

**SYNOPSIS OF THE CASE**

**2014 MT 117, DA 13-0241: ABRAHAM B. MORROW and BETTY JEAN MORROW**, Plaintiffs and Appellants, v. **BANK OF AMERICA, N.A., BAC HOME LOANS SERVICING, LP, fka COUNTRYWIDE HOMELOANS SERVICING, LP**, Defendants and Appellees.<sup>1</sup>

The Montana Supreme Court allowed homeowners Abraham B. and Betty Jean Morrow to proceed with their lawsuit against their mortgage servicer, Bank of America. The Morrows claim Bank of America promised them over the phone that it would reduce the payments on their mortgage under the federal Home Affordable Modification Program (HAMP). The Morrows say the Bank promised to reduce their interest rate and extend the term of their loan from 15 years to 40 years. The Morrows say they made the lowered payments for over a year, only to have Bank of America reject their application for a modification and begin foreclosing on their home. Bank of America denies promising the Morrows a modification, and says they were ineligible for the program because the home was not their primary residence.

The Morrows obtained an injunction stopping the foreclosure and sued Bank of America for breach of contract, fraud, negligence, negligent misrepresentation, and violations of the Montana Consumer Protection Act (MCPA). The Lewis and Clark County District Court granted summary judgment to Bank of America. The District Court said the Morrows could not legally enforce an oral agreement to modify their loan, because it had to be in writing. The District Court also said the Morrows could not use fraud and consumer protection claims as an attempt to enforce the oral agreement. Finally, the District Court said the Bank was not negligent, because it was not the Morrows' financial adviser and owed them no legal duty.

The Supreme Court affirmed the District Court's decision on the breach of contract claim. The Morrows' loan documents were written agreements and could only be modified in writing or by proof that the oral agreement had already been fully performed. The oral agreement also would have extended the deed of trust that secured the loan for an additional 25 years. An extension of a deed of trust must be made in writing and placed in the county land records.

The Supreme Court reversed summary judgment on the Morrows' negligence claim. The Supreme Court held that, assuming the facts alleged by the Morrows to be

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<sup>1</sup> This synopsis has been prepared for the convenience of the reader. It constitutes no part of the Opinion of the Court and may not be cited as precedent.

true, Bank of America owed a fiduciary duty to the Morrows because it had actively advised them during the modification process. Bank of America was not required to modify the Morrows' loan, but once it accepted their application, it had a duty to process the application promptly and give them accurate information. Because it told the Morrows their application would be processed under HAMP, the Bank also had a duty to follow federal guidelines. The Morrows' allegations raised questions as to whether Bank of America had fulfilled those duties that should be resolved at a trial.

The Supreme Court also reversed summary judgment on the Morrows' claims of fraud, constructive fraud, and negligent misrepresentation. The Supreme Court held that although an oral agreement may be unenforceable as a contract, the statements can still be used as evidence for other purposes. The Court held that the rule requiring written contracts in certain cases, called the Statute of Frauds, exists to prevent fraud and should not be used as a defense by those who have allegedly committed fraud. The Morrows allege Bank of America committed fraud by telling them to intentionally miss a payment to be considered for a modification. They claim the Bank told them they had been approved for a modification when they had not, and that they should ignore notices of default.

Finally, the Supreme Court reversed summary judgment on the Morrows' MCPA claim. The Morrows claim the Bank gave them conflicting information about the status of their loan and the amount they were required to pay. The Morrows claim the Bank instructed them to make reduced payments without telling them that doing so would make them delinquent on their mortgage. The Bank took ten months to reach a decision on the Morrows' application for a modification, instead of the three months standard under HAMP. The Supreme Court held that these allegations, if proven to be true, represent practices substantially injurious to Montana consumers.

The Morrows' claims of negligence, negligent misrepresentation, actual and constructive fraud, and violations of the MCPA will now be returned to the District Court for further proceedings.

Justice McKinnon, in a separate opinion joined by Justice Rice, partially concurred and dissented from the Supreme Court's decision. The two Justices concurred with the Supreme Court's conclusions that summary judgment in favor of the Bank was proper on the Morrows' contract claims, and that summary judgment was improper on the Morrows' negligence, negligent misrepresentation, and MCPA claims. They dissented, however, from the Supreme Court's conclusion that the Morrows have alleged facts which would support a claim of constructive fraud. The dissenting Justices

maintain that the Supreme Court has not heretofore recognized a common law claim of constructive fraud and that the statutory basis for constructive fraud, upon which the Supreme Court relies in approving the Morrows' constructive fraud claim, has been neither pleaded nor argued by the parties. Moreover, to the extent a claim of constructive fraud could be maintained by the Morrows, it would require a showing that the Bank gained an unfair advantage from its allegedly false statements—an allegation which also has been neither pleaded nor argued by the Morrows.

Finally, although Justices McKinnon and Rice agree that the Morrows may pursue a claim of actual fraud, such a claim requires a showing of "intent to deceive." Since the Bank cannot be found to have made the allegedly false statements both intentionally and negligently, either the claim of actual fraud or the claim of negligent misrepresentation must fail upon a trier of fact's finding of the Bank's intent. The partial concurrence and dissent additionally addressed the procedures for determining on remand whether the facts support a finding of a fiduciary duty owed by the Bank to the Morrows on their negligence claim.

Montana Bankers Association Member Alert

To: MBA Member Banks  
From: Steve Turkiewicz, President/CEO  
Re: Morrow v. Bank of America, 2014 MT 117

On May 7, 2014, the Montana Supreme Court issued a decision, Morrow v. Bank of America, which significantly increases a bank's exposure to lender liability claims when handling problem loans. Morrow quite clearly expands the type of claims that a borrower may maintain against a bank, even where no express terms of the loan documents have been breached. In a case where Bank of America was accused of mismanaging a HAMP real estate loan modification request, including allegedly advising the borrower to stop making loan payments so they could qualify for a loan modification, the Montana Supreme Court held:

- Under the facts alleged, the bank owed a duty to manage the modification process in a manner that would not cause the borrower to suffer loss or injury by reason of its negligence;
- If proven to be true in a jury trial, advice given to the borrower in the loan modification process could be sufficient to establish a "fiduciary duty" that subjects the bank to additional tort liability (which could include damages for emotional distress and punitive damages);
- Although the statements allegedly made by the bank to the borrower did not establish an enforceable loan modification, those same statements could be used, notwithstanding the Statute of Frauds, to maintain tort claims against the bank for fraud, negligent misrepresentation and constructive fraud; and
- The borrower could also maintain a lawsuit against a bank under the Montana Consumer Protection Act based on allegations that the bank

gave conflicting information and mismanaged the HAMP loan modification process, again notwithstanding the Statute of Frauds and the fact that no written loan term had been breached. This claim exposes the bank to an award of attorney's fees and risk of treble damages.

While the Morrow decision involved a residential loan borrower, the broad language used by the Court will make post-default "mismanagement" type claims more easily available to all types of consumer, commercial and agricultural loan customers.

This decision creates a more difficult environment for lenders working through problem loans. It creates the legal basis for liability for any oral statements made during the negotiation and modification process without requiring a finalized written agreement, even if the earlier loan documents would not permit oral modifications of those earlier written agreements.

In the coming months our office will be considering a number of measures to mitigate the impact of Morrow on the bank/borrower relationship, especially in the workout/problem loan setting. We will also evaluate the need for a legislative response to the problems Morrow is likely to foster.

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SENATE BILL NO. 280  
INTRODUCED BY F. MOORE

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING LAWS REGARDING THE LIABILITY OF REGULATED LENDERS FOR TRANSACTIONS CONDUCTED THROUGH WRITTEN DOCUMENTS; AND AMENDING SECTION 31-1-116, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 31-1-116, MCA, is amended to read:

**"31-1-116. ~~Commercial loans~~ Loans by regulated lender -- when written agreement required. (1)**  
No action in contract or tort ~~With respect to a commercial loan, a contract action or a breach of contract action~~  
may ~~not~~ be brought against a regulated lender based on a negotiation, promise, or commitment that is not in writing signed by the lender where the negotiation, promise, or commitment is to:

- (a) lend money or to extend credit;
- (b) alter, amend, renew, extend, or otherwise modify an existing negotiation, promise, commitment, or agreement to lend money or extend credit; or
- (c) make a financial accommodation.

(2) ~~For the purposes of this section, "commercial loan" means~~ This section applies to money loaned or credit extended by a regulated lender to any person or business in which the amount involved exceeds \$50,000. ~~primarily for commercial or business purposes, in excess of \$100,000, and does not include money lent or credit extended for personal, family, or household purposes and also does not include charge or credit card accounts, personal lines of credit, personal overdraft accounts, or other consumer accounts."~~

- END -

Amendments to Senate Bill No. 280  
1st Reading Copy

Requested by Senator Frederick (Eric) Moore

For the Senate Business, Labor, and Economic Affairs Committee

Prepared by Jameson Walker  
February 12, 2015 (4:04pm)

1. Page 1, line 24.

**Insert:** "(3) This section does not affect remedies available  
under Title 30, chapter 14."

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SENATE BILL NO. 281  
INTRODUCED BY F. MOORE

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING CONSUMER PROTECTION LAWS TO EXEMPT A REGULATED LENDER AND CLARIFY DAMAGES AWARDED; AND AMENDING SECTIONS 30-14-102 AND 30-14-133, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 30-14-102, MCA, is amended to read:

**"30-14-102. Definitions.** As used in this part, the following definitions apply:

(1) "Consumer" means a person who purchases or leases goods, services, real property, or information primarily for personal, family, or household purposes.

(2) "Department" means the department of justice created in 2-15-2001.

(3) "Documentary material" means the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording.

(4) "Examination" of documentary material includes the inspection, study, or copying of documentary material and the taking of testimony under oath or acknowledgment in respect to any documentary material or copy of documentary material.

(5) (a) "Gift certificate" means a record, including a gift card or stored value card, that is provided for paid consideration and that indicates a promise by the issuer or seller of the record that goods or services will be provided to the possessor of the record for the value that is shown on the record or contained within the record by means of a microprocessor chip, magnetic stripe, bar code, or other electronic information storage device. The consideration provided for the gift certificate must be made in advance. The value of the gift certificate is reduced by the amount spent with each use. A gift certificate is considered trust property of the possessor if the issuer or seller of the gift certificate declares bankruptcy after issuing or selling the gift certificate. The value represented by the gift certificate belongs to the possessor, to the extent provided by law, and not to the issuer or seller.

(b) The term does not include:

(i) prepaid telecommunications and technology cards, including but not limited to prepaid telephone

1 calling cards, prepaid technical support cards, and prepaid internet disks that have been distributed to or  
2 purchased by a consumer;

3 (ii) a coupon provided to a consumer pursuant to any award, loyalty, or promotion program without any  
4 money or consideration being given in exchange for the card; or

5 (iii) a gift certificate usable with multiple sellers of goods or services.

6 (6) "Person" means natural persons, corporations, trusts, partnerships, incorporated or unincorporated  
7 associations, and any other legal entity.

8 (7) "Possessor" means a natural person who has physical control over a gift certificate.

9 (8) (a) "Trade" and "commerce" mean the advertising, offering for sale, sale, or distribution of any  
10 services, any property, tangible or intangible, real, personal, or mixed, or any other article, commodity, or thing  
11 of value, wherever located, and includes any trade or commerce directly or indirectly affecting the people of this  
12 state.

13 (b) The term does not include the making or servicing of loans in excess of \$50,000 by a regulated lender  
14 as defined in 31-1-111."

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16 **Section 2.** Section 30-14-133, MCA, is amended to read:

17 **"30-14-133. Damages -- notice to public agencies -- attorney fees -- prior judgment as evidence.**

18 (1) A consumer who suffers any ascertainable loss of money or property, real or personal, as a result of the use  
19 or employment by another person of a method, act, or practice declared unlawful by 30-14-103 may bring an  
20 individual but not a class action under the rules of civil procedure in the district court of the county in which the  
21 seller, lessor, or service provider resides or has its principal place of business or is doing business to recover  
22 ~~actual damages~~ money damages in the amount of any ascertainable loss of money or property or \$500,  
23 whichever is greater. An individual claim may be brought in justice's court. The court may not award punitive  
24 damages but may, in its discretion, award up to three times the ~~actual damages~~ money damages in the amount  
25 of any ascertainable loss of money or property sustained and may provide any other equitable relief that it  
26 considers necessary or proper.

27 (2) Upon commencement of any action brought under subsection (1), the clerk of court shall mail a copy  
28 of the complaint or initial pleading to the department and the appropriate county attorney and, upon entry of any  
29 judgment or decree in the action, shall mail a copy of the judgment or decree to the department and the  
30 appropriate county attorney.

1           (3) In any action brought under this section, the court may award the prevailing party reasonable attorney  
2 fees incurred in prosecuting or defending the action. A person who brings an action on the person's own behalf  
3 without an attorney may receive attorney fees at the judge's discretion.

4           (4) Any permanent injunction, judgment, or order of the court made under 30-14-111 is prima facie  
5 evidence in an action brought under this section that the respondent used or employed a method, act, or practice  
6 declared unlawful by 30-14-103."

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- END -

Amendments to Senate Bill No. 281  
1st Reading Copy

Requested by Senator Frederick (Eric) Moore

For the Senate Business, Labor, and Economic Affairs Committee

Prepared by Jameson Walker  
February 12, 2015 (1:57pm)

1. Title, page 1, line 5.  
**Strike:** "EXEMPT A REGULATED LENDER AND"
2. Title, page 1, line 5 through line 6.  
**Strike:** "SECTIONS 30-14-102 AND"  
**Insert:** "SECTION"
3. Page 1, line 10 through page 2, line 14.  
**Strike:** section 1 in its entirety  
**Renumber:** subsequent sections

- END -