NO. 123038

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB, **Plaintiff-Appellant,** **v.** **Andres Cobo; Amy M. Rule,** **Defendants -Appellees**	) Appeal from the Appellate Court,) First District, No. 1-17-872)) On Appeal from the Circuit Court of) Cook County, Law Division) Case No. 15 L 7759) Hon. Raymond W. Mitchell,) Judge Presiding)) Date of Order Appealed From:) November 6, 2017

AMICUS BRIEF

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I. The Association of Foreclosure Defense Attorneys

The Association of Foreclosure Defense Attorneys (AFDA) is a 501(c)(6) professional non-profit group dedicated to helping the foreclosure defense bar improve client representation through education, mentoring, shared research, pleadings, and strategies. The members of the AFDA are attorneys who represent homeowners being foreclosed on. The AFDA formed during the recent recession because there was a great need for sharing best practices and different approaches to defending homeowners and navigating Illinois foreclosure laws. AFDA conducts outreach out to the public to educate foreclosure defendants in their options as well as the availability of quality, qualified and affordable legal representation.

The AFDA has a substantial interest in the questions being presented to the Court. Lower courts have inconsistently applied the single refiling rule and its close cousin, the doctrine of *res judicata* with relationship to mortgage foreclosures and other actions on the debt. As an organization dedicated to the best practices of attorneys who defend homeowners, the AFDA takes a position on these matters that considers the history of mortgage foreclosure actions, the plain reading of the Code of Civil Procedure, including the Illinois Mortgage Foreclosure Law. The AFDA suggests this Court apply the single refiling rule in a manner that supports the public policy of alleviating homeowners from duplicative litigation that takes up already strained judicial resources.

II. THE SINGLE REFILING RULE PREVENTS CONSUMERS FROM BEING THE SUBJECT OF NUMEROUS LAWSUITS INTENDED TO HARRASS AND DIVERT JUDICIAL RESOURCES.

The current case arises from a debt collector's multiple attempts to proceed against borrowers in three separate suits seeking a judgment on the same alleged default. After facing opposition in the first two suits each time, the debt collector voluntarily dismissed the suits. The third suit was involuntarily dismissed by the appellate court because it was barred by Illinois' single refiling rule.

The single refiling rule applies when a plaintiff voluntarily dismisses an action, pursuant to 735 ILCS 5/2-1009. After such a dismissal, the plaintiff is allowed an absolute right to refile, pursuant to Section 13-217 of the Code of Civil Procedure. *Timberlake v. Illini Hosp.*, 175 Ill.2d 159, 163 (1997). Allowing the refiling provides the plaintiff an opportunity to have its claim adjudicated on the merits. *Byrson v. New Am. Publ'ns., Inc.*, 174 Ill.2d 77, 106-07 (1996). However, if the second suit is dismissed, for any reason, then §13-217 precludes the filing of a third suit. *Timberlake v. Illini Hosp.*, 175 Ill.2d at 165.

In deciding that the absolute right to refile was limited to one additional filing, this Court in Gibellina v. Handley described the rule as follows:

> While a section 2-1009 motion in conjunction with section 13-217 may protect the right of a plaintiff to have a decision in the particular case made on the merits of the claim by potentially permitting 'two bites of the apple' when the first bite turns sour, the statutory scheme does not allow a third bite.

127 Ill.2d 122, 134 (1989).

In determining whether an action is new for purposes of the single refiling rule, Illinois courts are to look to whether there is an identity of causes of action using the principles of *res judicata*. *D'Last Corp. v. Ugent*, 288 Ill. App. 3d 216, 220 (1997). To that end, Illinois follows the transactional test in determining whether there is an identity of cause of action exists. *River Park, Inc. v. City of Highland Park*, 184 Ill.2d 290, 310 (1998). This Court has identified the rule as follows: separate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief. *River Park, Inc.*, 184 Ill.2d at 311.

Considering the above principles, the single refiling rule precludes a plaintiff from a third suit so long as the third suit arises from the same operative facts as the first two cases, even if new theories are offered or different remedies are sought. *Schrager v. Grossman*, 321 Ill. App. 3d 750, 758 (1st Dist. 2000).

A. The single refiling rule helps in preventing creditor and debt collector abuses of judicial resources.

It was not long ago that the topic of mortgage foreclosures dominated the headlines in print, television, and the courts. In the last few years the media has not focused on the issue, but in Illinois mortgage foreclosure lawsuits still decimate our communities and take up an inordinate amount of judicial resources. According to the Institute for Housing Studies at DePaul University, in 2016 there were 20,123 foreclosure filings made just in the Chicago Metro

Area.[1] Surely that is down from the astonishing high of 78,823 filing made in 2010, but mortgage foreclosures still consume a tremendous amount of judicial resources. In addition to the staggering number of foreclosure actions being filed, there is an increase in separate actions being filed by banks, debt collectors, and debt buyers seeking to obtain judgments against homeowners after completing a foreclosure.

These cases involve an inordinate number of voluntary dismissals, followed by refilings. Among the problems arising with the frequent voluntary dismissals of foreclosure actions are the delays and uncertainty imposed on the homeowner. The limbo created by these scenarios leaves a consumer with what is sometimes called "zombie title" or "zombie mortgage". See generally, J. Fox, *The Foreclosure Echo: How Abandoned Foreclosures Are Re-Entering the Market through Debt Buyers*, 26 Loy. Consumer L. Rev. 25 (2013). One reason for voluntarily dismissals of foreclosures is that the lender sells the note to a debt buyer. Mortgagees will even vacate already entered judgments in foreclosure actions for the purpose of obtaining a voluntary dismissal, making it easier for it to sell its mortgage asset. *The Foreclosure Echo*, 26 Loy. Consumer L. Rev. at 62 - 70. This phenomena has resulted in increased litigation centering around the pursuit of the homeowner on the note. Even though several years have passed

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[1] The Chicago metropolitan area consists of the counties of Cook, DuPage, Kane, Lake, McHenry, and Will. Data obtained from data portal for the Institute for Housing Studies at DePaul University found at https://www.housingstudies.org/dataportal/, last visited on May 28, 2018.

since the height of the foreclosure crisis, litigation is ongoing and continues to haunt our courts as debt buyers continue to pursue consumers. However, where the on again off again litigation violates the single refilling rule or *res judicata*, the courts must step in to stop the abusive tactics.

B. The three filings made by First Midwest against Defendants were harassing.

The harassment arising from multiple litigation is found in the record in the case *sub judice*. On December 8, 2011 Waukegan Savings and Loan filed a mortgage foreclosure action against Defendants arising out of an alleged payment default occurring on July 1, 2011. (R. at C168) Notably, the complaint asserted Defendants were personally liable for any deficiency. (R. at C169) The Complaint also sought the entry of a personal judgment against the Defendants as a form of relief. (R. at C170) However, on April 2, 2013, First Midwest Bank voluntarily dismissed the action.[2](R. at C193)

Two weeks later, on April 16, 2013 First Midwest filed an action for breach of the promissory note in the Law Division of the Circuit Court of Cook County. (R. at C196) The second action alleged the very same July 1, 2011 failure to pay on the Note. (R. at C197) On April 3, 2015 the matter was called for trial. First Midwest made an oral motion to continue the trial. The circuit court denied the motion. First Midwest then – unprepared to try its own case – voluntarily dismissed the action. (R. at C205)

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[2] First Midwest Bank appears to have substituted in a plaintiff after purchasing the assets of Waukegan Savings Bank. (R. at C25 - 57).

On July 30, 2015, First Midwest, now represented by new counsel, brought its third action against Defendants. The third action brought two counts: (1) breach of promissory note, and (2) unjust enrichment. (R. at C2 - 5) In each count First Midwest alleged damages arising from an alleged payment default occurring on July 1, 2011. Defendants contested the third action as a violation of the single refiling rule. (R. at C103)

The trial court denied Defendants' motion to dismiss the action. (R. at C246) According to the trial court the action was not barred because in the foreclosure action no judgment was entered on the request for deficiency. (R. at C249) The trial court's ruling missed the mark. The question here is not whether *res judicata* barred the third action, which would require a final judgment on the merits, it is whether the single refiling rule was violated, which does not require a judgment on the merits. *Flesner v. Youngs Dev. Co.*, 145 Ill.2d 252, 254 (1991). This basic misunderstanding of the single refiling rule was corrected by the appellate court. *First Midwest Bank v. Cobo*, 2017 IL App (1st) 170872 ¶25 (finding a final judgment is not needed to perform transactional test pursuant to section 13-217).

However, before the appellate court could correct the error, defendants were forced to litigate the foreclosure action by filing an answer, affirmative defenses. After substantial discovery and motion practice Defendants were unsuccessful. The trial court entered summary judgment against Defendants along with a money judgment in the amount of $308,192.56. (R. at C1494)

The Defendants have now litigated three different cases over a period of seven years all involving the same alleged failure to pay. This type of duplicative and protracted litigation is offensive to the very public policy that supports the single refiling rule. This Court should affirm the decision of the appellate court.

C. The rule sought by First Midwest would allow consumers to be subject to almost never ending and harassing lawsuits.

The rule sought by First Midwest poses a threat to homeowners and consumers all over Illinois. Under First Midwest's analysis a mortgage foreclosure plaintiff could get well beyond two bites at the apple. According to First Midwest, a mortgagee would be entitled to file two mortgage foreclosure actions. In both actions the consumer would be under threat of a personal judgment being entered for the debt owed. 735 ILCS 5/15-1508(e). If the mortgage foreclosure actions proved unsuccessful, then the plaintiff could move on to file an action solely on the note. If the first such action was voluntarily dismissed, then the creditor would get one more opportunity. Now, the consumer - resources completely tapped after numerous and protracted litigation - succumbs to the debt collector. Notably, once a judgment is entered against the homeowner, the debt collector continues to be able to foreclose a lien against the home. *State Bank of Piper City v. A-Way, Inc.*, 115 Ill.2d 401, 411 (1987) (recognizing UCC permits creditor to file action to foreclose on collateral after action to obtain personal judgment against debtor). Therefore, the consumer would likely be the subject of a fifth lawsuit.

This scenario is further exacerbated by the uncertainty surrounding the *res judicata* effect of alleging a default in a mortgage foreclosure action. Mortgagees have taken the position that they only need adjust the default date alleged in the complaint to assert a new cause of action, thereby avoiding *res judicata* concerns. This is troubling where it is clear that no separate default event has occurred. Any action filed on this "new" default would be a sham as the parties undoubtedly would be litigating with the same event using the same evidence. In fact, when the mortgagee moves for judgment it is likely going to seek the same judgment amount as in the first action.

In a mortgage foreclosure action, a mortgagee typically files a mortgage foreclosure after a few mortgage payments are missed and the debt is then accelerated such that the entire debt is due. See Restatement of the Law Third (Property) Mortgages §8.1. The acceleration is a requirement for the mortgagee to seek foreclosure of the entire debt. *Cathay Bank v. Accetturo*, 2016 IL App (1st) 152783 ¶33. The mortgagee then stops taking mortgage payments from the borrower. As a result, by the time a mortgage foreclosure action is filed, several months have passed since the initiation of the alleged default and the debt has been accelerated.

The acceleration of the debt is an important consideration in the *res judicata* analysis. If no acceleration occurs, then arguably a new default event occurs with the failure to pay each installment. *Thread and Gage Co., Inc. v. Kucinski*, 116 Ill. App3d 178, 184 (1983). However, the acceleration of the debt

changes the status of the debt, from being due in timely monthly installments to being all due and payable immediately. *Markus v. Chicago Title & Trust Co.*, 373 Ill. 557, 561 (1940). After acceleration, regardless of whether the mortgagee proceeds on an action for mortgage foreclosure or as an action on the note, the entire amount of the debt is at issue. *Straus v. Turnquist*, 279 Ill. App. 572, 580 (1st Dist. 1935). For purposes of *res judicata*, after acceleration has occurred, a mortgagee should not be able to simply allege a different date of the default within the same acceleration event. Instead, it would seem that in order for a "new" cause of action to arise from the same loan, a deacceleration (i.e., reinstatement of the loan) would have to take place. Therefore, where a plaintiff files an action on a debt any subsequent action relating to the same acceleration would be the same set of operative facts for *res judicata* purposes. Such a rule would then provide protections to consumers that the plaintiff is not abusing the litigation tools.

If mortgagees are permitted to engage in such veil gamesmanship, then after losing a mortgage foreclosure, the mortgagee can file a new action and simply allege a different month as the default, even if no new acceleration event has occurred. At least one author has advocated for the use of such a strategy in mortgage foreclosure actions. Manetti, Louis J. Jr., *Recent Illinois Court Decision Illustrates Pitfalls of Multiple Filings of a Mortgage Foreclosure Action*, https://www.hinshawcfs.com/pitfalls-of-multiple-filings-of-a-mortgage-foreclosure-action (last visited on May 30, 2018) ("However, a *Cobo* holding may

be avoidable. In *Cobo*, each of the three complaints alleged the same due date and the same principal amount due, but where a money obligation is payable in installments, a separate cause of action arises under Illinois law on each installment payment."). One organization, representing the default servicing industry, was even more bold stating "it appears that every new mortgage default date and corresponding changing balance owed forms a separate potential claim, with each separate claim permitted two filings. Given the plethora of circumstances that could alter a mortgage's default date over time, this ruling may provide a defense against the single refiling rule." http://dsnews.com/daily-dose/09-04-2017/single-refiling-rule-reconsidered (last visited May 30, 2018).

At least one court has identified this threat and held that *res judicata* still applies to the new action. *United States Bank Trust, N.A. v. Skibbe*, 2016 IL App (2d) 151143-U (*res judicata* barred subsequent foreclosure action even though new default date was alleged where court found no new default event occurred) compare to *JP Morgan Chase Bank, N.A. v. Moore*, 2015 IL App (1st) 142971-U (*res judicata* did not bar subsequent foreclosure action where lender advances all payments in arrearage on loan so that loan was reinstated prior to bringing a new action)[3]. The multiple defaults dilemma combined with the four bites at the

[3] Amicus Curiae doesn't cite the Skibbe and Moore Orders as precedent. Instead, the cases are referred to merely as an example of a case where a mortgagees changed default dates for their subsequent foreclosure actions under differing circumstances and how the courts dealt with the allegations for purposes of *res judicata*.

apple allowed by First Midwest's rule allows of almost endless litigation against homeowners. No matter how strong a defense a homeowner may have to a foreclosure, a creditor could wear the consumer down with endless litigation.

This Court's guidance is needed in this area to clarify the landscape of the *res judicata* effect of the filing of a mortgage foreclosure action. Allowing mortgage foreclosure plaintiffs to continue the filing of mortgage foreclosure actions in such a haphazard fashion subjects Illinois homeowners to potentially endless litigation where the plaintiff is otherwise unable to prove its case.

D. Proper application of the single refiling rule does not interfere with a mortgagees' obligations for loss mitigation.

First Midwest suggests public policy is promoted by its interpretation of the single refiling rule. According to First Midwest, a mortgagee may be forced to proceed with foreclosure as opposed to loss mitigation as a result of concerns about voluntary dismissals. First Midwest's argument does not honor the legal requirements of loss mitigation or foreclosure custom and practice.

When a mortgagee agrees to loss mitigation, it is often for a payment plan, forbearance agreement, or loan modification. Generally, the mortgagee does not dismiss their foreclosure action until such time as the agreement has been reached and all conditions for the agreement have been met by the borrower.[4] At

[4] In most instances involving a residential foreclosure, the loss mitigation process will be governed by federal law. 12 C.F.R. §1024.41. Under federal regulations, if a homeowner submits a completed package for loss mitigation to the loan's servicer, the loan servicer must cease taking any action that would lead to a foreclosure judgment or sale. 12 C.F.R. §1024.41(g) ("If a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing required by applicable law

that time the status of the loan has changed and would likely involve reinstatement of the loan. Any future default by the homeowner would truly be a new cause of action and a mortgagee's right to a future foreclosure action is not in jeopardy by the single refiling rule.

The decision in Wells Fargo Bank v. Norris is an example of this logic. In Norris, the plaintiff filed a mortgage foreclosure action. 2017 IL App (3d) 150764. However, the action was voluntarily dismissed in light of a pending loan modification agreement. *Norris*, at ¶4. In the mistaken belief that the loan modification agreement had been consummated and that the homeowner breached *that* agreement, a second mortgage foreclosure action was filed. *Norris*, at ¶5. During the second action it was brought to the plaintiff's attention that the loan modification agreement was not entered into. Therefore, the homeowner's failure to pay was not a violation of the loan modification agreement, but a continuation of the default that was the genesis of the first action. *Norris*, at ¶7. The plaintiff probably should have simply amended its complaint, but instead voluntarily dismissed the second action and filed a third. The third action returned to the allegations of default contained in the first foreclosure. *Norris*, at ¶8. The defendant appealed after a motion to dismiss for violation of single refiling rule was denied.

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for any judicial or non-judicial foreclosure process but more than 37 days before a foreclosure sale, a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale"). However, the regulations do not require the foreclosure action immediately be dismissed.

On appeal, the appellate court properly found that the second action was based upon an entirely different default event than the first action. *Norris*, at ¶22. Therefore, the second action was not a refiling of the first action. The Norris decision shows that a mortgagee's good faith attempt at loss mitigation will not result in unfair dismissals.

Even if a mortgagee dismissed its foreclosure action in order to pursue loss mitigation with a borrower, it has an absolute right to refile that action, pursuant to §2-1009 and §13-217. The mortgagee is then on notice not to prematurely dismiss any future action based on the same default event. This is no different than any plaintiff who may choose to attempt settlement with a defendant. The single refiling rule properly balances the public policy of promoting settlements (or loss mitigation) with the public policy of avoiding multiplicative and harassing litigation against consumers to proceed.

III. MORTGAGE FORECLOSURE AND SUITS ON THE NOTE EACH ALLOW ENTRY OF A PERSONAL JUDGMENT AGAINST ILLINOIS HOMEOWNERS

In the past there has been questions about the authority of chancery courts to grant a money judgment in a foreclosure. As a result, mortgagees were allowed to file separate actions to obtain money judgments after foreclosure. However, over the years, statutes and other authority of the courts have changed. Nonetheless, the lower courts have been slow and inconsistent in applying *res judicata* principles to mortgagees in the same fashion as other plaintiffs. At least one author has considered the state of the law in this area and

found the cases inconsistent and not in keeping with *res judicata* principles. E. Martin, *Getting a Second Bite at the Apple: The Res Judicata Exception for Seeking Foreclosure Deficiencies in Illinois*, 2016 U. Ill. L. Rev. 2271 (2016). For the reasons stated below, Amicus Curiae agrees with the conclusions in the article – that Illinois law should no longer permit mortgagees to seek personal deficiencies in subsequent litigation after a mortgage foreclosure.

A. Mortgage Foreclosure Practice Prior To The IMFL.

As recognized by the court in Metrobank v. Cannatello, long ago, Chancery courts were not permitted to enter personal judgment without a specific statutory authority. 2015 IL App (1st) 110529. In that regards, as early as 1865 the Illinois legislature enacted Section 17 of the Mortgages Act, which provided for the entry of a personal judgment against a defendant in the same action as a mortgage foreclosure. (1939 Session Laws, Chptr. 95, §17). As such, mortgage foreclosure defendants were subject to personal deficiencies where the sale of the property did not result in satisfaction of the foreclosure decree. *State Bank of St. Charles v. Burr*, 375 Ill. 379 (1941).Nonetheless, some chancery courts considered mortgage foreclosure an *in rem* proceeding, where the property owner was not necessarily a defendant. However, this distinction was corrected by this Court in ABN Amro Mortg. Group, Inc. v. McGahan, 237 Ill.2d 526, 536 (2010) where this Court held that mortgage foreclosure is a *quasi in rem* proceeding. Notably, this Court instructed that in a mortgage foreclosure action:

> The mortgagor is the instrumentality of the wrong. It was he or she who breached the contract by defaulting on the note secured by the mortgage.

> The foreclosure action is based on the note, the vehicle which gives the plaintiff the legal right to proceed against the property. The object of the foreclosure action is to enforce the obligation crated by that contract, through the property, but against a specific person.

227 Ill.2d at 536. This Court's insight into the nature of a mortgage foreclosure speaks to the very issue before the Court today. A mortgage foreclosure action at its heart is an action to obtain satisfaction for a property owner's failure to comply with the terms of the Note. Although the remedy is through the property, it does not alter that the action is about collecting on a note.

The jurisdictional challenge for chancery courts to hear claims for money damages was abolished with the enactment of the 1970 Constitution. Nonetheless, foreclosure courts continued to permit consecutive and duplicative litigation by mortgagees against homeowners to foreclose on the mortgage and then separately file an action to pursue a personal judgment.

B. The IMFL allows the mortgagee to seek a personal deficiency and then requires the trial court to enter the money judgment, when the consumer is personally served with process.

In 1987, the Illinois legislature enacted the Illinois Mortgage Foreclosure Law, which was codified in the Code of Civil Procedure. The IMFL is generally considered to have brought together various disparate statutory provisions allowing for mortgage foreclosure into one cohesive scheme.

The IMFL sets forth a statutory form complaint that a plaintiff may follow. 735 ILCS 5/15-1504(a). Among the matters that may be included in the complaint is a true and accurate copy of the note. 735 ILCS 5/15-1504. The plaintiff must also allege a default has occurred. 735 ILCS 5/15-1504. Under the IMFL, a

mortgagee may request a deficiency judgment "if the sale of the mortgage real estate fails to produce a sufficient amount to pay the amount found due, the plaintiff may have a personal judgment against any party in the foreclosure indicated as being personally liable therefor and the enforcement thereof be had as provided by law." 735 ILCS 5/15-1504(f).

In order to request the entry of a deficiency, the plaintiff must include two things in the statutory short form complaint. First, paragraph (3)(M) of the form complaint expressly names the parties who the plaintiff seeks to hold personally liable for the deficiency. 735 ILCS 5/15-1504(a). Second, the complaint must seek "A personal judgment for a deficiency" as one of the Request for Relief. 735 ILCS 5/15-1504(a). A mortgage foreclosure plaintiff is not required to plead allegations to seek a personal deficiency, if one is not sought. 735 ILCS 5/15-1504(b). However, if the request for relief seeks a deficiency, then under the IMFL:

> A request for a personal judgment for a deficiency in a foreclosure complaint if the sale of the mortgaged real estate fails to produce a sufficient amount to pay the amount found due, the plaintiff may have a personal judgment against any party in the foreclosure indicated as being personally liable therefor and the enforcement thereof be had a provided by law.

735 ILCS 5/15-1504(f).

A mortgagee who proves up its case is entitled to a judgment of foreclosure and sale. 735 ILCS 5/15-1506. Among the matters required to be resolved in a judgment of foreclosure is the ruling with respect to each request for relief set forth in the complaint. 735 ILCS 5/15-1506(e). As such, the trial court will set forth whether a mortgagee is entitled to a personal deficiency should the

sale of the subject property bring less than what is owed. In those instances, the circuit court is required to enter a personal judgment against the homeowner, if the sale of the property does not satisfy the outstanding debt. 735 ILCS 5/15-1508(e). See *U.S. Bank Trust, N.A. v. Atchley*, 2015 IL App (3d) 150144 ¶11.

There are only a few limitations placed on the circuit court's authority to enter a personal judgment. First, the entry of personal deficiency must be "otherwise authorized". 735 ILCS 5/1508(e)(i). This appears to be a reference to whether the underlying loan was a non recourse loan or where the borrower may have previously discharged the debt in bankruptcy. Second, the mortgagee must have plead a request for a deficiency and proved up the amount of the deficiency in its report of sale. 735 ILCS 5/1508(e)(ii). The only other limitation for the entry of a personal judgment is that the mortgagee must accomplish personal service on the homeowner. *Metrobank v. Cannatello*, 2015 IL App (1st) 110529 ¶30. This is a marked change as courts previously held that prior to the enactment of the IMFL, no legal remedy was allowed on the note in a single count foreclosure action. *Hickey v. Union Nat'l Bank & Trust Co.*, 190 Ill. App. 3d 186, 190 (3rd 1989).

IV. WHEN A MORTGAGEE VOLUNTARILY DISMISSES A COMPLAINT SEEKING A PERSONAL DEFICIENCY IN A MORTGAGE FORECLOSURE ACTION, THEN IT MAY NOT THEN FILE TWO SUBSEQUENT ACTIONS ON THE NOTE.

A plaintiff is generally considered to be the master of its complaint. With that a party is generally given an absolute right to voluntarily dismiss their cause

of action. However, "absolute" does not mean unlimited. A plaintiff who timely refiles its action, pursuant to §13-217 is limited to only one refiling. *Gendek v. Jehangin*, 119 Ill.2d 338, 343 (1988). Similar to the doctrine of *res judicata*, the purpose of the single refiling rule is to save a defendant from harassment and preserve the limited judicial resources.

The question before this Court is quite straightforward and the answer is found in the IMFL and Code of Civil Procedure. A statutory complaint for foreclosure seeking a personal judgment against the defendant is the same cause of action, for *res judicata* purposes, as an action on the note. Therefore, for purposes of the single refiling rule: The voluntary dismissal of a mortgage foreclosure a mortgagee may refile once, and only once, another action pursuing the same alleged default whether in a mortgage foreclosure or for a personal judgment on the note.

There can be no question that a personal judgment against the homeowner is part of a mortgage foreclosure action under the IMFL. Thus, for purposes of *res judicata* analysis, at least since 1987, foreclosures arise out of the same operative facts as a separate suit only on the note. There is no need to decide whether all mortgage foreclosure actions arise out of the same set of operative facts as all suits on the note, because in this matter (as is the case in the overwhelming majority of residential foreclosures) First Midwest requested a deficiency, which necessarily arises out of the note.

The connection between a mortgage foreclosure action and a suit on the note was explored by the Appellate Court in LSREF2 Nova v. Coleman. In Coleman, a mortgage foreclosure action was filed against Michelle Coleman. 2015 IL App (1st) 140184. As with almost all residential foreclosure defendants in Illinois, the complaint listed Coleman as "personally liable for any deficiency". *Coleman*, at ¶4. Three months later a judgment of foreclosure was entered against Coleman. The judgment provided that in case there was a deficiency the plaintiff was entitled to a deficiency judgment against Coleman. Three months later a sale of Coleman's home was conducted leaving a deficiency of over $227,000.

Six weeks after the sale the circuit court approved the sale and granted the deficiency "*in rem*". *Coleman*, at ¶6. Not happy with its foreclosure victory and substantial deficiency, the plaintiff filed a second suit against Coleman. This time they changed their mind about having the *in rem* deficiency and sought a personal judgment against Coleman. *Coleman*, at ¶7. The trial court dismissed the money action with prejudice based upon *res judicata* and an appeal ensued.

The parties disputed whether there was an identity of causes of action between the mortgage foreclosure action and the separate money action. *Coleman*, at ¶12. Following the transactional test, the Illinois Appellate Court properly concluded a mortgage foreclosure and a suit on the note are the same cause of action for purposes of *res judicata*. *Coleman*, at ¶¶14-16. Key to the appellate court's reasoning was that the mortgage foreclosure action sought personal liability against Coleman for the debt. The appellate court correctly

ignored the fact that the plaintiff obtained an *in rem* judgment in the foreclosure action. *Coleman*, at ¶15. For purposes of *res judicata*, it only matters what relief the plaintiff had available to it, not what relief it ultimately received.

The decision in Coleman is in keeping with this Court's ruling in River Park, Inc. In River Park, Inc. this Court applied the transactional test by reviewing the parallels between the factual allegations made by the plaintiff. *River Park, Inc.*, 184 Ill.2d at 314. This Court found that the facts alleged were "virtually identical" in the two suits. Therefore, the suits were considered identical causes of action for purposes of the single refiling rule. The Court rejected the notion that the causes of action were not identical based upon different theories of relief requested in the two suits.

Here, a comparison between First Midwest's foreclosure action and its two subsequent Law Division cases shows identity of causes of action. In each complaint First Midwest alleges the existence of the same Note and same alleged default. First Midwest also sought a personal judgment against Defendants in each of the three cases. Although, First Midwest added and subtracted forms of relief along the way. As in River Park, Inc., this Court should reject any idea that the foreclosure action and Law Division cases had to request the same form of relief. First off, all three actions sought the same relief - a personal judgment against the Defendants. (R. at 2-5, C169, and C197). More importantly, the actions did not need to seek the same remedy in order to have an identity in the cause of action.

Next, First Midwest argues the right of the plaintiff to a personal deficiency was never at issue in the foreclosure action because the plaintiff didn't follow through to obtain such a judgment. (Br. at pg. 21) Instead, First Midwest claims to only have been following the form complaint. (Br. at pg. 18). This line of reasoning is flawed. First off, First Midwest as plaintiff was master of its own complaint and did not have to follow the IMFL form. 735 ILCS 5/15-1504. Even in following the general form, First Midwest had the choice of which forms of relief to seek in the complaint. First Midwest *chose* to seek a deficiency in its complaint. More importantly, for determining the identity of a cause of action, it is irrelevant whether First Midwest chose to pursue a personal deficiency so long as the relief was available, which it was. 735 ILCS 5/15-1508(e).

First Midwest also seems to misunderstand that the single refiling rule doesn't require the first action to end with a ruling on the merits. Instead, the rule only requires that the first action be voluntarily dismissed. *Bush v. J&J Transmissions, Inc.*, 2017 IL App (3d) 160254 ¶7. A plaintiff is not permitted to refile a cause of action more than once, even if none of the cases are decided on the merits. See *Flesner v. Youngs Dev. Co.*, 145 Ill.2d at 254 (court dismissed third action as violation of single file rule where first two action were dismissed for lack of jurisdiction and voluntarily, respectively).

First Midwest's filing of two subsequent actions seeking a personal judgment against the Defendants violates the single refiling rule. According to First Midwest, it should be able to pursue as many actions as its wants, so long as

none of the actions reach the merits before being voluntarily dismissed. This position underlines the harassing nature of creditor lawsuits and is exactly precluded by the *single* refiling rule.

As a last-ditch attempt, First Midwest argues a personal deficiency is distinct from a suit on the note. (Br. at 19 – 21) First Midwest overlooks that for *res judicata* purposes, that distinction between the remedies is not the issue. It has long been held that *res judicata* encompasses not only the claims brought, but also "all that might have been." *Skolnik v. Petella*, 376 Ill. 500, (1941).The fact that a plaintiff may have more than one remedy available to it, *res judicata* bars them all. *Blumenthal v. Brewer*, 2016 IL 118781 ¶42.

More importantly, First Midwest is wrong about the nature of a personal deficiency judgment. In its discussion on this issue First Midwest is only able to point out procedural differences in how a plaintiff obtains a personal deficiency vs. a judgment on the note. (Br. at 20) Despite the procedural differences, the nature of the judgments is the same. 735 ILCS 5/15-1508(e) ("enforcement may be had for the collection of [personal deficiency amount], the same as when the judgment is solely for the payment of money.") There is no meaningful difference between obtaining a personal judgment against a homeowner in a mortgage foreclosure action as opposed to one in a Law Division case on the Note.

First Midwest argues the Appellate Court failed to account for proper service. First off, in over seven years of litigation First Midwest has never

suggested it did not obtain personal service on Defendants. Even now, First Midwest does not make that claim.[5] More importantly, First Midwest misses the point. If no personal service was obtained on a defendant, then a deficiency judgment is not available and there would be an exception to the application of *res judicata*. §26(1) of the Restatement (Second) of Judgments (1982) adopted by *Rein v. David A. Noyes & Co.*, 172 Ill.2d 325, 341 (1996). (*res judicata* not applicable where court in original action restricted in ability to entertain a remedy otherwise available to plaintiff). Amicus Curiae agrees that a mortgagee who is unable to obtain personal service in a foreclosure action (after using the required diligence to obtain service) may bring a separate action for the deficiency.[6]

CONCLUSION

The Court should not permit creditors an endless mechanism to file lawsuits against Illinois homeowners. Instead, there is no statutory basis or good public policy reason for continuing to allow mortgagees in Illinois to do what no other plaintiff enjoys, near endless litigation on a single set of operative facts. The Court should clarify the single refiling rule and impose the following rule:

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[5] Personal service was obtained on the defendants in the mortgage foreclosure action styled as Waukegan Savings Bank v. Jordan, et al., 2011 CH 42013. According to filings made in the foreclosure action, James MacCarthy, a special process server, served both Coby and Rule on February 13, 2012 via substitute service. This Court may take judicial notice of the records of the Clerk of the Circuit County of Cook County. *Curtis v. Lofy*, 394 Ill. App. 3d 170, 172 (2009).

[6] Service by publication is allowed in a mortgage foreclosure action. However, a plaintiff may not resort to service by publication without complying with requirements for due inquiry and diligent efforts to locate the defendant and obtain personal service first. *Bank of New York Mellon v. Karbowski*, 2014 IL App (1st) 130112 ¶13. Should a plaintiff fail to comply, any judgment entered would be void. *Karbowski*, ¶12.

> Once a mortgagee voluntarily dismisses a mortgage foreclosure action where there is personal jurisdiction over the homeowner, then the mortgagee is limited by the single refiling of an action involving the same default event arising under either the note or the mortgage.

Amicus Curiae also believes the Court should address the issue of what constitutes a "new" default, as that issue is closely tied to the matter before the Court and mortgagees appear ready to attempt to dodge any *res judicata* ruling by simply alleging a different default date when in fact no "new " default has occurred. For those reasons, Amicus Curiae urges the Court to affirm the ruling of the Appellate Court in this matter.

Respectfully Submitted,

/s/ Lloyd Brooks

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Lloyd Brooks, One of Amicus Curiae's Attorneys

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 24 pages.

/s/ Lloyd Brooks

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Lloyd Brooks, attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I, Lloyd J. Brooks, an attorney, hereby certify that I caused a true and correct copy of this **Amicus Curiae Brief for Association of Foreclosure Defense Attorneys** to be served upon the parties listed below via court's electronic service systems on June 1, 2018. Please take note that the above document was filed with the Clerk's Office by electronic means on June 1, 2018.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

__/s/ Lloyd Brooks_____
Lloyd J. Brooks

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