 147 Wash. App. 1018, at *1, *4–7 (2008) (unpublished); *Levy v. Butler*, 93 Wash. App. 1001, at *2 (1998) (unpublished). And not only did the Olsons put their home at risk, but, as explained above, Unison structured its product to offer these financially distressed borrowers a smaller initial payment in exchange for repayment that includes a high rate of effective interest. *See supra* 33–34.

In sum, Unison's product qualifies as a reverse mortgage or just a mortgage under Washington law, and it is undisputed that Unison has not met the clear statutory requirements for either kind of product. This constitutes a per se violation of the Consumer Protection Act.

**D.** The district court's single paragraph on this question does not warrant any other result. The court reasoned that the contract "makes clear that it is not a loan" but "an option contract." 1-ER-5. Unison had paid the Olsons "to secure an option to participate in the appreciation of Olsen's [sic] property," and this, according to the court, could not be a loan because "Unison is not obliged to exercise its option (if, for example, home prices decrease)." *Id.* That was error.

**1.** The district court appeared to rest its decision on the logic that the presence of an option mechanism in a financial instrument means that it can never be a mortgage loan. But "[t]here is no limit to human inventiveness in th[e] field" of

lending and financial instruments. *Panag*, 204 P.3d at 895. Companies design and sell all manner of financial products with complex structures that won't resemble the most straightforward notion of a mortgage loan. And Washington caselaw doesn't permit a lender to categorically sidestep the state's regulation of mortgages by simply including an option mechanism as part of a contract secured by a deed of trust. *See, e.g.*, *Ten Bridges*, 474 P.3d at 1063 ("[T]he form of a transaction cannot be used to evade a statute"). The district court, for its part, cited no Washington authority to support its contrary view.

More fundamentally, though, whatever the differences between options and loans in the abstract, the Washington state legislature has specifically defined reverse mortgages and mortgages generally. When the legislature "has assigned a particular definition to a term, courts may not simply cast such definitions aside in favor of the term's 'ordinary' meaning." *Edmonds Inst. v. Babbitt*, 93 F. Supp. 2d 63, 67 (D.D.C. 2000). The statute's definition of a reverse mortgage describes Unison's product, and Washington law also renders mortgage laws applicable to this product. The district court's general sense that this product isn't a loan cannot override this.

**2.** Instead of drawing on the Washington statutes or caselaw on mortgages, the district court relied entirely on another federal district court opinion. 1-ER-5 (citing *Foster v. Equitykey Real Est. Invs. L.P.*, 2017 WL 1862527, at *3–*5 (N.D. Cal. May 9, 2017)). But that opinion was interpreting the *federal* Truth in Lending Act. *Id.* That

is no substitute for Washington's statutory framework defining mortgages and on-point Washington caselaw.

Nor is the mere fact that Unison's profit or loss will depend on the value of the home over time. That, too, does not distinguish Unison's product from a reverse mortgage. A product can still be a reverse mortgage even if the only thing that becomes "due and payable" is the "shared appreciation" in the value of the home. RCW § 31.04.505(5)(b). Washington's law also specifically contemplates repayment "contingent on the value of the property upon execution of the loan or at maturity, or on changes in value between closing and maturity." RCW § 31.04.515(2). Further, as a nonrecourse obligation, even more traditional reverse mortgages still expose lenders to losing money if the value of the home has dropped by the time of the triggering event. *See supra* 7–8. And the same goes for traditional mortgages if the borrower is no longer able to repay and the home has dropped in value sufficiently that the lender will no longer be able to recoup its initial investment.

The district court accordingly erred in dismissing the Olsons' claims for a per se violation of the Consumer Protection Act.

## II. Even if Unison has managed to slip through the cracks of the Consumer Loan Act, the Consumer Protection Act prohibits practices that pose the same risks as regulated practices but creatively avoid regulation.

Even if Unison has managed to creatively design its product to avoid the letter of the Consumer Loan Act, that does not immunize the company from the broader

protections of the Washington Consumer Protection Act. Selling a product posing the same risks as a reverse mortgage without the necessary safeguards for the vulnerable target population is itself a violation of the Consumer Protection Act's broad protections, which cover "an unfair or deceptive act or practice not regulated by statute but in violation of public interest." *Klem*, 295 P.3d at 1187. That ensures "sufficient flexibility to reach unfair or deceptive conduct that *inventively* evades regulation." *Panag*, 204 P.3d at 49 (emphasis added). This is a paradigm case.

Importantly, the question here is not whether all reverse mortgages are unfair, nor whether all financial products with basic structures like Unison's are unfair. In some cases, such products could provide value to homeowners in need of cash. Instead, the question is whether such products are unfair when they lack certain crucial protections. The Washington state legislature has already answered that question, and the answer is yes. Under Washington law, reverse mortgages are permitted only if there are protections against highly disproportionate rates of return, unfair property charge defaults, deceptive marketing, and consumer confusion. Absent such protections, these are categorically "an unfair and deceptive act or practice." RCW § 31.04.208. Because Unison's product carries similar risks to homeowners but lacks those necessary protections, it is unfair under the Consumer Protection Act. The district court barely addressed this meritorious claim, and its decision should be reversed.

**A.** The Consumer Protection Act's definition of "unfair … acts or practices," RCW § 19.86.020, requires flexibility because otherwise companies could creatively tailor their practices to slip through the cracks of the law, while posing all the same risks as practices that are specifically prohibited. The legislature understood that "[t]here is no limit to human inventiveness in this field" and that "[e]ven if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again." *Panag*, 204 P.3d at 895. Indeed, if the only practices limited by the Consumer Protection Act were those specified in other statutes, the general prohibition on "unfair or deceptive acts or practices," RCW § 19.86.020, would be superfluous. But there is nothing superfluous about it; "[a] central purpose of the CPA is to provide an efficient and effective method of filling the gaps in the common law and statutes." *Panag*, 204 P.3d at 898. Unison's practices are a case in point, as they pose the same risk as traditional reverse mortgages under the Consumer Loan Act but offer none of the protections the legislature deemed necessary to mitigate such risks.

**1.** The Washington Supreme Court's decision in *Panag* illustrates how the Washington Supreme Court would undertake the analysis of an unfair practice that does not violate specific statutory provisions.

In *Panag*, plaintiffs challenged a debt collection practice that was not covered by the Washington Collection Agency Act (CAA) or similar federal laws. 204 P.3d at

896. However, the fact that the acts in question were "beyond the scope of the CAA does not mean deceptive [debt] collection practices are exempt from suit under the broader scope of the CPA," since "the CPA is intended to provide broader protection than exists under the common law or statute." *Id.* at 898. Nonetheless, this analysis was not without guideposts; to the contrary, the CAA was "important to [the] analysis" as illustrating what kinds of practices are "not regulated" by statute but in violation of public interest. *Id.* at 897–98.

*First*, in determining whether the public interest was implicated in this area, the court looked to the CAA. The court explained that "[w]hen a violation of debt collection regulations [under the CAA] occurs, it constitutes a per se violation of the CPA." *Id.* at 897. This "reflect[s] the public policy significance of this industry" and indicates that "[t]he business of debt collection affects the public interest." *Id.*

*Second*, as to whether these kinds of practices implicated policy concerns recognized by the State, the Court observed that "collection agencies are subject to strict regulation to ensure they deal fairly and honestly with alleged debtors." *Id.* And "[t]he strong public policy underlying state and federal law regulating the practice of debt collection also applies where collection practices do not fall within the laws' prohibitions." *Id.*

*Third*, the court considered the specific protections of the CAA as analogies for what is improper in this area. For example, the CAA "requires the creditor to inform

a consumer of his or her right to contest the alleged debt," and, in *Panag*, the company "failed to notify the alleged debtors of their right to contest the amounts due." *Id.* Similarly, the CAA prohibits "making false representations as to the legal status of a debt," and the company in *Panag* had made misleading representations of this kind. *Id.* This was further evidence that the practices violated the Consumer Protection Act.

*Finally*, taking all this together, the court concluded that these "debt collection activities that are not regulated under the CAA" nonetheless violated "the broader scope of the CPA," based on "[1] the broad legislative mandate that the business of insurance is vital to the public interest, [2] the public policies favoring honest debt collection, and [3] the statutory mandate to liberally construe the CPA in order to protect the public from inventive attempts to engage in unfair and deceptive business practices." *Id.* at 898.

**2.** Every step of the relevant analysis here tracks *Panag*.

*First*, the public interest is implicated in the area of mortgage regulation. Just like the CAA in *Panag*, a violation of the Consumer Loan Act's regulation of reverse mortgages and mortgages generally "constitutes a per se violation of the CPA … reflecting the public policy significance of this industry." *Id.* at 897; *see* RCW § 31.04.208. Nor can there be any serious debate that advancing homeowners lump

sums of cash against equity interests in their homes, putting them at serious risk of foreclosure, has public policy significance.

This case also satisfies many of the other factors that Washington courts have looked to in various contexts as indicia of public interest. For example, the acts were "committed in the course of defendant's business," "part of a pattern or generalized course of conduct," involved "repeated acts" of providing such contracts, and there was "a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 537–38 (Wash. 1986). Similarly, Unison "advertise[d] to the public in general," "actively solicit[ed] this particular plaintiff" through its mailer, and the parties "occup[ied] unequal bargaining positions," *id.*, as the Olsons were financially distressed senior citizens caring for an adult son with disabilities, while Unison is a large corporation that operates in multiple states. These factors are non-exhaustive, but all "represent indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact." *Id.*

*Second,* Washington law recognizes the strong public policy interests in prohibiting unfair and deceptive practices in this area. Nor is Washington an outlier: "Due to the significant risks of abuse by lenders and inadequate understanding of reverse mortgage agreements by many senior citizens, reverse mortgages and

foreclosures are subject to stringent rules and regulations promulgated by both federal and state authorities." *Namahoe*, 528 P.3d at 236.

*Third*, review of analogous Consumer Loan Act provisions makes clear that Unison's practices are just the kind of unfair practices that existing regulations seek to combat. When seniors' homes are on the line, companies must abide by certain protections when selling these kinds of complex financial products. *See supra* 14–16. There's an independent counseling requirement to ensure that seniors fully understand the consequences of being bound by these complex and confusing financial products. The prohibition on requiring purchases of insurance guards against certain property charge foreclosures. The interest rate cap limits the ratio of cash to equity so that homeowners do not lose disproportionate amounts of the value of their homes in exchange for far too little money. And the pre-approval requirement ensures that products are vetted before being sold to this particularly vulnerable population. Absent such protections, the Consumer Loan Act expressly states that reverse mortgages are "an unfair and deceptive act or practice." RCW § 31.04.208. All of these concerns are present with Unison's product, but none of these necessary protections.

*Finally*, putting this together, a liberal construction of the Consumer Protection Act precludes Unison's attempt to evade crucial regulations in an area of significant public interest. This serves the statute's core goal of "protect[ing] the public from

inventive attempts to engage in unfair and deceptive business practices." *Panag*, 204 P.3d at 899.

**3.** Advancing an unconscionable or grossly unfair contract also violates the Consumer Protection Act. *See e.g.*, *Mellon v. Reg'l Tr. Servs.*, 334 P.3d 1120, 1126–27 (Wash. App. 2014); *Washington v. Kaiser*, 254 P.3d 850, 859 (Wash. App. 2011). At a moment of serious financial vulnerability, Unison locked the Olsons into a complex financial instrument that requires them to make continuing payments at risk of foreclosure, all for the privilege of being deprived of tens if not hundreds of thousands of dollars in equity of their home that they spent a lifetime building up. *See supra* 19–22, 33–35. In exchange for being locked into this agreement, the elderly couple ended up with an initial sum of $48,740 after all the initial costs Unison required them to pay.[8] And while Unison will receive 70% of the sale price of the home, the Olsons are currently paying 100% of the charges to maintain the home and will be forced to pay 100% of the likely tens of thousands of dollars in closing costs when the home is sold. *See supra* 34–35.

The result is that what had once been their greatest asset—a house that Mr. Olson had been diligently paying off since 1986—will net them little to nothing. 1-ER-219–21. Meanwhile, Unison will make many multiples of the amount it provided

[8] Unison's "Investment Payment" was initially $64,750, but Unison charged the Olsons a transaction fee of $2,525, ER-164, and required them to pay off a further $13,484.97 in other debts upon closing, ER-168.

the Olsons—with the current amount being a total repayment of $229,143 on its initial lump sum payment of $64,750, for a net profit of $164,393. *See supra* 33–34. The "manner in which the contract was entered"—including the Olsons' vulnerability and the distance between Unison's representations about its product and its fine print, *see infra* 49–53—and the predatory results meet the standard for a grossly unfair or unconscionable contract under Washington law. *Kaiser*, 254 P.3d at 860. The Olsons accordingly stated a claim for a violation of the Consumer Protection Act's broad prohibition on unfair practices.

**C.** The district court, however, hardly addressed whether Unison's product was unfair even if it was not expressly covered by the Consumer Loan Act. Instead, over the course of a paragraph, the court lumped together this argument with the question of whether Unison's conduct was deceptive. 1-ER-5–6. But "an act or practice can be unfair without being deceptive," *Klem*, 295 P.3d at 1187, and the court improperly failed to address this claim separately. And in any event, for the reasons above, the district court's dismissal of this meritorious claim should be reversed.

## III. Unison's claims that it was providing non-loan products with no payments or interest were unlawfully deceptive.

Alongside per se violations and unfair practices, the Consumer Protection Act also prohibits "an act or practice that has the capacity to deceive substantial portions of the public." *Klem*, 295 P.3d at 1187. Unlike typical fraud claims, "[a] plaintiff need not show the act in question was intended to deceive, only that it had the capacity to

deceive a substantial portion of the public." *Panag*, 204 P.3d at 894. Several features of Unison's marketing have a significant capacity to deceive. These include the statements that homeowners don't need to make any payments (when the contract requires regular payment of various costs on penalty of foreclosure); that homeowners will pay no interest to Unison and take on no additional debt (when failure to pay these fees leads to interest-accruing debts with Unison); and that the products are not loans (when they are, in fact, reverse mortgages).

The district court engaged in no analysis of several of these misleading statements, instead treating boilerplate language suggesting that individuals talk to an advisor or family member as immunizing Unison from a deceptive-practices claim under the Consumer Protection Act. That has no basis in the statute, and it would effectively immunize all manner of predatory and deceptive practices so long as this form language was included somewhere.

**A.** The Consumer Protection Act contains strong protections against deceptive practices, independent of their intent. "Deception exists if there is a representation, omission or practice that is likely to mislead a reasonable consumer." *Panag*, 204 P.3d at 895–96. Furthermore, "a communication may contain accurate information yet be deceptive," as "a communication may be deceptive by virtue of the net impression it conveys, even though it contains truthful information." *Id.* Thus, "fine print disclosures" and creative wording cannot rescue communications

that would deceive an ordinary consumer. *Id.* And "[i]n evaluating the tendency of language to deceive," courts "should look not to the most sophisticated readers but rather to the least." *Id.*

**B.** Unison's communications with the Olsons contained misleading statements that: (1) homeowners wouldn't need to make any payments, (2) that there would be no interest and no additional debt, and (3) that the product is not a loan. 1-ER-28, 220–21.

**1.** Scholars have singled out such "no payments" claims as especially likely to deceive seniors and lead to foreclosure: "[A]ssurances that reverse mortgages are 'payment free' … have raised the specter of foreclosure for tens of thousands of seniors in their twilight years." Mancini & Williamson, *Reversing Course*, 26 Elder L.J. at 87. The federal government has taken enforcement actions against reverse mortgage lenders who "falsely told potential customers that they would have no payments" when the contracts "require, among other things, paying property taxes, making homeowner's insurance payments, and paying for property maintenance." CFPB, *CFPB Takes Action*. And the Washington Supreme Court has looked to similar evidence of federal enforcement as illustrating the meaning of "deceptive practices" under the Consumer Protection Act. *Panag*, 204 P.3d at 895.

Unison's conduct fits the same bill. The flyer stated that "[w]ith Unison, you can receive $79,850 and use that money however you choose—**with no monthly**

**payments and no interest**." 1-ER-28 (emphasis in original). To hammer the point home, the mailer then stated: "Yes, you read that correctly. It's almost too good to be true." *Id.* The mailer also stated that the recipient would "pay nothing until you decide to sell" and again that "[y]ou make no payments to us until you sell." *Id.*

Yet Unison's contract includes a continuing requirement to pay "all taxes and assessments," as well as to maintain "at the Owner's expense" several forms of insurance on the property that meet Unison's specifications. 1-ER-111–12 §§ 8.10(a), 8.16(a). Moreover, if the homeowner "fails to maintain or obtain the insurance coverage required by this [contract]," then Unison "*at Owner's expense* may … obtain such coverage," which "might significantly exceed the cost of insurance that Owner could have obtained and may not protect Owner or cover Owner's personal property." 1-ER-113 § 816(c) (emphasis added). Unison's payments of any unpaid taxes, fees, or insurance payments are "Protective Advances," which accrue interest at a rate of 1.5% per month, and which must be repaid on penalty of foreclosure. 1-ER-111, 113.

These are not the only payments that the contract imposes. The homeowner must also maintain the property to meet Unison's specifications and cover the cost of all repairs to do so—once again, on pain of foreclosure. 1-ER-99, 103. Once again, a failure to cover these costs can lead to foreclosure, as in a recent reverse mortgage

case where a company "sought foreclosure based on [the homeowner's] alleged failure to complete $500.00 worth of repairs to his home." *Namahoe*, 528 P.3d at 227.

In practice, the combination of the "payment free" claim with these continuing payments has been a significant cause of the high rates of defaults on reverse mortgages. Mancini & Williamson, *Reversing Course*, 26 Elder L.J. at 87. Such claims thus plainly have "the capacity to deceive a substantial portion of the public." *Panag*, 204 P.3d at 894. A reasonable consumer told that she will "pay nothing until you decide to sell," 1-ER-28, would be left unaware that Unison could seek to foreclose on her home if she "defaulted on just one payment" of the insurance that Unison requires her to carry, Brenner, *Reverse Mortgages and Elderly Americans*, 80 Alb. L. Rev. at 573. Similarly, she would be unaware that if she failed to pay her "municipal water bill," she could be forced to make payments to the company with interest or lose her home. *Id.* at 575. If anything more were needed, "[i]n evaluating the tendency of language to deceive," courts "should look not to the most sophisticated readers but rather to the least." *Panag*, 204 P.3d at 895. And the "uniquely vulnerable" population of seniors targeted by products like Unison's show why that rule is particularly important here. Brenner, *Reverse Mortgages and Elderly Americans*, 80 Alb. L. Rev. at 575.

**2.** The mailer also contained several misleading statements that there is "**no interest**," there are "NO INTEREST CHARGES," and "you'll pay no interest

with Unison." 1-ER-28 (emphasis and caps in original). This, too, is deceptive because if Unison makes any "Protective Advances" when the homeowner misses an insurance payment or water bill, the "Protective Advances shall bear interest at the rate of one and one-half percent (1½%) per month, subject to applicable law, from the date of demand." 1-ER-111 § 8.11(b). That would add up to 19.56% annually if compounded or 18% simple interest.[9] A reasonable consumer would likely think that "NO INTEREST CHARGES" and "you'll pay no interest with Unison" mean that Unison wouldn't charge her a double-digit rate of interest.

Other representations reinforce this belief. Unison's flyer trumpets that there is "NO ADDED DEBT," that "[b]y partnering with Unison you do not take on any additional debt," and that "Unison can provide the funds you need without the burden of additional debt." 1-ER-28. But Unison's Protective Advances that cover the homeowner's contractual obligations and accrue interest would constitute a debt even under the district court's restrictive definition. A reasonable consumer would likely be unaware that they will take on *additional* financial obligations (such as more insurance and repairs) and go into debt with Unison if they can't continue to cover those obligations.

**3.** Unison's contract documents also state that their product is "not a loan." 1-ER-82 § 6. But as explained above, the product either meets the statutory definition

[9] *APR Converter*, Stoozing, https://perma.cc/Z7UG-22JM.

for or functions like a reverse mortgage or a general mortgage. Unison paid the Olsons a lump sum in exchange for a contract imposing continuing financial obligations secured by a deed of trust, and which triggers repayment out of the equity and shared appreciation of the home. *See supra* 30–34. Not only does this function as a loan, but the vastly disproportionate rate of interest that Unison can collect on its initial advance of money makes this an especially dangerous kind of loan.

**B.** The district court rejected the Olsons' argument that Unison's marketing was deceptive with virtually no analysis. The court simply asserted that Unison's marketing claims were accurate. 1-ER-6. And in the court's view, any deceptive-practices claim based on Unison's marketing materials was "belied" by the company's inclusion of a boilerplate sentence advising "potential customers to seek counsel on the financial product." 1-ER-6. The district court relied entirely on remarks buried in the extensive documents that the elderly couple received and signed that: "**If you have not already discussed the Unison HomeOwner Agreement with your own advisors (legal, financial, estate planning, tax) and family members, we strongly urge you to do so before proceeding any further**." 1-ER-169.

The idea that this boilerplate encouragement immunizes Unison flies in the face of the Consumer Protection Act, Washington caselaw, and common sense.

*First*, an isolated disclaimer will not immunize an otherwise deceptive communication. A disclaimer buried in whole series of documents won't be sufficient to change the "net impression." *Washington v. CLA Est. Servs., Inc.*, 515 P.3d 1012, 1022 (Wash. App. 2022), *review denied sub nom.*, 523 P.3d 1187 (Wash. 2023), *cert. denied*, 2024 WL 71910 (Jan. 8, 2024). And this disclaimer is particularly weak, as it doesn't even provide any notice to homeowners of the actual risks associated with the product. Instead, it just suggests that they talk with others.

*Second*, in determining whether something is deceptive under the Consumer Protection Act, Washington courts also look to whether related statutes would prohibit such conduct for similar reasons to guard against similar harms. *Panag*, 204 P.3d at 896–97. That's true here. Through the Consumer Loan Act, the Washington legislature already determined that when a senior's home will be at risk from a product of this kind, the burden is on the *company* to ensure that an individual has received independent counseling. RCW § 31.04.515(9), (10). The district court erroneously permitted Unison to place that burden on the homeowners themselves, not the company.

*Finally*, if companies could immunize themselves from deceptive practices claims under the Consumer Protection Act by including this kind of boilerplate language, that would allow for a complete end-run around the statute. If this were true, then so long as somewhere in the documents that Unison provides homeowners

the company included a suggestion that they consult with others, the company could lawfully send out mailers with blatant falsehoods—such as stating that there's zero risk of foreclosure or that a homeowner can end the contract for free at any time. That simply cannot be right.

## IV. This case meets the criteria for certification to the Washington Supreme Court.

Although the district court's erroneous application of Washington state law warrants reversal by this Court, this case involves a question of state law that requires analysis of Washington state public policy and that is unlikely to be resolved in state court absent certification. To the extent this Court believes that guidance from Washington courts would be instructive, certification to the Washington Supreme Court is appropriate.

"Washington law authorizes the state supreme court to accept certified questions from the federal courts." *Potter v. City of Lacey*, 46 F.4th 787, 791 (9th Cir. 2022) (citing RCW § 2.60.020). This statute permits certification when "it is necessary to ascertain the local law of [Washington] state in order to dispose of [a] proceeding and the local law has not been clearly determined." RCW § 2.60.020. This Court will "certify questions" that "the Washington Supreme Court is better qualified to answer in the first instance." *Potter*, 46 F.4th at 791. And "certification is especially appropriate when a question of law has not been clearly determined by the Washington courts, and the answer to our question is outcome determinative." *Id.* To the extent there is

any doubt about the application of Washington law on the issues here, certification would be warranted under a straightforward application of that standard.

*First*, Washington courts have not yet clearly determined the application of the state Consumer Protection Act to financial products and advertising techniques like Unison's here. The Washington Supreme Court is particularly qualified to answer this novel question because "this issue is complex and involves policy considerations that are best left to the State of Washington's own courts." *Id.* at 792. As explained above, the Consumer Protection Act prohibits not just conduct enumerated in the statute, but "an unfair or deceptive act or practice not regulated by statute but in violation of public interest." *Klem*, 295 P.3d at 1187. The question of Washington's public interest is a "public policy decision[]" that is uniquely suited to resolution by the State's highest court. *Albano*, 634 F.3d at 540. Furthermore, these are particularly "important issue[s] of [Washington] state law." *Yamashita*, 48 F.4th at 1001. These issues affect potentially hundreds of homeowners under Unison's agreements alone, not to mention those of other companies selling similar products. 1-ER-223, 228–29. And just like with the Olsons, the consequences of being bound by such agreements are dire.

*Second*, the question is clearly outcome determinative. The district court granted Unison's motion to dismiss because it concluded that the Olsons had failed to state a claim under the Consumer Protection Act. 1-ER-3–7.

*Third*, absent certification, this issue will likely never be resolved in Washington state court. Because Unison is not a Washington company but sells policies to Washington homeowners, the company will almost always be able to remove any case in state court to federal court—as happened here. When an issue will almost always arise in "cases in diversity," then "there is a chance that any such cases end up in federal court—thereby indefinitely denying the state an opportunity to pass upon its own law." *Yamashita*, 48 F.4th at 1002–03. In such a situation, if this Court were to resolve the state law questions here, it would bind all lower courts to which such cases would invariably be removed. *Id.* Doing so would "inadvertently infringe the sovereign power of a state in denying the state's courts' an opportunity first to answer the question." *Id.*

For these reasons, this case fits the criteria for certification.

## CONCLUSION

The district court's judgment should be reversed or, in the alternative, the Court should certify the state law issues in this case to the Washington Supreme Court.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Circuit Rule 32-1(a) because this brief contains 13,652 words excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

*/s/ Matthew W.H. Wessler*
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## CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2024, I electronically filed the foregoing brief with Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants are registered for CM/ECF users and will be served by the CM/ECF system.

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