

No. _____

In the
Supreme Court of the United States

JEFFREY B. BROADHURST,

Petitioner,

v.

CITIMORTGAGE, INC.,

Respondent.

**On Petition for a Writ of Certiorari to the
Third Circuit Court of Appeals**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Third Circuit Court of Appeals Erred in Affirming the District Court's Order Granting Respondent's Motion for Summary Judgment by finding that because Petitioner, in deposition, stated that he may not have accepted the loan modification terms, he was unable to show harm under the UTPCPL.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this Court are as follows:

Jeffery B. Broadhurst;

CitiMortgage, Inc..

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Jeffery B. Broadhurst has no parent corporations and no publicly held company that owns 10% or more of any entity.

LIST OF PROCEEDINGS

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2:18-cv-00121-PD

JEFFREY B. BROADHURST v. CITIMORTGAGE, INC.

Order dated 02/26/2020

Defendant's Motion for Summary Judgment GRANTED.

Broadhurst v. CitiMortgage, Inc., No. 18-121, 2020 U.S. Dist. LEXIS 82063 (E.D. Pa. Feb. 26, 2020).

THIRD CIRCUIT COURT OF APPEALS

No. 20-1665

JEFFREY B. BROADHURST v. CITIMORTGAGE, INC.

Judgment dated 12/11/2020

District Court's Order AFFIRMED.

Broadhurst v. Citimortgage, Inc., 838 F. App'x 671 (3d Cir. 2020)

TABLE OF CONTENTS

| | |
|--|-----|
| QUESTIONS PRESENTED FOR REVIEW..... | i |
| PARTIES TO THE PROCEEDINGS..... | ii |
| CORPORATE DISCLOSURE STATEMENT..... | ii |
| LIST OF PROCEEDINGS..... | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES..... | v |
| PETITION FOR A WRIT OF CERTIORARI..... | 1 |
| OPINIONS BELOW | 1 |
| BASIS FOR JURISDICTION IN THIS COURT..... | 2 |
| STATUTORY PROVISIONS INVOLVED..... | 2 |
| STATEMENT OF THE CASE | 9 |
| REASONS TO GRANT THIS PETITION | 12 |
| I. The United States Court of Appeals for the Third Circuit erred when it detailed that in an Deposition Petitioner stated that he may not have accepted the terms regardless of whether he received the letter in time..... | 12 |
| CONCLUSION | 18 |

APPENDIX

Appendix A

Order from the Third Circuit Court of Appeals
Denying Petitioner's Petition Appeal 1a

Appendix B

Order from the United States District Court for the
Eastern District of Pennsylvania, Granting Summary
Judgment for Defendant CitiMortgage 10a

TABLE OF AUTHORITIES**Cases**

| | |
|--|--------|
| <i>Am. Home Prods. Corp. v. FTC,</i> 695 F.2d 681 (3d Cir. 1982)..... | 17 |
| <i>American Home Products Corp. v. FTC,</i> 695 F.2d 681 (3d Cir. 1982)..... | 17 |
| <i>Broadhurst v. Citimortgage, Inc.,</i> 838 F. App'x 671 (3d Cir. 2020) | 1 |
| <i>Broadhurst v. CitiMortgage, Inc.,</i> No. 18-121, 2020 U.S. Dist. LEXIS 82063 (E.D. Pa. Feb. 26, 2020) | 1 |
| <i>Commonwealth ex rel. Corbett v. Peoples Benefit</i> <i>Servs., Inc.</i> , 923 A.2d 1230 (Pa. Commw. 2007) | 15, 16 |
| <i>Commonwealth v. Golden Gate National Senior</i> <i>Care, LLC</i> , 194 A.3d 1010 (Pa. 2018) | 13 |
| <i>Commonwealth v. Hush-Tone Indus., Inc.,</i> 4 Pa. Commw. 1 (1971) | 16, 17 |
| <i>Commonwealth v. Monumental Properties, Inc.,</i> 459 Pa. 450, 329 A.2d 812 (1974) | 13 |
| <i>FTC v. Algoma Lumber Co.,</i> 291 US 67 (U.S. 1934)..... | 16 |
| <i>FTC v. Colgate-Palmolive Co.,</i> 380 U.S. 374 (1965) | 17 |

| | |
|--|--------|
| <i>FTC v. Sterling Drug, Inc.,</i> 317 F.2d 669 (2d Cir. 1963)..... | 17 |
| <i>FTC v. World Travel Vacation Brokers, Inc.,</i> 861 F.2d 1020 (7th Cir. 1988) | 16 |
| <i>Gregg v. Ameriprise Financial, Inc.,</i> 195 A.3d 930 (Pa. Super. 2018), <i>alloc, granted,</i> No. 490 WAL 2018, 2019 WL 2635642 (Pa. Jun. 27, 2019)..... | 13, 18 |
| <i>Koch v. F.T.C.,</i> 206 F.2d 311 (6th Cir. 1953) | 16 |
| <i>Meyer v. Community College of Beaver County,</i> 625 Pa. 563, 93 A.3d 806 (2014) | 13 |
| <i>Montgomery Ward v. FTC,</i> 379 F.2d 666 (7th Cir. 1967) | 16 |
| <i>Regina Corporation v. FTC,</i> 322 F.2d 765 (3d Cir. 1963)..... | 18 |
| <i>Removatron Int'l Corp. v. FTC,</i> 884 F.2d 1489 (1st Cir. 1989)..... | 17 |
| <i>Trans World Accounts, Inc. v. FTC,</i> 594 F.2d 212 (9th Cir. 1979) | 17 |

Statutes

| | |
|--------------------------|----|
| 15 U.S.C. §§ 41-58 | 14 |
| 28 U.S.C. § 1254..... | 2 |

| | |
|--------------------------------|------------|
| 28 U.S.C. § 1332(a)..... | 9 |
| 73 P.S. § 201-2(4)(ix)..... | 14 |
| 73 P.S. § 201-2(4)(vi)..... | 14 |
| 73 P.S. § 201-2(4)(x)..... | 14 |
| 73 P.S. § 201-2(4)(xvii) | 15 |
| 73 P.S. § 201-2(4)(xx)..... | 15 |
| 73 P.S. § 201-2(4)(xxi)..... | 14, 15, 16 |
| 73 P.S. § 2270..... | 2, 12 |

Rules

| | |
|------------------------------|----|
| Supreme Court Rule 29.6..... | ii |
|------------------------------|----|

PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully requests that a Writ of Certiorari be issued to review the decisions of the United States' Third Circuit Court dismissing his petition for rehearing and affirming the United States District Court for the Eastern District of Pennsylvania's grant of summary judgment to the Respondent.

OPINIONS BELOW

The December 11, 2020 decision from the Third Circuit Court of Appeals can be found at *Broadhurst v. CitiMortgage, Inc.*, 838 F. App'x 671 (3d Cir. 2020) and is reproduced in the Appendix ("Pet. App. 1a") at Pet. App. 1a-7a.

The February 26, 2020 decision from the United States District Court for the Eastern District of Pennsylvania can be found at *Broadhurst v. CitiMortgage, Inc.*, No. 18-121, 2020 U.S. Dist. LEXIS 82063 (E.D. Pa. Feb. 26, 2020) is reproduced in the Appendix Pet. App. 8a.

BASIS FOR JURISDICTION IN THIS COURT

The Third Circuit Court of Appeals affirmed the decision of the United States District Court for the Eastern District of Pennsylvania on December 11, 2020. (Pet. App. 1a). This Court has jurisdiction pursuant to statutory provisions 28 U.S.C. § 1254 to review on writ of certiorari the decision of the United States Court of Appeals for the Third Circuit.

STATUTORY PROVISIONS INVOLVED

73 P.S. § 2270.

(a) BY DEBT COLLECTORS.— It shall constitute an unfair or deceptive debt collection act or practice under this act if a debt collector violates any of the provisions of the Fair Debt Collection Practices Act (Public Law 95-109, 15 U.S.C. § 1692 et seq.)

(b) BY CREDITORS.— With respect to debt collection activities of creditors in this Commonwealth, it shall constitute an unfair or deceptive debt collection act or practice under this act if a creditor violates any of the following provisions:

(1) Any creditor communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall:

(i) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;

- (ii) not state that such consumer owes any debt;
- (iii) not communicate with any such person more than once unless requested to do so by such person or unless the creditor reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;
- (iv) not communicate by postcard;
- (v) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the communication relates to the collection of a debt; and
- (vi) after the creditor knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of or can readily ascertain such attorney's name and address, not communicate with any person other than that attorney unless the attorney fails to respond within a reasonable period of time to communication from the creditor.

(2) Without the prior consent of the consumer given directly to the creditor or the express permission of a court of competent jurisdiction, a creditor may not communicate with a consumer in connection with the collection of any debt:

- (i) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a creditor shall assume that the convenient time for communicating with a consumer is after 8 a.m. and before 9 p.m. local time at the consumer's location;
- (ii) if the creditor knows the consumer is represented by an attorney with respect to such debt and has knowledge of or can readily ascertain such attorney's name and address unless the attorney fails to respond within a reasonable period of time to a communication from the creditor or unless the attorney consents to direct communication with the consumer; or
- (iii) at the consumer's place of employment if the creditor knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

(3) Except as provided in paragraph (1), without the prior consent of the consumer given directly to the creditor or the express permission of a court of competent jurisdiction or as reasonably necessary to effectuate a postjudgment judicial remedy, a creditor may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise

permitted by law, a debt collector, the attorney of the debt collector or the attorney of the creditor.

(4) A creditor may not engage in any conduct the natural consequence of which is to harass, oppress or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this paragraph:

- (i) The use or threat of use of violence or other criminal means to harm the physical person, reputation or property of any person.
- (ii) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.
- (iii) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 1681a(f) or 1681b(a)(3) of the Fair Credit Reporting Act (Public Law 91-508, 15 U.S.C. § 1681 et seq.).
- (iv) The advertisement for sale of any debt to coerce payment of the debt.
- (v) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse or harass any person at the called number.

(vi) Except as provided in paragraph (1), the placement of telephone calls without meaningful disclosure of the caller's identity.

(5) A creditor may not use any false, deceptive or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this paragraph:

(i) The false representation or implication that the creditor is vouched for, bonded by or affiliated with the United States or any state, including the use of any badge, uniform or facsimile thereof.

(ii) The false representation of the character, amount or legal status of any debt.

(iii) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(iv) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, attachment or sale of any property of any person unless such action is lawful and the creditor intends to take such action.

(v) The threat to take any action that cannot legally be taken or that is not intended to be taken.

- (vi) The false representation or implication that a sale, referral or other transfer of any interest in a debt shall cause the consumer to lose any claim or defense to payment of the debt or become subject to any practice prohibited by this act.
- (vii) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.
- (viii) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a debt is disputed.
- (ix) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued or approved by any court, official or agency of the United States or any state or which creates a false impression as to its source, authorization or approval.
- (x) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.
- (xi) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(xii) The false representation or implication that documents are legal process.

(xiii) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

STATEMENT OF THE CASE

A. Bringing the Claims to Federal Court.

Petitioner initially filed a complaint in the Court of Common Pleas of Montgomery County, Pennsylvania. (Pet. App. 8a). On January 10, 2018, Respondent filed for removal to the United States District Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1332(a). (Pet. App. 8a).

B. Concise Statement of Facts Pertinent to the Questions Presented.

1. The initial loan.

Petitioner, and his former spouse, who is a non-party, obtained a \$354,700 loan from Respondent on December 15, 2004, in the form of a note. (Pet. App. 2a). The Note was secured by a mortgage against the purchased property in Lansdale, Pennsylvania. The initial terms of the loan lasted from February 1, 2005, through January 1, 2015, where Petitioner was obligated to pay monthly interest rates of \$1,625.71 (5.5% interest-only mortgage). (Pet. App. 2a). Thereafter, Petitioner sought to remove himself from the interest-only mortgage. (Pet. App. 2a). Repeatedly, Respondent offered Petitioner a more desirable mortgage. As such, Petitioner applied for, and was subsequently denied, a more favorable loan because the home's value depreciated and was worth less than the original principal amount in the original mortgage. Believing that he was a victim of a predatory loan, Petitioner contacted several counsel including Mitchell Tarter, Esq., David Bifulco, Esq.,

Diane Tosta, Esq., and the undersigned counsel. (Pet. App. 2a).

2. The Loan Modification Program.

In February 2014, Petitioner sought a loan modification seeking to alter the terms of his loan by and through Attorney David Bifulco. (Pet. App. 2a). On October 31, 2014, Attorney Bifulco, through written letter, informed Respondent that Petitioner was represented and that all communications aimed at Petitioner were to be made towards counsel. (Pet. App. 2a).

On October 31, 2016, Citi sent a letter to Petitioner and his wife outlining a Trial Plan, participation in which could serve as a precursor for modification of the loan. (Pet. App. 3a). The 2016 letter stated: "You are approved to enter into a trial period plan under the Home Affordable Modification Program (HAMP). (Pet. App. 3a). This is the first step toward qualifying for more affordable mortgage payments." (Pet. App. 3a). Under this plan, Petitioner would have been required to make three payments of \$1,596.22. (Pet. App. 3a). These payments were to be made December 1, 2016, January 1, 2017, and February 1, 2017. (Pet. App. 3a). Respondent informed Petitioner that if the conditions of the HAMP were satisfied, Petitioner's mortgage would be modified. (Pet. App. 3a). Additionally, the letter explained to Petitioner that payments under the modified loan may be different than the payments in the trial plan. (Pet. App. 3a). Moreover, payments under a modified loan would include an escrow for property taxes and

insurance, and that he might have to make additional payments to cover the charges for creating the escrow account. (Pet. App. 3a).

On May 16, 2017, Petitioner was approved for a loan modification. (Pet. App. 3a). Under the loan modification plan, Petitioner's monthly payments would be \$2,306.56. (Pet. App. 3a). To accept these terms, Petitioner was required to accept the terms and sign the and return the Modification Agreement by May 30, 2017. (Pet. App. 4a). Importantly, Petitioner did not receive this letter until after the submission deadline. (Pet. App. 4a).

C. Procedural History

On January 10, 2018 Defendant timely removed this matter from state court, invoking diversity jurisdiction. (Pet. App. 8a).

The United States District Court for the Eastern District of Pennsylvania granted summary judgment in favor of Respondent on February 26, 2020. (Pet. App. 17a).

On Appeal, the Third Circuit Court of Appeals affirmed the District Court's summary judgment finding. (Pet. App. 1a-7a).

This Petition for Writ of Certiorari followed.

REASONS TO GRANT THIS PETITION

- I. The United States Court of Appeals for the Third Circuit erred when it detailed that in an Deposition Petitioner stated that he may not have accepted the terms regardless of whether he received the letter in time.**

In its opinion dated December 11, 2020, the Third Circuit erred in its analysis of Pennsylvania law as it related to 73 P.S. § 2270 – Unfair Trade Practices and Consumer Protection Law. The Third Circuit stated:

The District Court concluded that Broadhurst failed to show ascertainable loss with respect to Citi’s purported direct communications with Broadhurst and its untimely sending of the Modification Agreement, even assuming that such conduct might constitute false or deceptive misrepresentations under the FCEUA and UTPCPL. The Court was correct in doing so. First, Broadhurst’s argument that Citi’s alleged direct contacts with him are *per se* violations of the UTPCPL has no basis in Third Circuit or Pennsylvania case law...

Moreover, in his deposition, Broadhurst testified that the terms of the Modification Agreement were unacceptable, and even if he had additional time to review its terms, he was unlikely to have accepted them.

The Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1 to 201-9.2 ("UTPCPL"), like other so-called Little FTC Acts, is remedial legislation enacted to provide consumers with broader and more effectual protections than those provided by traditional common law. See, e.g., *Commonwealth v. Golden Gate National Senior Care, LLC*, 194 A.3d 1010, 1023 (Pa. 2018); *Meyer v. Community College of Beaver County*, 625 Pa. 563, 93 A.3d 806, 811 (2014). It is animated by the principle that honest markets and true competition cannot exist in the absence of honest disclosure and fair dealing. With the 1976 addition of a private consumer cause of action (Act of Nov. 24, 1976, P.L. 1166, No. 260, § 1), the UTPCPL created a dual enforcement scheme allowing both the Attorney General and private consumers to police the market against "unfair or deceptive acts or practices" through a robust array of potential remedies, including restitution, treble damages, and cease and desist orders.

Pennsylvania courts have deemed the UTPCPL to be a strict liability statute prohibits any deceptive act or practice towards a consumer, whether or not the merchant acted intentionally, carelessly or with the utmost care. See *Gregg v. Ameriprise Financial, Inc.*, 195 A.3d 930, 939 (Pa. Super. 2018), alloc. granted, No. 490 WAL 2018, 2019 WL 2635642 (Pa. Jun. 27, 2019). In *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 329 A.2d 812 (1974), the Pennsylvania Supreme Court held that the UTPCPL was intended "to benefit the public at large by eradicating 'unfair or deceptive' business practices [and] to ensure the fairness of market transactions."

459 Pa. at 457, 329 A.2d at 815. Furthermore, the Court emphasized that the UTPCPL must be "liberally construed." *Id.* at 461, 329 A.2d at 817.

Like the Federal Trade Commission Act ("FTCA"), 15 U.S.C. §§ 41-58, upon which the Pennsylvania law was modeled, the UTPCPL was meant to be an "adaptable tool for protection of the public interest." *See* 459 Pa. at 464, 329 A.2d at 819 (construing the UTPCPL in light of the principles and precedents pertaining to the FTCA).

The UTPCPL has a "Catchall" provision that prohibits "any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding." 73 P.S. § 201-2(4)(xxi). Significantly, the Catchall encompasses "any other" deceptive conduct that has the capacity to confuse or mislead; the statutory text does not require a showing that any such "other" conduct be "knowingly" or "intentionally" deceptive.

For the most part, The UTPCPL's enumerated deceptive practices require some sort of mens rea. ("knowingly" misrepresenting that services, repairs or replacements are needed); some that require express proof of "intent," §§ 201-2(4)(ix) & (x) (advertising goods or services "with intent" not to sell or supply them as advertised); some that require the making of a false or misleading statement but with no mental state specified, § 201 -2(4)(xi) (misleading statements about "the reasons for . . . or the amount of price reductions"); some that require an affirmative representation, § 201-2(4)(vi)(representing used goods

[*5] as new); some that involve an omission or failure to disclose information, § 201-2(4)(xvii)(mandatory disclosures for telemarketers); § 201-2(4)(xx)(mandatory disclosures regarding rustproofing of automobiles).

The Catchall provision, § 201-2(4)(xxi), by using the words "any other," while omitting any scienter or intent requirement, indicates that each of the preceding twenty enumerated practices-some of which include an element of ill-intent and some of which do not-is a specific example of a practice that would also fall within the Catchall. It therefore cannot be the case that only an intentional [*6] misrepresentation can violate the Catchall provision, or that there cannot be a violation in the absence of knowledge or intent. To put it another way, the text of § 201-2(4), in its entirety, outlaws more than just common law fraud, as can be seen from the enumerated examples themselves.

Because the UTPCPL uses "knowledge" and "intent" specifically for only certain subsections of the twenty enumerated practices, neither the statute generally nor the Catchall requires a plaintiff who has been harmed by deceptive commercial conduct to prove intent.

"An act or a practice is deceptive or unfair if it has the capacity or tendency to deceive[,] and "[n]either the intention to deceive nor actual deception must be proved; rather, it need only be shown that the acts and practices are capable of being interpreted in a misleading way." *Commonwealth ex rel. Corbett v.*

Peoples Benefit Servs., Inc., 923 A.2d 1230, 1236 (Pa. Commw. 2007) (internal quotations omitted).

Id., 194 A.3d at 1023.

Importantly, innocent deceptive conduct has served as basis for proving a violation of the UTPCPL and the FTCA for decades. *Commonwealth v. Hush-Tone Indus., Inc.*, 4 Pa. Commw. 1 (1971) ("The fact that the advertiser acted in good faith is not determinative.") (citing *Koch v. F.T.C.*, 206 F.2d 311, 317 (6th Cir. 1953) ("The fact that petitioners made the representations in good faith is immaterial.")); See *FTC v. World Travel Vacation Brokers. Inc.*, 861 F.2d 1020, 1029 (7th Cir.1988) (Because the statute does not require an intent to deceive, the subjective good faith of the advertiser is not a valid defense to an enforcement action brought under section 5(a) of the FTCA).

Under the FTCA, deception is a broader, more flexible standard of actionable misconduct than the traditional tort of common law fraud. The modern concept of deception is shaped by federal court interpretations of the FTCA. The term "deceptive conduct" has been defined in FTC litigation to be less than common law fraud. See *FTC v. Algoma Lumber Co.*, 291 US 67, 81 (U.S. 1934) (establishing the capacity to deceive standard); *Montgomery Ward v. FTC*, 379 F.2d 666,670 (7th Cir. 1967) (rejecting common law requirements to prove deception and reiterating capacity to deceive standard). 3Link to the text of the note

Many federal courts have held that a misrepresentation which has the tendency or capacity to mislead consumers is a deceptive act or practice under federal law. See e.g., *American Home Products Corp. v. FTC*, 695 F.2d 681, 686 (3d Cir. 1982); *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979); *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963); see also the discussion in *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 384-90 (1965). To determine whether a representation is deceptive, courts must consider "the impression created by the representation, not its literal truth or falsity." *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1496 (1st Cir. 1989) (quoting *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982)).

Here, the Third Circuit placed undue reliance on the fact that "in his deposition, Broadhurst testified that the terms of the Modification Agreement were unacceptable, and even if he had additional time to review its terms, he was unlikely to have accepted them." (Pet. App. 7a).

As noted in *Gregg*, whether or not Petitioner suffered ascertainable loss or would have accepted the plan is inconsequential to the issue at hand. Respondent's conduct was unquestionable deceptive. First, Respondent issued the letter far too close the acceptance deadline. This lack of good faith falls squarely within the definition of deceptive and deviates from the arguable conduct in *Hush-Tone*.

Second, the gross difference between the trial plan payments and modification payments created a

degree of falsity that misled Petitioner. Again, *Gregg* dictates that the statute at hand is strict liability. Elements of common-law fraud are not required in this instance. Additionally, an explicit lie is not required to prove deception since "[i]t is now settled that deception may be accomplished by innuendo rather than by outright false statements." *Regina Corporation v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963). The UTPCPL lists twenty specified examples of "unfair or deceptive acts or practices," and then adds a "Catchall" provision that prohibits "any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding." 73 P.S. § 201-2(4)(xxi). Here, it is uncontested that Petitioner was confused and there was a clear misunderstanding. This confusion and misunderstanding is a direct result of Respondent's deceptive tactics to stronghold Petitioner into an unfavorable loan.

As such, this Court should find that the Third Circuit's analysis is flawed and departs from Pennsylvania and other jurisdictions' law.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 5, 2021.