

Discharge in Bankruptcy Without Reaffirmation is Not a Shield and a Sword

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Many borrowers use bankruptcy as a shield against a lender's foreclosure action. Some also try to use bankruptcy as a sword to bring up defenses that stem from the mortgage contract to defeat a foreclosure. A recent second district case, *PNC Bank, N.A. v. Wilson*, 2017 IL App (2d) 151189 (March 2, 2017), has dealt with this exact issue and found that a borrower is not allowed to do this.

In the *Wilson* case, the borrowers, the Wilsons, alleged that PNC did not comply with a notice requirement in the Code of Federal Regulations (CFR) laying out requirements that must be followed prior to initiating a foreclosure. Due to this alleged failure to provide the notice, the Wilsons were arguing that the foreclosure should be dismissed.

The appellate court found that the notice requirement in the CFR contemplates that there is still an agreement between the parties that can be remedied. But, since the borrowers did not reaffirm the debt in bankruptcy, the court found that there was no contract to remediate. Thus, the notice found in the CFR would be pointless and futile due to the discharge in bankruptcy without reaffirmation. As the court noted, futile acts are generally excused particularly when the equities favor the act being excused. In essence, the court summed its decision up by stating that the discharge in bankruptcy without reaffirmation signifies that the borrowers are no longer bound by the mortgage and should not be permitted to enjoy any of the benefits of the mortgage that their voluntary act has invalidated.

Now, banks are justified in not sending notices that used to be required under a mortgage after there has been a discharge in bankruptcy without reaffirmation. This gives the banks a very strong argument against delay tactics and against arguments stemming from defenses relating to the mortgage. Arguments are likely still going to be made, claiming that banks are required to send the notices, but the *Wilson* case provides a powerful defense to such claims.

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