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MORROW V. BANK OF AMERICA, FURTHER DEVELOPMENTS IN CONSUMER LAW IN MONTANA, AND THEIR IMPACT ON CONSUMERS IN THE AGE OF COVID-19

David K. W. Wilson, Jr.*
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I. Introduction

Today, this country faces the worst financial crisis since the Great Depression, as the ongoing COVID-19 pandemic continues to wreak havoc on both the nation's and Montana's economies. As of this writing, it is impossible to say how long the crisis will last, or how bad it will become. But it is safe to assume that many individual Montana consumers will struggle financially as jobs are lost or cut back. Those consumers will need many tools in their toolbox to cope with the uncertain times. Fortunately, Montana consumers have the Montana Consumer Protection Act,[1] and the benefit of recent decisions from the Montana Supreme Court arising from the mortgage crisis of 2008–09.

This Article looks at the issues for consumers that arose out of the mortgage crisis, and the case law that developed as a result. In particular, the Article focuses on the Montana Supreme Court's decision in *Morrow v. Bank of America*,[2] and how it helped reinforce the strength of consumer protections under Montana law. This Article also looks at decisions that followed *Morrow*, and how they served to further flesh out Montana consumer rights. Finally, this Article discusses how the lessons learned during the mortgage crisis can help consumers dealing with the challenges of COVID-19 and issues arising out of the "CARES Act,"[3] Congress's most wide-reaching attempt to mitigate some of the impacts on individuals from government-imposed shutdowns. In particular, problems with forbearance and credit reporting provisions of the CARES Act appear likely to lead to future litigation.

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1. Mont. Code Ann. §§ 30-14-101–144 (2019).

2. 324 P.3d 1167 (Mont. 2014).

3. Coronavirus Aid, Relief, and Economic Security Act, Publ. L. No. 116-136, 134 Stat. 281 (2020).

II. Mortgage Crisis

The mortgage crisis wreaked havoc on the United States economy in the late 2000s, triggering a deep recession in the global economy. The mortgage crisis was largely caused by the rise of subprime mortgages before 2007, creating a housing bubble that burst in 2008–09. To help stop the bleeding caused by the mortgage crisis, the government implemented several programs falling under the umbrella of the Troubled Asset Relief Program ("TARP").[4] The Home Affordable Modification Program ("HAMP")[5] was among these programs.

A. Subprime Mortgages

Prime mortgages represent the majority of homeowner loans.[6] Borrowers who qualify for a prime mortgage have good credit, they make traditional down payments, and they fully document their income.[7] On the other hand, subprime mortgages consist of applicants with high default risk, including uncertain income and low credit scores.[8] For successful subprime mortgage applicants, the interest rate of their loan is much higher than their counterparts who received a prime mortgage.[9] Finally, near-prime mortgages exist on the spectrum between prime and sub-prime mortgages.[10] These types of mortgages go to borrowers with better credit than subprime borrowers but who still may not be able to accurately document their income or afford traditional down payments.[11]

Before 2007, the growth of subprime mortgages, and to some extent near-prime mortgages, created a housing bubble. According to the Financial Crisis Inquiry Commission implemented by Congress, this bubble consisted of inflated housing prices, lending practices that had "spun out of control," and too many homeowners taking on mortgages and debt they could not afford.[12] As a result, mortgage indebtedness in the United States nearly doubled in less than a decade, climbing from $5.3 trillion in 2001 to $10.5 trillion in 2007.[13] Likewise, "The amount of mortgage debt per household

4. 12 U.S.C. §§ 5211–41 (2018).
5. *Id.* § 5219a.
6. Danielle DiMartino & John V. Duca, The Rise and Fall of Subprime Mortgages, 2 Econ. Letter: Insights from the Fed. Res. Bank of Dallas 11, at 2 (2007).
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. The Fin. Crisis Inquiry Comm'n, 111th Cong., the Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States, at 3. (Comm. Print 2011) [hereinafter Financial Crisis Inquiry Report].
13. *Id.* at 7.

rose from $91,500 in 2001 to $149,500 in 2007."[14] Financial institutions became caught up in the competition over the expansion in mortgage lending, becoming careless as they "expected that house prices would continue to rise—thereby allowing borrowers to build up equity in their homes—and that credit would remain easily available so that borrowers would be able to refinance if necessary."[15]

Higher rates and home prices eventually drove down demand for home ownership. The decline began in 2006 and continued to accelerate into 2007. Fewer people were buying homes, and homes began to sit on the market. At the same time, the high interest rates assigned to subprime borrowers began to take their toll. Homeowners were unable to afford their mortgage payments and, as a result of the weak housing market, they were unable to sell their homes to avoid foreclosure.[16] As mortgage delinquencies and defaults rose, investors became frightened, pulling back from "a range of credit markets."[17] In turn, facing stunning losses on their mortgages, financial institutions cut back on lending.[18] The markets were spooked, and the government at first provided no assistance.[19] As a result of the financial turmoil, the U.S. entered a deep recession.

B. Aid Programs

Against this backdrop, Congress recognized the need to implement programs that would attempt to help both financial institutions and homeowners. These programs were established by the Treasury Department through TARP, while TARP itself was established by the Emergency Economic Stabilization Act of 2008 ("EESA").[20] The EESA, meant to provide stability to the economy, proved controversial. Many Americans did not believe the government should be "bailing out" Wall Street.[21] Despite its controversial nature, President Bush signed EESA into law on October 3, 2008.[22]

14. *Id.*

15. Ben Bernanke, *Four Questions about the Financial Crisis*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., ¶ 7, https://perma.cc/LE82-FQTC (last updated Apr. 14, 2009).

16. *The State of the Nation's Housing 2008*, J. CTR. FOR HOUS. STUDIES OF HARVARD UNIV., 2 (2008), https://perma.cc/A2H5-NNST.

17. Bernanke, *supra* note 15, ¶ 9.

18. *Id.*

19. Dina Temple-Raston, *Bush Signs $700 Billion Financial Bailout Bill*, NPR (Oct. 3, 2008), https://perma.cc/3PYD-VTDL.

20. 12 U.S.C. §§ 520–61 (2008).

21. Doyle McManus, *Americans Reluctant to Bail Out Wall Street*, L.A. TIMES (Sept. 24, 2008), https://perma.cc/DP7P-VBLR.

22. Temple-Raston, *supra* note 19.

TARP was intended to "stabilize the U.S. financial system, restart economic growth, and prevent avoidable foreclosures."[23] While TARP first allocated $700 billion for wide-ranging economic relief, Congress subsequently reduced the budgetary amount to $475 billion through the Dodd-Frank Wall Street Reform and Consumer Protection Act.[24] Within the Dodd-Frank Act, "approximately $250 billion was committed in programs to stabilize banking institutions," and $46 billion was set aside to help homeowners avoid foreclosure.[25]

The Treasury Department, through TARP, oversaw many sub-programs. Seeking to provide homeowners assistance, it launched the Making Home Affordable ("MHA") program in 2009.[26] HAMP, the cornerstone of the MHA program, was conceived to offer those homeowners at risk of foreclosure reduced monthly mortgage payments that were both "affordable and sustainable over the long-term."[27] To participate in HAMP, mortgage servicers executed a Servicer Participation Agreement with the government.[28] In turn, the government paid incentives to the participating servicers.[29] In theory, lenders would allow delinquent homeowners various mortgage modifications, including an adjusted interest rate, an extended term on the loan, and the forbearing or forgiving of the principle.[30] Ideally, for those homeowners eligible for HAMP, they would typically be put on a three-month trial payment period of reduced mortgage payments, allowing them to prove they could consistently make the new payments.[31] If they successfully did so, the mortgage lender was supposed to execute an official modification agreement.[32]

In reality, it did not work out that way. Financial institutions like Bank of America ("BOA") gamed the system even after they settled a governmental lawsuit over mortgage program abuses for $25 billion.[33] Such

23. *TARP Programs*, U.S. Dep't of Treasury, https://perma.cc/4PJ5-NJHA (last updated Sept. 15, 2016).

24. *Id.*

25. *Id.*

26. *Making Home Affordable*, U.S. Dep't of Treasury, https://perma.cc/VQ5U-TXUY (last updated Mar. 10, 2017).

27. *Making Home Affordable: Home Affordable Modification Program (HAMP)*, U.S. Dep't of Treasury, https://perma.cc/Q9Y7-4DBK (last updated Jan. 30, 2017).

28. *Servicer Participation Agreement*, U.S. Dep't of Treasury (Sept. 22, 2010), https://perma.cc/F6KK-ARAJ.

29. *Making Home Affordable Handbook,* Making Home Affordable 103 (Sept. 1, 2011), https://perma.cc/KX4G-DYG2.

30. *Understand the Terms of Your Modification*, Making Home Affordable, https://perma.cc/3C7Y-XS6C (last updated Dec. 30, 2016).

31. *Id.*

32. *Id.*

33. Office of Pub. Affairs, *$25 Billion Agreement Provides Homeowner Relief & New Protections, Stops Abuses*, U.S. Dep't of Justice, https://perma.cc/2GH7-GAFS (last updated Oct. 22, 2014).

abuses triggered lawsuits such as *Morrow* in Montana and across the country.

III. Issues in Montana – *Morrow*

Beginning in late 2009 or early 2010, consumer law practitioners in Montana had a noticeable increase in calls from distressed homeowners who were adversely affected by the mortgage crisis and were unable to obtain loan modifications under HAMP or other programs designed by Congress to assist folks like them. The complaints had many common elements. Among them were instances in which (1) consumers were told by their loan servicers that they needed to "skip a payment" (or otherwise be in default) before they could apply for a loan modification, even though under HAMP, the standard was "reasonably foreseeable or imminent default" (not actual default);[34] (2) modification application material was routinely rejected by loan servicers many times for minor errors or oversites, leading to delays in applying as defaults grew; (3) consumers rarely, if ever, spoke with the same person, and most experienced calls with dozens of different servicing employees, usually telling them different things than the last person they talked to; (4) consumers would complete the "trial payment period" only to be rejected for a permanent loan modification; (5) many consumers faced imminent foreclosure and loss of their homes, because they had followed servicer instructions and made the reduced payments; and (6) foreclosures were routinely botched by an array of agents for servicers working with high volumes of cases.

And then there were the Morrows. A.B. and Betty Morrow, like many folks, fell in love with Montana after traveling around the state. Originally from South Carolina, they bought land and built a home for their retirement near White Sulphur Springs in 2006, high on a hillside with a view of the Crazy Mountains. They first financed their home through Quicken Loans. That loan was sold to Countrywide Financial, which, in January 2008, was sold to BOA. The Morrows had planned to retire after selling two businesses in South Carolina. In early 2009, those sales fell through. Worried that they may fall behind on their loans because of this drop in income, the Morrows contacted BOA to discuss a loan modification, through the HAMP program, in May 2009.[35] The Morrows kept up with their payments until November 2009 and claimed that in October 2009, a BOA employee informed them they should intentionally miss the next month's payment to

34. *Making Home Affordable Handbook*, *supra* note 29, at 67.

35. Morrow v. Bank of Am., 324 P.3d 1167, 1173 (Mont. 2014).

become eligible for a modification.[36] At that time, they were current on their payments.[37]

On December 8, 2009, the Morrows spoke with Sunil Kumar, a BOA representative. According to the Morrows, Kumar told them they were "locked" for a modification with trial payments of $1,239.99.[38] Kumar explained to the Morrows they would need to make the trial payments for three to four months. At the end of that period, if the Morrows had successfully made the trial payments, he informed them, the modification would be made permanent. The modification, according to the Morrows, would extend the period of the loan from 15 to 40 years and reduced the interest rate from 4.99% to 2%. The Morrows believed the modification had been approved, subject to execution of the documents and completion of the trial period.[39]

After the conversation, the Morrows immediately began to do what they had been told to do—they started making the trial payments as told and submitted to BOA the financial documents requested.[40] Nevertheless, by February 2010, the Morrows received a Notice of Intent to Foreclose. When they called BOA about why they were getting such notices when they were making the required trial payments, they were told by BOA to just ignore the notices.[41] Months followed with the Morrows continuing to make the trial payments but receiving confusing and inconsistent information from BOA.[42] After making the trial payments for at least a year, the Morrows were told they did not qualify for the modification because they "appeared to reside in South Carolina," even though they were legal residents of Montana by this point, and even though BOA had never before raised this issue while accepting over a year's worth of trial payments.[43]

The Morrows filed a lawsuit with these claims: breach of oral contract; negligence; negligent misrepresentation; tortious breach of the covenant of good faith and fair dealing; fraud; and violation of the Montana Consumer Protection Act ("MCPA").

On summary judgment, the district court first concluded the Morrows' breach of contract claim was barred by the Statute of Frauds. The district court also rejected the Morrows' claims of negligence, negligent misrepresentation, and tortious breach of the covenant of good faith and fair dealing—concluding BOA owed no duty to the Morrows. The district court also

36. *Id*.
37. *Id.*
38. *Id*.
39. *Id.* at 1173–74.
40. *Id.* at 1174.
41. *Id*.
42. *Id.* at 1174–75.
43. *Id.* at 1175.

concluded the Morrows' claims for fraud and violation of the MCPA were barred by the Statute of Frauds, because they presented alternative theories of enforcement of the oral agreement to modify the loan.[44] The Morrows subsequently appealed.

Before the *Morrow* decision, the Montana Supreme Court had not yet dealt with consumer issues arising out of HAMP. BOA, as well as other banks and loan servicers, believed that verbal false or misleading statements made to consumers were simply not actionable because of the Statute of Frauds, just as the district court ruled in *Morrow*.[45] However, other courts around the country had begun to address similar issues. For instance, in *Ansanelli v. JP Morgan Chase Bank, N.A.*,[46] the United States District Court for the Northern District of California, while noting the general rule that a lender does not owe a borrower a duty of care when it does not exceed the scope of its conventional role as money lender, refused to dismiss the complaint under Rule 12, because the complaint alleged that the defendant went beyond that standard lender role in offering a loan modification and engaging in the trial payment plan.[47] The court also refused to dismiss the fraud and negligent misrepresentation claims based on Chase's contradictory and misleading statements.[48]

The case of *Wigod v. Wells Fargo Bank, N.A.*, also cited by the Court in *Morrow*, involved facts somewhat similar to the Morrows'—the borrower entered into a trial payment period and made all the payments as promised, only to have Wells Fargo later deny the permanent, thus increasing the borrower's likelihood of default.[49] Given these facts, the Seventh Circuit's opinion in *Wigod* provides a good summary of the HAMP program under TARP, and its trial payment plan requirement:

> Where a borrower qualified for a HAMP loan modification, the modification process itself consisted of two stages. After determining a borrower was eligible, the servicer implemented a Trial Period Plan (TPP) under the new loan repayment terms it formulated using the waterfall method. The trial period under the TPP lasted three or more months, during which time the lender "must service the mortgage loan . . . in the same manner as it would service a loan in forbearance." Supplemental Directive 09-01. After the trial period, if the borrower complied with all terms of the TPP Agreement—including making all required payments and providing all required documentation—and if the borrower's representations remained true and correct, the servicer had to offer a permanent modification.[50]

44. *Id*.
45. *Id*.
46. No. C 10-03892, 2011 U.S. Dist. LEXIS 32350 (N.D. Cal. Mar. 28, 2011).
47. *Id.* at *21–22.
48. *Id.* at *19–21.
49. 673 F.3d 547, 557–58 (7th Cir. 2012).
50. *Id.* at 557.

The *Wigod* court overturned the district court's dismissal of Wigod's consumer protection claims, ruling that she did not need to prove an "intent to deceive" under Illinois' Consumer Fraud and Deceptive Business Practices Act, and that she had sufficiently alleged actual pecuniary loss, including costs and fees, lost opportunity to save her home, and the lost ability to take the path of an "efficient breach."[51]

In another early case—and as the Montana Supreme Court would later do in *Morrow*—the United States District Court for the District of Massachusetts in *Bosque v. Wells Fargo Bank, N.A.*[52] upheld the plaintiffs' ability to pursue their claims under Massachusetts' Consumer Protection Act ("93(A)").[53] There, the complaint alleged that Wells Fargo made deceptive, false or misleading representations to plaintiffs about the eligibility for a loan under HAMP.[54] The court found these allegations of injury and causation sufficient to state a claim under § 93(A).[55]

While the Montana Supreme Court took note of these and cases from other jurisdictions, it also relied heavily on existing Montana case law to fashion its findings in favor of the Morrows.[56] It is worth briefly reviewing the Court's treatment of the Morrows' other claims under contract and tort, as those rulings established the foundation for the MCPA finding.

The Court first addressed the Morrows' claim that BOA's various representations related to the loan modification, including that they were approved for it, that it constituted an enforceable oral contract that BOA violated, and that BOA had also violated the covenant of good faith and fair dealing.[57] The Court rejected these claims, basing its decision on the Statute of Frauds, and its historical purpose which "serves to give security and certainty to titles."[58]

The Court, however, reversed the district court and ruled in the Morrows' favor on all other counts. First, the Court addressed whether Bank of America owed the Morrows a common law or fiduciary duty as a basis for their negligence claim. In doing so, the Court reviewed Montana case law concerning duties owed by banks, discussing the distinction between "regular" banking transactions, under which there is no duty, and ones involving a fiduciary relationship, which would be actionable.[59] In the case of the Morrows, the Court found that a fiduciary relationship existed:

51. *Id.* at 575.
52. 762 F. Supp. 2d 342 (D. Mass. 2011).
53. *Id.* at 353–54.
54. *Id.* at 353.
55. *Id.* at 354.
56. *Morrow,* 324 P.3d at 1185.
57. *Id.* at 1175–76.
58. *Id.* at 1176–78.
59. *Id.* at 1177.

> The Morrows have alleged facts which, if proven, would establish that Bank of America owed them a fiduciary duty. The Morrows claim Bank of America advised them it would be in their best interests to deliberately miss a payment and default on their loan. . . . Instructing a borrower not to repay a loan, to pay less than the amount required by the loan documents, or to ignore notices of impending foreclosure and avoid curing a default is not the type of advice "common in the usual arms-length debtor/creditor relationship." *Coles Dept. Store*, 240 Mont. at 229, 783 P.2d at 934. While the Morrows stood at arm's length to their lender in negotiating the initial loan, once their loan was in default they had little choice but to continue placing their trust in the bank. It is unrealistic to say Bank of America and the Morrows continued to hold equal footing throughout the negotiations.[60]

As a result, the Court reversed the district court's dismissal of the Morrows' negligence claims: "The facts alleged by the Morrows, if proven, would demonstrate that BOA failed to provide them with accurate information about the modification process; failed to minimize the confusion and risk associated with the modification; and failed to timely respond and resolve their inquiries and complaints."[61]

The rest of the Court's rulings on the Morrows' other tort claims flowed from the Court's finding that BOA owed the Morrows a duty. BOA's actions could lead to negligent misrepresentation based on the Morrows' allegations of "directly conflicting information" about the loan modification process.[62] Likewise, the Morrows were allowed to proceed with their fraud-based claims: "The Statute of Frauds cannot 'be used as a shield or cloak to protect fraud, or as an instrument whereby to perpetrate fraud' . . . [a] claim of fraud is therefore not barred by the Statute of Frauds even if the claim relies on evidence of an oral agreement that would be unenforceable in contract."[63]

Finally, the Court turned to the Morrows' claims under the MCPA. Before addressing that discussion, though, it is worth looking at the context in which the Court addressed the law. The MCPA is supported by the Montana Constitution: "The legislature shall provide protection and education for the people against harmful and unfair practices by either foreign or domestic corporations."[64] Other states have some form of consumer protection built into their constitutions, but none so broad as Montana.[65] The Court has consistently held that the MCPA "is broad in scope" and "being in derogation of the common law, should be liberally construed with a view to effect

60. *Id.* at 1177–78 (citations omitted).
61. *Id.* at 1179.
62. *Id.* at 1181.
63. *Id.* at 1182.
64. Mont. Const. art. XIII, § 1(2).
65. Ala. Const. art. IV, § 103; Colo. Const. art. XV, § 8; Idaho Const. art. XI, § 8; Minn. Const. art. XIII, § 6; and N.H. Const. pt. 2, art. LXXXIII.

its object and to promote justice."[66] Moreover, the Court has long held that lending and borrowing are subject to the MCPA.[67]

In *Morrow*, the Court's discussion of the MCPA was relatively brief. The Court summarized the broad reach of the MCPA, first noting that the MCPA "prohibits" unfair or deceptive acts or practices in the conduct of any trade or commerce.[68] The Court later affirmed that the Act applied to consumer lending and collection and servicing of loans,[69] and that a practice is considered unfair if it "offends established public policy and . . . is either immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."[70] Focusing in on the misrepresentations made by BOA here, the Court cited the Administrative Rules of Montana, which state that a representation is unfair or deceptive if it "states that a transaction involves rights, remedies or obligations that it does not involve."[71] Finally, the Court recognized the statutory threshold that a consumer may sue under the MCPA if he or she has suffered "'any ascertainable loss of money or property' as a result of an unfair practice."[72]

Turning to what happened to the Morrows, the Court reviewed the series of misrepresentations it had discussed before in relation to the other tort claims, summarizing that the Morrows' "default grew for more than a year, while Bank of America repeatedly told them to ignore it, and while the Morrows made trial payments for fourteen months."[73] The Court determined "the allegations stated by the Morrows, if true, would constitute a practice substantially injurious to consumers" and violated the MCPA.[74] In addressing the Morrows' claims of damages and the BOA's claim that they had not suffered any "ascertainable loss of money or property", the Court ruled that the issue of damages should be resolved by the finder of fact and not at summary judgment.[75]

Morrow is significant in that it made clear that consumers may sue banks and loan servicers, under the MCPA and in tort, for false statements and misrepresentations about the handling of mortgage loans. Given the number of consumers at risk during the COVID crisis of foreclosure and

66. Baird v. Norwest Bank, 843 P.2d 327, 333 (Mont. 1993); Plath v. Schonrock, 64 P.3d 984 (Mont. 2003).

67. *Baird*, 843 P.2d at 334 (citing Pa. Bankers Ass'n v. Com. Bureau of Consumer Prot., 427 A.2d 730, 733 (Pa. Commw. Ct. 1981) (for the proposition that "lending and collecting" money is trade and commerce).

68. *Morrow*, 324 P.3d at 1184 (Mont. 2014), (citing MONT. CODE ANN. § 30-14-103 (2019)).

69. *Id.* at 1184 (citing *Baird,* 843 P.2d at 334).

70. *Id.* (quoting Rohrer v. Knudson, 203 P.3d 759, 764 (Mont. 2009)).

71. *Id.* (citing MONT. ADMIN. R. 23.19.101(1)(l) (2014)).

72. *Id.* at 1184 (citing MONT. CODE ANN. § 30-14-133(1) (2013)).

73. *Id.* at 1184–85.

74. *Id.* at 1185.

75. *Id.*

potentially losing their homes, *Morrow* provides a strong foundation for consumer claims that may arise out of the current crisis.

IV. Post-*Morrow* Consumer Decisions from the Montana Supreme Court

After *Morrow,* the Montana Supreme Court has issued several decisions that help flesh out consumer rights and consumers' ability to obtain damages for unfair and deceptive actions by businesses. *Jacobson v. Bayview Loan Servicing*[76] involved a situation much like the Morrows'. The Jacobsons, like the Morrows, were harmed by the 2008 economic crisis. They fell behind on their loan payments, and their loan servicer, Bayview, sent them a default letter.[77] Like the Morrows, they were told to stop making payments on their loan to help them qualify for their requested loan modification.[78] The Jacobsons then went through months of hearing conflicting information from the servicer, while loan modification applications were made at the same time the servicer scheduled—then canceled—foreclosure sales.[79]

At a bench trial, the district court determined Bayview engaged in deceit, negligent misrepresentation, and it violated the MCPA and the Fair Debt Collection Practices Act ("FDCPA").[80]

The Court first reviewed the many misrepresentations made to the Jacobsons, by Bayview, through the lens of the FDCPA.[81] The Court found Bayview's activities were "seriously misleading misrepresentations" concerning the Jacobsons' loan and its status, and that they were material because they would "mislead the 'least sophisticated consumer.' "[82]

Turning to the MCPA, the Court, relying on *Morrow*, found that Bayview's instructions—to the Jacobsons—not to make payments was a practice "substantially injurious to consumers" and in violation of the MCPA.[83] The Court also found Bayview's efforts to collect attorneys' fees and costs *following* the trial it lost violated the MCPA.[84] The Court also

76. 371 P.3d 397 (Mont. 2016).

77. *Id.* at 401.

78. *Id.* at 402.

79. *Id* at 402–03.

80. *Id.* at 405–09.

81. The FDCPA applied in *Jacobson* because Bayview, as a loan servicer, was subject to the Act, whereas the Morrows would not have had a claim under the FDCPA against Bank of America because only entities conducting collections are subject to the Act, not the original creditor. *See* Jacobson, 371 P3d at 405–06.

82. *Jacobson*, 371 P.3d at 409.

83. *Id.* at 410 (quoting *Rohrer*, 203 P.3d at 764).

84. *Id*.

ruled the violations of the FDCPA "establish state law grounds for violations of the MCPA."[85]

The most significant portion of the *Jacobson* decision was the Court's treatment of damages. The Court first determined, as in *Morrow*, Bayview's actions in causing the loan balance to increase "while Bayview was making misrepresentations to the Jacobsons" was "substantially injurious" to the Jacobsons.[86] The Court agreed with the district court's award of damages based on the increased interest charges caused by Bayview's actions.[87] Finally, the Court upheld the award of emotional distress damages of $50,000 under the MCPA, underscoring the broad and remedial purpose of the Act.[88] Specifically, Montana Code Annotated § 30-14-133(1) affords the district court discretion in awarding damages as "other equitable relief that it considers necessary or proper." Thus, the Montana Supreme Court held the award of emotional distress damages was appropriate.[89] For Montana attorneys representing consumers, the confirmation that a consumer may obtain damages for emotional distress is a significant expansion of the possible remedies a prevailing consumer may obtain under the MCPA.

Puryer v. HSBC Bank,[90] also involved an attempt by a borrower to obtain a loan modification under HAMP. In *Puryer,* the Montana Supreme Court reversed the district court's Rule 12(b)(6) dismissal of Puryer's claims for breach of contract; breach of the covenant of good faith and fair dealing; violation of the FDCPA; and violation of the MCPA, closely following *Jacobson* in deciding the latter two issues.[91] Notably for this discussion, the lender had alleged that because Puryer had not made mortgage payments and had been in default for years—based on the lender's advice to stop making payments according to Puryer—there was no "ascertainable loss of money or property" triggering damages under the MCPA.[92] Building on the Court's decision in *Jacobson*, the Court reversed the district court's dismissal of the MCPA claim for lack of damages. The district court had declined to award damages because Puryer "failed to allege any ascertainable loss of money or property."[93] The Supreme Court disagreed: "[w]e have rejected Lenders' argument that under the MCPA 'ascertainable loss of

85. *Id.* at 410–11.
86. *Id.* at 411–12.
87. *Id.* at 412.
88. *Jacobson*, 371 P.3d at 413.
89. *Id.* at 413.
90. 419 P.3d 105 (Mont. 2018).
91. *Puryer*, 419 P.3d at 115.
92. *Id.* at 108.
93. *Id.* at 115.

money and property' requires a showing of 'actual damages' such as a foreclosure sale."[94] The Court went on:

> Puryer's MCPA claim alleged damages of cost and fees, attorney fees, and ascertainable loss of money and property by executing a legal proceeding to stop Lenders' improper foreclosure of her property. Therefore, Puryer sufficiently pled damages recognized by this Court, even if no foreclosure sale took place, to overcome a 12(b)(6) motion to dismiss. Taking Puryer's allegations as true, we conclude she has sufficiently pled a violation under the MCPA.[95]

In other words, incurring the costs to bring a lawsuit challenging a lender's actions may be a sufficient "ascertainable loss of money or property" to trigger recovery under the MCPA.

However, not all post-*Morrow* decisions by the Montana Supreme Court have gone in favor of consumers.[96] In *Anderson v. ReconTrust, N.A.*,[97] the Court upheld dismissal, under Rule 12(b)(6), of allegations much like those made by the Morrows, not as well fleshed out in the Complaint, and not as egregious.

In addressing the negligence and negligent misrepresentation claims, the Court stated the facts "boil[ed] down to no more than that Bank of America erroneously told them they qualified for a loan modification and then, within a matter of days, backtracked and told them they did not."[98] The Court further noted that, unlike in *Morrow*, "the complaint does not allege that Bank of America induced Andersons to take, or refrain from, any action, or that, but for their reliance on the bank's initial misrepresentation, they would have timely cured their default and avoided foreclosure."[99]

In likewise rejecting the Andersons' MCPA claim, the Court said the "Andersons' amended complaint alleges nothing similar or close to the bank conduct at issue in *Morrow*."[100] The Court also rejected the Andersons' claim for damages under the MCPA, relying again on the fact that the amended complaint did not show any reliance by the Andersons on representations by the bank.[101]

In similar fashion, the Montana Supreme Court has dismissed consumer claims like in *Morrow*, either at the motion to dismiss stage or at

94. *Id*.

95. *Id*.

96. Anderson v. ReconTrust, 407 P.3d 692 (Mont. 2017); Bank of Am. v. Alexander, 389 P.3d 1020 (Mont. 2017); Graham-Rogers v. Wells Fargo Bank, 449 P.3d 798 (Mont. 2019).

97. 407 P.3d 692 (Mont. 2017).

98. *Id.* at 699–700.

99. *Id.* at 699.

100. *Id.* at 700.

101. *Id*.

summary judgment, in *Bank of America, N.A. v. Alexander*,[102] and *Graham-Rogers v. Wells Fargo Bank, N.A.*[103]

While the post-*Morrow* cases dismissed by the Montana Supreme Court may serve as a cautionary lesson in proper pleading and case selection, *Jacobson* and *Puryer*, along with *Morrow,* reflect that Montana's consumer protection statutes continue to be interpreted as "broad in scope and flexible in application so as to respond to human inventiveness," as the Court determined almost 30-years ago.[104] The strength and breadth of the MCPA based on these recent decisions will likely serve distressed Montana consumers well in dealing with issues arising from the economic impact of the COVID-19 pandemic.

V. Looking Ahead to the Current Crisis

Fast forward to 2021 and COVID-19, the country is facing a financial crisis more dangerous and comprehensive than what it experienced during the housing crisis. Millions of Americans have lost their jobs.[105] As of this writing, Congress and the President reached an accord on another round of stimulus packages, including aid for struggling homeowners;[106] however, the country is facing another—more intense—wave of COVID-19 infections.[107] Although it is too early to predict how things will shake out, we can make some assumptions and apply past lessons, based in part on the congressional assistance which was approved early in the pandemic.

A. The CARES Act

Signed into law by the President on March 27, 2020, the Coronavirus Aid, Relief, and Economic Security ("CARES") Act is a sweeping piece of legislation meant to provide "fast and direct economic assistance for American workers, and families, small businesses, and preserve jobs for American industries."[108] The CARES Act provided wide-ranging relief such as the

102. 389 P.3d 1020 (Mont. 2017).

103. 449 P.3d 798 (Mont. 2019).

104. *Baird*, 843 P.2d at 333.

105. *The Employment Situation – September 2020*, U.S. Dep't of Labor (Oct. 2, 2020), https://perma.cc/K4VU-W3KR.

106. Zach Montague, *A Look at What's in the Stimulus Package Trump Signed*, N.Y. Times (Dec. 28, 2020), https://perma.cc/77XD-3PFG.

107. *Coronavirus: Why are Infections Rising Again in U.S.?*, BBC News (Oct. 8, 2020), https://perma.cc/SN6A-J7HY.

108. *The CARES Act Works for All Americans*, U.S. Dep't of Treasury, https://perma.cc/FQJ5-F979 (last visited Oct. 18, 2020).

Paycheck Protection Program intended to keep small businesses afloat[109] and the $1,200 Economic Impact Payment sent to qualifying taxpayers.[110]

1. Section 4022

One of the measures found in the CARES Act provided relief to homeowners unable to pay their mortgages and risking foreclosure as a result. Section 4022, "Foreclosure Moratorium and Consumer Right to Request Forbearance," prevented mortgage servicers from foreclosing on any home owner who did not make their mortgage payment within a 60-day period beginning on March 18, 2020, with one important caveat—the mortgage loan must be federally backed.[111] These loans are insured or guaranteed by the Federal Housing Administration ("FHA"), National Housing Act, Housing, and Community Development Act of 1992, Department of Veteran Affairs, Department of Agriculture, or purchased or securitized by Federal Home Loan Mortgage Corporation, or the Federal National Mortgage Association—more commonly known as Freddie Mac and Fannie Mae.[112] This is a significant segment of the home-owning population—70% of mortgages are federally backed.[113] Independent of the § 4022 moratorium, the Federal Housing Finance Agency[114] and FHA[115] have continued to extend foreclosure protections through the end of the year, extending single family foreclosure moratoriums to those mortgages backed by Freddie Mac, Fannie Mae, and the FHA through the end of 2020.

Additionally, § 4022 of the CARES Act allows mortgagees, with federally backed loans, to request forbearance on their mortgage payments due "directly or indirectly" to the COVID-19 pandemic.[116] The standard to grant a forbearance is lax—after a borrower has submitted a request to his or her servicer stating that he or she is experiencing financial difficulties because of COVID-19, the servicer "shall with no additional documentation required other than the borrower's attestation" provide the forbearance without appending any additional fees or penalties.[117] A period of 180 days of forbearance is then granted, which can be extended by another 180 days

109. CARES Act § 1102, 134 Stat. at 286.

110. *Id.* at 490.

111. *Id.*

112. *Id.*

113. Tara Siegel Bernard, *Mortgage Relief That Comes with a $4,000 Bill*, N.Y. Times (May 15, 2020), https://perma.cc/2TWV-CENZ.

114. *FHFA Extends Foreclosure and REO Eviction Moratoriums*, Fed. Hous. Fin. Agency (Aug. 27, 2020), https://perma.cc/T7CL-MCML.

115. *FHA Extends Foreclosure and Eviction Moratorium for Homeowners Through Year End*, U.S. Dep't of Hous. and Urban Dev. (Aug. 27, 2020), https://perma.cc/4V7Y-9PN8.

116. CARES Act § 2201, 134 Stat. at 490.

117. *Id.* at 490–91.

at the request of the borrower.[118] The borrower may shorten the duration of the forbearance period.[119]

2. *Section 4021*

Section 4021 of the CARES Act, titled "Credit Protection During COVID-19," provides important credit protections to consumers, especially those borrowers who request a forbearance on their mortgage loan.[120] If an accommodation is made by agreement to "defer one or more payments, make a partial payment, forbear any other delinquent amounts, modify a loan or contract, or any other assistance or relief granted to a consumer who is affected by the coronavirus disease," the furnisher of the loan or contract must report the credit obligation as current.[121] If the account was delinquent before the covered period and an agreement to accommodate is made, the delinquent status is maintained unless the account is brought to current (after which, it will be reported as current until the covered period ends).[122] The covered period is defined as January 31, 2020, through 120 days after the national emergency concerning COVID-19 terminates.[123]

3. *Issues Arising from CARES Act*

As the application of the HAMP program during the housing crisis shows, just because a law gives consumers certain rights, it does not automatically mean consumers will be able to avail themselves of those rights and opportunities. For instance, while the CARES Act allows consumers to take advantage of forbearances to avoid immediate problems, the Act does not spell out how the amounts forborne will have to be repaid. The amounts due do not magically go away—they will have to be repaid somehow. Each federally backed mortgage program issued guidance on how debtors may repay those amounts, and they include: payments of the forbearance amount in a lump sum; addition of the missed payments to monthly payments; and loan modification—with most of the federally guaranteed programs requiring that the lender engage with the borrower at least thirty-days before the expiration of the forbearance period.[124]

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118. *Id.* at 490.
119. *Id.*
120. *Id.* at 489.
121. *Id.*
122. *Id.*
123. *Id.*
124. Andrew Pizor & Geoffry Walsh, *Mortgage Relief for Homeowners Affected by COVID-19*, NAT'L CONSUMER LAW CTR. (Sept. 23, 2020), https://perma.cc/H8E6-FKFV (The National Consumer Law Center is a great resource for current consumer issues arising from COVID-19).

The opportunities for problems to arise for distressed consumers from this array of potential repayment schemes is obvious, based on the experiences arising from HAMP a decade ago. What if the lender refuses to modify a loan and makes the forborne amounts due in a lump sum, even after giving the consumer the impression that he or she qualified for a modification? What if the lender goes straight to the option of having the consumer pay in a lump sum without offering other options?

Likewise, while § 4021 of the CARES Act provides consumers' credit reports must continue to report a consumer, who was current at the beginning of the forbearance period, as in good standing during the forbearance period, cases have already arisen in which servicers incorrectly reported delinquent loans in forbearance.

A slew of complaints to date single out Wells Fargo as the main offender.[125] Plaintiffs allege Wells Fargo has, without permission of the borrowers, placed their loans into forbearance.[126] Typically, this happens against the plaintiff's express wishes.[127] With Samara Green, for instance, a Wells Fargo representative called her to speak about escrow payments she was making.[128] Throughout the conversation, they discussed placing her mortgage in forbearance, which Ms. Green declined.[129] When she next spoke with Wells Fargo, she was informed her mortgage had been placed in forbearance anyways with neither her knowledge nor consent.[130] This is largely an issue because when a loan is placed into forbearance, the borrower cannot refinance.[131] The complaints allege that Wells Fargo is incentivized to place loans into forbearance as they receive an incentive payment from Freddie Mac or Fannie Mae for placing borrowers in repayment of deferral plans.[132] As similar complaints continue to crop up across the country, the lessons of *Morrow* may prove relevant once again.

125. Complaint Class Action, Delpapa v. Wells Fargo Bank, N.A., (N.D. CA Aug. 26, 2020) (No. 3:20-cv-06009) [hereinafter Complaint Class Action]; Class Action Complaint, Green v. Wells Fargo & Co., (N.D. CA July 31, 2020) (No. 3:20-cv-5296) [hereinafter Class Action Complaint]; Plaintiff's Original Class Action Complaint and Application for Injunctive Relief, Forsburg v. Wells Fargo & Co., (W.D. VA July 23, 2020) (No. 5:20-cv-00046) [hereinafter Application for Injunctive Relief].

126. Complaint Class Action, *supra* note 125, ¶ 3.

127. Class Action Complaint, *supra* note 125, ¶ 93.

128. *Id.* ¶ 124.

129. *Id.* ¶¶ 124–25.

130. *Id.* ¶¶ 128–29.

131. *Id.* ¶ 34.

132. Complaint Class Action, *supra* note 125, ¶ 31; Class Action Complaint, *supra* note 125, ¶ 77; Application for Injunctive Relief, *supra* note 125, ¶ 15.

VI. Conclusion

Experience from the housing crisis showcases it will take several months, if not years, before Montana consumer practitioners begin to see cases arising from the CARES Act, and any subsequent relief bills that Congress may pass. Given the high unemployment, it is also likely that consumer practitioners will see more foreclosure related issues. With the *Morrow* decision and its progeny, consumer law practitioners will have more tools available to assist distressed consumers, especially homeowners, in Montana through the challenging years ahead. To paraphrase the Montana Supreme Court, lenders, because of "human inventiveness,"[133] in the negative sense, will always find new ways to mistreat unsophisticated borrowers. Luckily, Montana law provides flexible and wide-reaching tools to respond to crises and protect Montana consumers.

133. *Baird*, 843 P.2d at 333.