

August 16, 2010 | Posted By

## **LENDER'S REPRESENTATION THAT BORROWER "QUALIFIED" FOR LOAN NOT A REPRESENTATION BORROWER COULD "AFFORD" A LOAN**

**Question:** Is a lender's representation to a borrower that the borrower can "qualify" for a mortgage loan a representation that the borrower can also "afford" the loan?

**Answer:** No, according to the First District Court of Appeal in *Perlas v. GMAC Mortgage, LLC* (No. A125212), decided August 11, 2010.

In this case, the plaintiff borrowers obtained a refinance loan from GMAC. According to their complaint, plaintiffs signed an Application stating their "total income" was substantially greater than the actual information they provided to GMAC. (Plaintiffs claimed they signed the Application without being given an opportunity to review it.) Their actual income was not enough for them to make the required Loan payments.

Six months later, GMAC's agent recorded a notice of default. The borrowers filed suit alleging various claims. In response to the defendants' demurrer, they argued that through its knowingly false representation that the borrowers were "qualified" for the Loan, GMAC was in effect representing that they could "afford" the Loan and make the required payments. The trial court sustained the demurrer.

The First District affirmed, noting that nowhere did plaintiffs allege GMAC had expressly represented to them they had the ability to make the loan payments specified in the loan documents. In effect, the borrowers were arguing "that they were entitled to rely upon GMAC's determination that they *qualified* for the loans in order to decide if they could *afford* the loans." The Court of Appeal rejected this argument, citing previous cases holding that there is no fiduciary relationship between a borrower and lender, that a lender owes no duty of care to a borrower in approving a loan, and that a "lender's efforts to determine the creditworthiness and ability to repay by a borrower are for the lender's protection, not the borrower's."

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