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IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 13-0241

ABRAHAM B. MORROW and BETTY JEAN MORROW,

Plaintiffs and Appellants,

v.

BANK OF AMERICA, N.A., BAC HOME LOANS SERVICING, LP, f/k/a COUNTRYWIDE HOME LOANS SERVICING, LP,

Defendants and Appellees.

BRIEF OF AMICUS CURIAE
STATE OF MONTANA DEPARTMENT OF JUSTICE

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Kathy Seeley, Presiding

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INTRODUCTION AND STATEMENT OF INTEREST

The State of Montana through the Office of the Attorney General respectfully submits this Amicus Brief pursuant to Mont. R. App. P. 12(7). As Chief Legal Officer of the State of Montana, the Attorney General is responsible for enforcing the Montana Unfair Trade Practices and Consumer Protection Act (hereinafter "MCPA"). Mont. Code Ann. §§ 30-14-101, *et seq.*

This appeal raises several legal issues, but the State submits this brief solely to address the district court's conclusion that the Appellants (hereinafter "Morrows") could not defeat summary judgment with their MCPA claim. As discussed below, the district court incorrectly granted Appellees' (hereinafter "Bank of America" or "the Bank") motion for summary judgment on the Morrows' MCPA claim.

A. Background

The Morrows' claims are not an isolated anomaly. During the relevant time period in this case, the mortgage servicing industry was rife with abuses. Widespread problems in the industry included *inter alia*: providing consumers false or misleading information in the course of home loan servicing; failing to maintain adequate staffing, training and quality control; failure to review consumers' timely loan modification applications and other paperwork; inexplicably losing consumers' application materials; advising consumers to

intentionally default in order to qualify for modifications; chronic conflicting communications; and "dual-tracking" consumers' accounts through inherently confusing simultaneous modification and foreclosure efforts as described in the Morrows' claims. Similar behavior from the nation's five largest home loan servicers, along with the infamous "robosigning" scandal that shed light on those servicers' reliance on false affidavits to support foreclosures, ultimately led to the State of Montana joining a group of 48 other states in a lawsuit against the nation's five largest servicers that led to the National Mortgage Settlement. *See*, http://nationalmortgagesettlement.com/. In the Attorney General's Office of Consumer Protection, over 600 complaints and inquires have been fielded since January 1, 2010, regarding home loan servicing issues and foreclosure.

B. Implications for Montana Consumers

The district court's analysis under the MCPA to the Morrows' claims applies a narrow construction which--if affirmed--could adversely affect the Attorney General's ability to protect Montana consumers and the private bar's ability to enforce MCPA claims on behalf of harmed consumers. In this case, the district court's decision essentially allowed a statute of frauds defense to defeat a MCPA claim where the facts giving rise to that claim, taken as true, illustrate unfair or deceptive institutional behavior at Bank of America that is prohibited under the MCPA. While the statute of frauds serves a very important purpose in

contract disputes, allowing a statute of frauds defense to serve as an absolute shield from liability against Montana consumers whom have been injured by unfair or deceptive business practices by a foreign corporation is inconsistent with this Court's liberal interpretation of MCPA in favor of consumers as required by Montana law. The facts alleged by the Morrows illustrate that Bank of America's representations and business dealings with them were both unfair and deceptive. In light of Montana's strong consumer protection law, this Court should reverse the district court's order for summary judgment and remand this case for trial.

ARGUMENT

I. SUMMARY JUDGMENT WAS IMPROPER AS TO THE MONTANA CONSUMER PROTECTION ACT CLAIM

A. Montana's Unfair Trade Practices and Consumer Protection Act is to be Liberally Construed in Favor of Consumers

The MCPA "should be liberally construed with a view to effect its object and promote justice." *Baird v. Norwest Bank*, 255 Mont. 317, 327, 843 P.2d 327, 333 (1992). In *Baird*, the Montana Supreme Court held that the MCPA applies to the lending and collection of consumer loans by banks. At the time, whether the MCPA applied to the lending and collection of consumer loans by banks was an issue of first impression for the Montana Supreme Court. *Id.* at 326. In arriving at its determination, the *Baird* majority rejected contrary authority on the issue. *Id.*

at 328. Based on a liberal construal of MCPA, the Court affirmed a judgment in favor of the consumers against the bank that accelerated their loan and repossessed their vehicle(s).

The central legal issue presented under the MCPA in the *Baird* case is not the central legal issue under the MCPA for the Morrows. However, the *Baird* facts are illustrative. In *Baird*, a husband and wife struggled to make payments on a loan secured by collateral. They called their bank to try and work out an arrangement to bring the loan current. At trial, a central factual dispute was whether the bank agreed over the phone to accept late payments to reinstate the loan on September 1 or September 15, 1989. The bank argued the agreement was for payment on September 1; the Bairds argued that they were told it was September 15. The disagreement over this date was central to the case because the bank repossessed a portion of the collateral (a van) before September 15. The Bairds then attempted timely payments for the months of October and November based on their understanding of the agreement. The bank rejected those payments. Upon repossession in December 1989 of the remaining collateral (a truck), the Bairds sued, and ultimately prevailed on their MCPA claim tried to a jury verdict which this Court affirmed on appeal by the bank. "The substance of that phone call was central to the issues decided by the jury." *Id.* at 320.

Here, the district court in its MCPA analysis focused solely on the Morrows' argument that a modified loan contract existed, despite other existing and unresolved factual controversies involving the interactions between the Morrows and Bank of America. As in *Baird*, the substance of the interactions between the Morrows and Bank of America are central to the Morrows' MCPA claim and should be allowed to proceed to a jury. Furthermore, the Morrows' MCPA claim is separate and distinct from a contract claim and the statute of frauds is not an absolute defense against their MCPA claim. Taken in sum, the district court's analysis and application of the MCPA in the present case is inconsistent with a liberal construal as required by *Baird* and should be reversed.

B. <u>MCPA Claims are not Barred by the Statute of Frauds</u>

Bank of America argued in the district court that the MCPA claim is being used to "circumvent the statute of frauds...," *See* Br. in Supp. of Def.'s Mot. for Summ. J. at 26. Of course, the purpose of the statute of frauds is to *prevent* fraud. *Kluver v. PPL Mont.*, 2012 MT 321, ¶ 30, 293 P.3d 817, 823 (Mont. 2012) (emphasis added).[1]

[1] "[t]his Court has taken the position on several occasions that it will not allow the statute of frauds, the object of which is to prevent fraud, to be used to accomplish fraudulent purposes." *Kluver v. PPL Mont.* 2012 MT 321, ¶ 30, 368 Mont. 101, 293 P.3d 817.

In this case, the Morrows have maintained that they were subjected to unfair or deceptive acts and practices that go beyond mere breach of an agreement. While the statute of frauds may provide an affirmative defense related to a contract claim, this Court should not allow it to be used as an absolute defense against a Montana consumer that is able to prove unfair and deceptive acts and practices in violation of the MCPA. Courts in New Hampshire have addressed this issue directly, deciding in favor of a consumer/homeowner in a case involving threatened foreclosure and a disputed oral agreement for a deed in lieu of foreclosure. In *LaBarre v. Shepard*, 84 F.3d 496 (1st Cir. Mass. 1996), the First Circuit held:

> ". . . the Statute of Frauds is only a bar to the enforcement of certain oral contracts; it is not a rule of evidence. Evidence of the oral agreement in this case was relevant to the counts alleging improper foreclosure, misrepresentation, fraud, and unfair trade practices in violation of the Consumer Protection Act." *Id.* at 500.

In articulating its holding, the First Circuit recognized the New Hampshire Supreme Court had expressly rejected the same argument that Bank of America made in this case to the district court:

> "The New Hampshire Supreme Court held in *Munson v. Raudonis,*[2] that the Statute of Frauds . . . did not bar an action for deceit even though the oral promise that was breached could not be enforced because of the lack of a writing. In reaching that holding, the *Munson* court expressly rejected the argument pressed here by Shepard and Parks, i.e., that evidence of the oral agreement should have been

[2] 118 N.H. 474, 387 A.2d 1174, 1176 (N.H. 1978).

> excluded because the four non-contract counts were merely a back-door attempt to **circumvent** the Statute of Frauds. The court in *Munson* reasoned as follows: 'Barring an action in deceit because of the Statute of Frauds, however, would not further the policy of the statute. Quite the contrary, it would foster an injustice.'

Id. (emphasis added).

New Hampshire is not the only state to have held that state consumer protection law claims are not barred by the statute of frauds. [*See, East Coast Printing Equip. v. Dataprint*, 12 Mass. L. Rep. 334, 16-17, (Mass. Super. Ct. 2000) ("The Statute of Frauds makes certain oral contracts unenforceable. It does not bar enforcement of every single cause of action emanating from the unenforceable contract . . . (t)he Statute of Frauds does not bar a [Massachusetts Consumer Protection Act] claim based upon deceptive acts apart from the breach of the oral agreement."). *See also, Launius v. Wells Fargo Bank*, 2010 U.S. Dist. LEXIS 89234, (E.D. Tenn. 2010) (". . . courts in Tennessee recognize, the Statute of Frauds applies 'only in suits for the breach or enforcement of a contract and are thus inapplicable to tort claims.' Plaintiff has filed tort claims against Wells Fargo, including claims for intentional infliction of emotional distress and intentional misrepresentation. Plaintiff has also filed a claim under the Tennessee Consumer Protection Act. *This claim is based upon the alleged deceptive or unfair practices of Wells Fargo--not the enforceability of oral statements.*") (emphasis added). *See also, McClure v. Duggan*, 674 F. Supp 211, 224, 1987 U.S. Dist. LEXIS 11098.

(". . . DTPA [Texas Deceptive Trade Practices Act] claim for misrepresentation is not barred by the statute of frauds."). *See also, Gaidon v. Guardian Life Ins.*, 272 A.D.2d 60, 60, 707 N.Y.S.2d 166, 167 (2000). ("We reject defendant's challenge to the action as violative of the Statute of Frauds . . . a cause of action under [New York Consumer Protection law] . . . is not precluded where the alleged deceptive practice involves oral promises that cannot be performed within one year.").

The Morrows claims involve more than the mere breach of an agreement. From a public policy perspective, Montana consumers should be able to rely on representations made to them over the phone by their home loan servicer, an issue central to the Morrows' case. In reality, the telephone is the primary method by which most Montanans regularly communicate with their home loan servicer. [3] If the statute of frauds absolutely bars consumer protection claims in this context, home loan servicers would be able to mislead borrowers with impunity. Rejection of the statute of frauds as an absolute defense in MCPA cases and adoption of the standard the above cited courts have properly applied is consistent this Court's application of the MCPA in prior cases, consistent with an overarching purpose to prevent fraud, and serves to maintain the distinction between contracts claims and MCPA claims.

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[3] See. http://locators.bankofamerica.com/locator/locator/branch_and_atm_locations/coverage.html. The defendant in this case does not appear to have a Montana office.

C. Material Factual Controversies Still Exist

This Court reviews a district court's ruling on a motion for summary judgment *de novo*, applying the same criteria of Mont. R. Civ. P. 56 as the district court. *Reichert v. State*, 2012 MT 111, ¶ 18, 365 Mont. 92, 278 P.3d 455. Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). Summary judgment is an extreme remedy and should never be substituted for trial if a material factual controversy exists. *Spinler v. Allen*, 1999 MT 160, ¶16, 295 Mont. 139, 983 P.2d 348.

Material factual disputes remain in controversy between the Morrows and Bank of America. The Morrows allege they were directed by Bank of America in November 2009 to skip a payment at a time when their loan was 100 percent current--that Bank of America advised this strategic default as an eligibility prerequisite for a loan modification. *See*, Pls.' First Am. Compl. and Demand for Jury Trial, ¶¶ 6-7. The Morrows claim Bank of America notified them in December 2009 that the Bank would modify the home loan payment, in part by dropping the interest rate from 4.9 percent to 2 percent, and that the new monthly payment would be $1239. *Id.* at ¶ 7. Morrows tendered payment of the new, modified amount and Bank of America accepted it from December 2009-

February 2011. *Id.* Despite the delivery and acceptance of these payments for over a year, the Morrows say that Bank of America frequently placed collection calls to the Morrows in response to which the Morrows would explain to the Bank of America employee(s) that they were in a loan modification program. *Id.* ¶ 8. Upon hearing this information from the Morrows, each Bank of America employee would confirm the fact of the modification's existence and instruct the Morrows to disregard the call. *Id.*

Further, the Morrows say they submitted requested application materials, in full, multiple times. *Id.,* ¶ 10. However, Bank of America told them in November 2010 that their loan modification was denied because they failed to provide the requested paperwork. *Id.* The Morrows then filed a complaint with the Office of the Comptroller of the Currency (OCC). *Id.,* ¶ 11. In response, the Morrows claim that Bank of America wrote them a letter outlining the mistakes that Bank of America had made and subsequently left a voicemail informing the Morrows that their loan modification had been approved. *Id.* After the OCC complaint, Morrows allege they would periodically be in contact with Bank of America--each time with a different liaison--and be promised the modification had been approved. *Id.* at 12. Ultimately, the Morrows filed this lawsuit, and the district court preliminarily enjoined any foreclosure activities. Notwithstanding

that injunction, Bank of America sent a letter on April 3, 2012, to the Morrows stating that "foreclosure proceedings have resumed." *Id.*, ¶¶ 16-17.

In response to the Morrows' factual allegations in support of their MCPA claim, Bank of America argues that the Morrows are attempting to "escape the facts that (1) the law imposes no duty upon lenders to modify or renegotiate a defaulted loan; and (2) Defendants were within their rights to initiate foreclosure proceedings." *See*, Br. in Supp. of Def.'s Mot. for Summ. J. at 26. Notwithstanding, issues of material fact related to the Morrows' allegations of unfair or deceptive acts and practices by the Bank in servicing their home loan persist, and summary judgment in this case is improper.

Bank of America's arguments fail to address the question of whether Bank of America's acts and practices were unfair or deceptive. Even if the Morrows were to concede that there is no affirmative duty to offer to modify a loan, that argument cannot negate Bank of America's role if a fact finder determines the Bank advised and encouraged strategic default, communicated a specific modified payment amount, and then accepted it for 14 months while simultaneously and repeatedly telling the Morrows to disregard conflicting notices of intent to accelerate foreclosure,[4] amongst all the other alleged unfair or deceptive practices.

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[4] *See*, *Entricken v. Motor Coach Federal Credit Union*, 256 Mont. 85, 845 P.2d 93 (1992), where consumer prevailed under similar facts where credit union told him over the phone to disregard delinquency notice. *Id.* at 95.

Material facts remain in dispute as to whether the manner in which Bank of America serviced the Morrows' loan was unfair or deceptive. Summary judgment on the record is inappropriate that this case should be reversed and remanded for further proceedings.

II. THE DISTRICT COURT DID NOT ADDRESS WHETHER OR NOT BANK OF AMERICA'S ACTIONS WERE DECEPTIVE

A. A Montana Deception Analysis

The district court did not expressly address whether or not Bank of America's actions may have been deceptive. The Montana Supreme Court has yet to adopt a deception analysis in the way it has adopted the *Rohrer* standard--an "unfairness" analysis (See, *Rohrer v. Knudson*, 2009 MT 35, 349 Mont. 197, 203 P.3d 759, articulates Montana's definition for an unfair act or practice as "one which offends established public policy and which is either immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."). This Court need not articulate a deception definition to reverse here for the reasons argued above; however, this case does present an opportunity to do so.

As this Court has previously recognized, Montana law requires that "in construing 30-14-103 due consideration and weight shall be given to the interpretations of the federal trade commission and the federal courts relating to

section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C., 45(a)(1) . . . ." Mont. Code Ann. § 30-14-104(1).[5] In *Rohrer*, this Court carefully weighed the FTC's interpretation, a quintessential U.S. Supreme Court case titled *FTC v. Sperry & Hutchinson,* 405 U.S. 233, 92 S. Ct. 898 (1972) (hereinafter "S&H"), and the "abundant precedent in other jurisdictions . . . " that applied the S&H law. Ultimately, this Court adopted the more common definition of an "unfair practice" amongst jurisdictions it reviewed. *Rohrer*, ¶¶ 29-31.

In 1983, the FTC released its Policy Statement on Deception (hereinafter "Deception Mandate"), to provide guidance to the public because at the time there was no "single definitive state of the Commission's view of its authority" against deceptive acts or practices under section 5 of the FTC Act. In drafting the Deception Mandate, the FTC "reviewed the decided cases to synthesize the most important principles of general applicability." The Deception Mandate can be found online[6] and is attached to this brief as Exhibit A.

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[5] Incidentally, a review of the language in Mont. Code Ann. § 30-14-103 and section 5(a)(1) of the Federal Trade Commission Act ("FTC Act") reveals the language to be very similar:

- Section 5, FTC Act: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."
- MCPA: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful."

[6] http://www.ftc.gov/bcp/policystmt/ad-decept.htm

In its Deception Mandate, the FTC defines a three-prong test in analyzing whether or not an act or practice was "deceptive" under Section 5 of the FTC Act: 1) there must be a representation, omission, or practice that is likely to mislead the consumer; 2) the act or practice must be considered from the perspective of the reasonable consumer; and 3) the representation, omission or practice must be material. *See* Ex. A. Federal and State courts have adopted similar definitions of "deceptive" acts in interpretation of Section 5 of the FTC Act and state consumer protection acts.[7]

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[7] "To prove a deceptive act or practice in violation of Section 5(a) of the FTC Act, the FTC must show: (1) a representation, omission, or practice that (2) is likely to mislead consumers acting reasonably under the circumstances, and that (3), the representation, omission, or practice is material." *FTC v. Cantkier*, 767 F. Supp. 2d 147, 151 (D.D.C. 2011); "Under the Consumer Fraud Act, a 'deceptive act or practice' is a material representation, practice or omission likely to mislead a reasonable consumer. A representation with the capacity or tendency to deceive is sufficient to establish the claim." *Bisson v. Ward*, 628 A.2d 1256, 1261, 160 Vt. 343, 351 (Vt. 1993); "The analysis by Ohio courts of the Ohio CSPA [Consumer Sales Protection Act] is substantially similar to the analysis that the FTC uses. *See* FTC Policy Statement on Deception (setting forth three-part standard FTC uses when determining whether an act or practice is deceptive . . . ." *Davis v. Byers Volvo*, 2012 Ohio 882, P35, 2012 Ohio App. LEXIS 752 (Ohio Ct. App. 2012); "The federal courts have determined that an act or practice is deceptive if three requirements are met. 'First, there must be a representation, omission, or other practice likely to mislead consumers. Second, the consumers must interpret the message reasonably under the circumstances. Third, the misleading representation, omission, or practice must be material--that is, likely to affect consumer decisions or conduct.'" *Caldor v. Heslin*, 215 Conn. 590, 597, 577 A.2d 1009, 1013 (Conn. 1990).

In the present case, the facts alleged by the Morrows' implore fact finders' analyses under the FTC's three-pronged Deception Mandate or a substantially similar analysis. The district court undertook no such analysis despite being presented with facts and a claim calling the question. While this Court need not address a "deceptive acts" definition in Montana to reverse the district court's MCPA ruling, given the facts forwarded by the Morrows, a deception analysis would have been appropriate and Morrows MCPA claim adequately pled that they were the victim of unfair or *deceptive* acts and practices. See, Pls.' First Am. Compl. and Demand for Jury Trial, ¶¶ 38-39.

CONCLUSION

For the foregoing reasons, the summary judgment below as to the Montana Unfair Trade Practices and Consumer Protection Act Claim should be reversed and remanded for trial.

Respectfully submitted this 3rd day of June, 2013.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,619 words, excluding certificate of service and certificate of compliance.

_____
CHUCK MUNSON

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Plaintiffs and Appellants,

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Defendants and Appellees.

APPENDIX

The Deception Mandate ..... Exhibit A