First Round of ATR Cases Goes to Banks

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The CFPB?s ability-to-repay (ATR) rule became effective in January 2014. It requires mortgage lenders to determine during underwriting that a borrower has a reasonable ability to repay a loan according to its terms. In the event of default resulting in foreclosure, borrowers can defend against foreclosure by claiming that their lender failed make a reasonable and good faith determination of their ability to repay. One year and nine months into this new regime, early cases indicate that borrowers cannot simply prevent foreclosures by assignees or servicers of their debt without *facts* showing that the loan originator committed an ATR violation.

For example, in *Khadher v. PNC Bank, N.A.*, 577 F. App?x 470 (6th Cir. 2014), the Sixth Circuit affirmed summary judgment in favor of an assignee, PNC Bank, N.A., finding ?no evidence? that the loan?s originator, National City Mortgage Services Company, failed to make a reasonable ATR determination. *Id*. at 480.

More recently, in *Pitts v. Wells Fargo Bank, N.A.*, 2015 WL 5728879 (D.D.C. Sept. 29, 2015), the United States District Court for the District of Columbia granted a servicer?s motion to dismiss an ATR claim finding that the borrowers failed to ?name[] the loan originators as defendants, and they allege no facts supporting Defendant Wells Fargo?s liability for the alleged TILA violations by the loan originators.? *Id.* at *4.

Together, these two cases suggest that courts will not let borrowers avoid or unwind foreclosures based on loose allegations of ATR violations. Instead, borrowers must name their loan originator and marshal actual *facts* showing that their loan originator failed make a reasonable and good faith determination of their ability to repay.

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