No. 123038

In the Supreme Court of Illinois

FIRST MIDWEST BANK, AS SUCCESSOR IN INTEREST TO WAUKEGAN SAVINGS BANK F/K/A WAUKEGAN SAVINGS AND LOAN, SB
Plaintiff-Appellant,

vs.

ANDRES COBO; AMY M. RULE,
Defendants-Appellees

On Appeal from the Appellate Court,
First District, No. 1-17-872
On Appeal from the Circuit of Cook County, Illinois
County Department, Law Division
Case No. 2015 L 007759
The Honorable Raymond J. Mitchell, Judge Presiding

AMERICAN LEGAL AND FINANCIAL NETWORK'S *AMICUS CURIAE* BRIEF

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PREFATORY STATEMENT

The main issue presented by this case represents a matter of grave concern to the mortgage lending and servicing industry. It involves three civil actions, two lawsuits for breach of a promissory note and a suit to foreclose a mortgage, and asks how Section 13-217 of the Illinois Code of Civil Procedure (735 ILCS 5/13-217)[1] ("Section 13-217"), known in part as the "single refiling rule" should be applied to the last filed action. The trial court found that the foreclosure proceeding was not based on the same set of operative facts as the suits on the note and therefore let the case proceed. The First District Appellate Court reversed holding, in essence, that the foreclosure was effectively the same claim as the note suits so it was barred by the single refiling rule.

If the decision under appeal is not reversed, it will have an enormous impact on the willingness of lenders to negotiate and facilitate foreclosure alternatives, and other loan work-outs with distressed homeowners. If they are not already, mortgage holders will be ever more reluctant to countenance settlement options with distressed borrowers if it means they have to dismiss a pending foreclosure proceeding. The threat that the "single-refiling" rule may bar them from re-foreclosing will quash any incentive they have to working with homeowners to save their homes.

In this brief, the *Amicus Curiae*, American Legal and Financial Network ("ALFN"), urges this Court to reconsider and overturn its prior interpretation of Section

[1] Although Section 13-217 of the Code was amended effective March 1995, the public act that made that amendment, PA 89-7, was later held to be unconstitutional in its entirety by this Court in *Best v. Taylor Machine Works*, 179 Ill.2d 367, 378, 689 N.E.2d 1057 (1997). Accordingly, the version of section 13-217 that is currently considered to be in effect, is the version that was in effect prior to the March 1995 amendment. *Hudson v. City of Chicago*, 228 Ill.2d 462, 469 n.1, 306, 889 N.E.2d 210 (2008). *See*, Footnote 3,

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13-217 in *Flesner v. Youngs Dev. Co.*, 145 Ill.2d 252, 582 N.E.2d 720 (1991) and find that a suit may be dismissed and refiled more than once, as long as the suit is refiled within the original period of limitation. If the Court is disinclined to reconsider its interpretation of Section 13-217, then the ALFN urges the Court to overturn the decision below because the Court of Appeals erroneously conflated a mortgage foreclosure with a suit on the note when those two actions are "not based on the same set of operative facts". Therefore, the single refiling rule did not bar this case. Should the Court decide not to reverse the Court of Appeals decision, it should clarify how the single refiling rule operates in suits where there is a payment default under an instrument requiring monthly or regular payments. Because each missed payment constitutes a distinct default under these types of instruments, a subsequent suit based on a different default is a different action for purposes of the single refiling rule.

BACKGROUND

The case at bar arose from Plaintiff's, First Midwest Bank, as successor in interest to Waukegan Savings Bank ("Waukegan") f/k/a Waukegan Savings and Loan, SB ("Appellant"), complaint for breach of contract against the Defendants, Andres Cobo and Amy M. Rule ("Appellees"), for their failure to make payments under a promissory note. The case on appeal (the "Second Note Action"), represented the third suit brought in connection with Appellees' default on the note. The first litigation was a *quasi in rem* action to foreclose the mortgage brought by Waukegan (the "Mortgage Foreclosure"), which Waukegan later voluntarily dismissed. The second suit, was an *in personam* action on the promissory note that Appellant commenced, as agent for the Federal Insurance

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Wells Fargo Bank, N.A. v. Norris, 2017 IL App (3d) 150764, 83 N.E.3d 1045, 1052, reh'g

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Deposit Corporation ("FDIC") as receiver for Waukegan (the "First Note Action"), which it too voluntarily dismissed. [R. A156, A25 ¶ 7.]

It is Appellees' contention in the Second Note Action, which was rejected by the Circuit Court of Cook County, but accepted by the Court of Appeals, that the suit represents an impermissible second refiling of the "cause of action" in violation of Section 13-217. In reversing the circuit court's ruling, the Court of Appeals found that the note actions were the same causes of action as the foreclosure proceeding. In reaching this decision, the Court of Appeals concluded that the suits were based on "the same set of operative facts gave rise to the causes of action in the foreclosure complaint and the breach of note complaint" because a suit alleging a breach of the note and a suit to foreclose a mortgage are both based on the note. [R. A32 ¶ 25.]. However, in concluding that the three actions were the same, the Court of Appeals ignored the fundamental difference between a mortgage foreclosure action and a suit asserting the breach of the note. The suits are not based on the same transaction and they seek fundamentally different purpose.

STATEMENT OF INTEREST

The American Legal & Financial Network ("ALFN") is a national network of legal and residential mortgage banking professionals that offers high quality educational and training resources to its members. Founded in 2001, it is now the largest organization of its kind with a membership of over 250 businesses reaching more than 10,000 professionals in the mortgage banking and mortgage servicing industry. It was created to bring residential mortgage industry professionals together with lawyers that provide

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denied (Aug. 29, 2017).

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services to the industry. In that capacity, ALFN creates a forum for the articulation of issues and concerns within the industry.

The ALFN interest in this case arises from the enormously adverse impact that the Appellate Court's decision will impose on its mortgage lending and mortgage servicing members operating in this state. The issues raised by this appeal are not limited to the parties to this appeal but would broadly affect creditors, servicers and, most importantly, Illinois homeowners and mortgage holders.

The application of the "single-refiling" rule to mortgage foreclosure litigation is a recent phenomenon, no doubt by efforts by mortgage lenders and servicers to consider distressed homeowners for loan modification and other work out scenarios in mortgage foreclosure. In fact, the only reported opinion on this topic is the recent opinion in *Wells Fargo Bank, N.A. v. Norris*, 2017 IL App (3d) 150764 ¶ 4, 83 N.E.3d 1045, reh'g denied (Aug. 29, 2017), which came down only last year.[2] The circuit courts are increasingly having to decide if a mortgage foreclosure action is barred if the lender who voluntarily dismissed earlier foreclosures due to the mortgagor's reinstatement of the mortgage or, more commonly, because the parties worked out a settlement, such as a loan modification, to prevent homeowners from losing their home. But what was once viewed as a saving provision to shield plaintiffs from the harsh effects of short statute of limitation periods, is now being invoked by borrowers to bar lenders from pursuing foreclosure upon a borrower's default before the original statute of limitation has lapsed.

The purpose of this brief is to provide a broader view of the lender-borrower relationship and the impact which the current interpretation and application of Section

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[2] Federal cases also.

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13-217 has on a lender's decision to engage in foreclosure alternatives and loss mitigation efforts. A typical consumer mortgage loan is designed for a life-span of 30 years, and during that time a lot can happen with respect to the borrower's ability to make the required monthly payment. Defaults lead to foreclosures, which the law allows the borrower to cure by reinstating the loan. And even where the borrower does not or cannot reinstate the loan, mortgage lenders are, in some cases motivated by their own desire to restore the loan to "performing" status, or compelled by regulatory rules, to offer foreclosure alternatives, such as a loan modification, to the defaulted borrower. In each case, the lender will have to dismiss the foreclosure.

The way Section 13-217 is being applied in mortgage foreclosure litigation stands as a serious obstacle to those efforts because it discourages lenders from agreeing to settlements that require them to voluntarily dismiss the case. The effect will ultimately harm Illinois homeowners and compel lenders to complete foreclosures where they may not want to. It will also frustrate federal and state policies that are specifically intended to promote loss mitigation for mortgagors. The current interpretation of the rule also opens the door to unscrupulous behavior. Borrowers who previously defaulted on their mortgage loans, and were parties to prior foreclosures that were voluntarily dismissed more than once, have little incentive to continue paying the mortgage if the lender cannot foreclose again. As such, the application of the broad transactional test that is currently used in mortgage litigation has the potential to increase strategic default and litigation.

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ARGUMENT

I. THE MAJORITY'S INTERPRETATION OF SECTION 13-217 IN *FLESNER* IS BADLY REASONED, UNWORKABLE, DETRIMENTAL TO PUBLIC INTERESTS AND SHOULD THEREFORE BE OVERRULED.

At the root of this matter is the Court's holding in *Flesner v. Youngs Dev. Co.*, 145 Ill.2d 252, 582 N.E.2d 720 (1991) that Section 13-217 "provid[es] for one and only one refiling regardless of whether the applicable statute of limitations has expired." *Id.* at 253. It is the ALFN's position that this holding is incorrect and should be overturned. The ALFN believes the Court should adopt the reasoning and conclusion of the dissenting opinion in *Flesner* that Rule 13-217 does not bar a plaintiff from refiling only once. Rather, a plaintiff is allowed to dismiss and refile a suit more than once as long as the suit was refiled within the original statute of limitations. *Id.* at 263.

The ALFN believes that the majority decision was wrongly decided and is unworkable, as the instant case plainly illustrates. The interpretation that the dissent adopted is more faithful to the rules of construction which require that limitations not be engrafted into a statute and that the language of the statute should be construed as a whole and consistent with what the legislative intends. The dissent's interpretation also eliminates the confusion and uncertainty plaguing Illinois foreclosures, such that Illinois homeowners and other mortgagors face the real risk that lenders will stop working with them to avoid a foreclosure judgment for fear of being later barred from refiling suit.

A. The doctrine of *stare decisis* allows the Court to overrule a decision if there is good cause.

The doctrine of *stare decisis* "'expresses the policy of the courts to stand by precedents and not to disturb settled points.'" *People v. Caballes,* 221 Ill.2d 282, 313, 851 N.E.2d 26 (2006), quoting *Neff v. George,* 364 Ill. 306, 308–09, 4 N.E.2d 388

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(1936), *overruled on other grounds by Tuthill v. Rendelman,* 387 Ill. 321, 56 N.E.2d 375 (1944). Thus, "'a question once deliberately examined and decided should be considered as settled and closed to further argument'". *Wakulich v. Mraz,* 203 Ill.2d 223, 230, 785 N.E.2d 843 (2003), quoting *Prall v. Burckhartt,* 299 Ill. 19, 41, 132 N.E. 280 (1921).

Stare decisis, however, is not an "inexorable command." *People v. Jones,* 207 Ill.2d 122, 134, 797 N.E.2d 640 (2003), quoting *Payne v. Tennessee,* 501 U.S. 808, 828, 111 S.Ct. 2597, 2609–10 (1991). If it is clear a court has made a mistake, it will not decline to correct it, even if the mistake has been reasserted and acquiesced in for many years. *People v. Boreman,* 401 Ill. 566, 571, 82 N.E.2d 459 (1948). But any departure from *stare decisis* must be "specially justified." *People v. Sharpe,* 216 Ill.2d 481, 520, 839 N.E.2d 492 (2005). Thus, prior decisions should not be overruled absent "good cause" or "compelling reasons." *Id.* "Good cause" exists where following the law is likely to result in serious detriment prejudicial to public interests. *Id*. Good cause to depart from *stare decisis* also exists when governing decisions are unworkable or badly reasoned. *Id*. The *Flesner* decision is detrimental to public interests, is unworkable and badly reasoned.

B. There is good cause to overrule *Flesner*: it is badly reasoned.

1. The majority's interpretation of Section 13-217 renders it in conflict with Section 2-1009 of the Civil Practice Act.

The majority's finding that Section 13-217 imposes a limitation on a plaintiff's right to refile regardless of whether the statute of limitations has run creates a conflict with the plaintiff's right to dismiss his case "without prejudice" embedded in Section 2-1009 of the Code of Civil Procedure. 735 ILCS 5/2-1009. That conflict disappears if the

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dissenting opinion in *Flesner* is adopted. The conflict is sufficient cause to overrule *Flesner*.

Section 2-1009 provides, in part, that:

> (a) The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, ***without prejudice***, by order filed in the cause. 735 ILCS 5/2-1009. (emphasis added).

Black's Law Dictionary (7th ed. 1999) defines dismissed "without prejudice" as "removed from the court's docket in such a way that the plaintiff may refile the same suit on the same claim,"[citation], and defines "dismissal without prejudice" as "[a] dismissal that does not bar the plaintiff from refiling the lawsuit within the applicable limitations period," [citation]. *Semtek International Inc. v. Lockheed Martin Corp.,* 531 U.S. 497, 505–06, 121 S.Ct. 1021, 1027 (2001). Unless the Plaintiff has split his claims, meaning there was a dismissal with prejudice entered on part of his suit prior to his voluntary dismissal, *Hudson v. City of Chicago*, 228 Ill.2d 462, 499–500, 889 N.E.2d 210 (2008) the voluntary dismissal of plaintiff's suit carries with it the absolute right to refile that action. *Id.* at 288. ("Since a dismissal under section 2–1009(a) is *without prejudice,* section 2–1009(a) protects a plaintiff's right to refile the voluntarily dismissed action." (emphasis in original)); *Case v. Galesburg Cottage Hosp.*, 227 Ill.2d 207, 215, 880 N.E.2d 171 (2007). The court "may not infringe upon this statutory right to refile." *Id.* at 215.

The majority view in *Flesner* infringes on that right by imposing a limit on how many times a plaintiff may refile such that the right may no longer be considered "absolute". The dissenting opinion, on the other hand, advocates a reading of the rule that preserves the plaintiff's absolute right to refile, subject only to the applicable statute of

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limitations. When the plain language of two statutes conflicts, the Court must attempt to construe them together, *in pari materia,* if such an interpretation is reasonable. *Moore v. Green,* 219 Ill.2d 470, 479, 848 N.E.2d 1015 (2006).

The only interpretation that makes sense when the two statutes are construed together is that a plaintiff may voluntarily dismiss a suit as many times as he likes under Section 2-1009 and may refile it as many times he likes under Section 13-217, subject to the applicable statute of limitations. Under section 13-217, if the statute of limitations has not run when the plaintiff dismisses the suit under Section 2-1009, he has the remaining time under that statute to refile. If the statute of limitation has run, the plaintiff has one year to refile a new action. After that, his right to refile ceases.

This is precisely how the dissenting opinion in *Flesner* believed Section 13-217 is supposed to operate:

> "I believe that section 13-217 is a saving provision which is not intended to come into operation during the applicable statute of limitations, but rather to operate only when the limitations period may serve to cut off a plaintiff's action. The statute allows the plaintiff an opportunity to take full advantage of whatever time is available under the applicable statute of limitations, and should that limitations period have run or be on the verge of running, allow the plaintiff one final opportunity to salvage his cause. There is no danger of prejudice to the defendant under these circumstances since the threat of continual filings is cut off upon reaching the applicable statute of limitations and then the one potential use of section 13-217.

Flesner v. Youngs Dev. Co., 145 Ill.2d 252, 262–63, 582 N.E.2d 720 (1991). This is the correct interpretation insofar as it does not undermine of conflict with the plaintiff's absolute right to refile under Section 2-1009.

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2. The authority relied on by the majority does not support the Court's interpretation of Section 13-217.

In fashioning the hard and fast "single-refiling" rule, the majority in *Flesner* did not undertake an independent or exegetical examination of Section 13-217; nor did it rely on Supreme Court precedent that did. It relied instead on the holdings of three appellate court decisions. However, as the dissent observed, those decisions did not address the effect of Rule 13-217's saving provision on an action that had already been dismissed twice but where the statute of limitations had also not yet expired. In other words, those cases did not address the issue that was before the court in *Flesner* and which is now before the court in this case.

The first appellate opinion cited by the majority to support the view that the statute allows for only one refiling after the first complaint has been dismissed is *Walicek v. Ciba-Geigy Corp.* (1987), 155 Ill.App.3d 667, 508 N.E.2d 246. *Walicek*, in turn relied on *Smith v. Chicago Transit Auth.*, 67 Ill.App.3d 385, 388, 385 N.E.2d 62 (1st Dist. 1978) and *Harrison v. Woyahn*, 261 F.2d 412 (7th Cir.1958). According to *Walicek*, "*Smith* has been interpreted to hold that [Section 13-217's predecessor] only permits one additional filing after the first complaint has been dismissed." *Walicek,* 155 Ill.App.3d at 670, *citing LaBarge, Inc. v. Corn Belt Bank* (1981), 101 Ill.App.3d 741, 745, 428 N.E.2d 711 as the source of that "interpretation". But as the dissent in *Flesner* correctly pointed out "[t]he court in *LaBarge,* [ ] merely employed a curt one-line statement that '[the rule] only permits one additional filing after the first suit has been dismissed' without explanation or elaboration.'" *Flesner* at 261.

The issue in *Smith* and *LaBarge* was whether a new action may be refiled ***after*** the original period of limitations has run. *Smith* at 387; *LaBarge* at 742. The concern, the

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Smith court observed, was that if a plaintiff were allowed multiple opportunities to dismiss and refile it could mean that a statute of limitations would never run. *Smith* at 388. The refiling bar "acts as a limited extension to prevent injustice; it should not be permitted to become a harassing renewal of litigation." *Id.*

The second appellate opinion relied on by the majority, *Bernstein v. Gottlieb Memorial Hospital* (1989), 185 Ill.App.3d 709, 542 N.E.2d 20, cited *Walicek* as well as *Gendek v. Jehangir*, 119 Ill.2d 338, 343, 518 N.E.2d 1051 (1988) for the proposition that "[t]he language of section 13-217 judicially has been construed to mean that * * * a plaintiff may refile his claim once before the expiration of the applicable statute of limitations or within a single year, whichever period is greater." *Id.* at 712. But as the dissent points out, *Gendek,* the only Supreme Court case cited for this proposition, "says no such thing" either. *Flesner* at 262. Like the *LaBarge* and *Smith* decisions, *Gendek* was concerned only with the effect of the rule on suits refiled ***after*** the statute of limitations had run. 119 Ill.2d at 343 (the statute "was not intended to permit multiple refilings following voluntary dismissals of an action *for which the original statute of limitations has lapsed.*" (Emphasis added.) The third appellate opinion cited by the majority, *Howard v. Francis*, 204 Ill.App.3d 722, 562 N.E.2d 599 (1990), relied upon *Walicek* and *Bernstein* for its decision, and so it too was inapposite to the issue at bar.

So the only case authority cited by the majority, *Walicek*, *Howard*, and *Bernstein*, were each premised upon an incorrect interpretation of *Gendek*, *Smith* and *LaBarge*; none of which held or even addressed whether Section 13-217 prohibits multiple refilings within the applicable statute of limitations. However, as the dissent in *Flesner* correctly noted, "Section 13-217 is a saving provision which is not intended to come into operation

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during the applicable statute of limitations, but rather to operate only when the limitations period may serve to cut off a plaintiff's action." *Id.* at 262. The dissent's interpretation echoed the holding in *Gendek v. Jehangir* (1988), 119 Ill.2d 338, 343, 518 N.E.2d 1051 where this Court found "that [Section 13-217] was not intended to permit multiple refilings following voluntary dismissals of an action *for which the original statute of limitations had lapsed*," (Emphasis added). The majority's opinion is not only inconsistent with its holding in *Gendek*, but rested on authority that does not support the conclusion it reached.

3. The majority misinterpreted Section 13-217 by not considering the statute as a whole and reading into it a limitation that is not there.

It is also well settled that in construing the meaning of a statute, the Court's primary objective is to ascertain and give effect to the intent of the legislature. *DeLuna v. Burciaga,* 223 Ill.2d 49, 59, 857 N.E.2d 229 (2006). The best evidence of the legislature's intent is the language of the statute, which must be given its plain and ordinary meaning. *Hadley v. Illinois Department of Corrections,* 224 Ill.2d 365, 371, 864 N.E.2d 162 (2007). A court must consider every part of the statute together and give every word or phrase some reasonable meaning. *In re E.B.,* 314 Ill.App.3d 712, 717, 731 N.E.2d 1270 (2000). Statutes are to be construed so that no clause is superfluous or void. *Id.* Finally, in construing a statute courts are prohibited from reading "exceptions, limitations or conditions into a statute that the legislature did not express". *In re D.D.,* 196 Ill.2d 405, 419, 752 N.E.2d 1112 (2001).

Without any parsing of the statute, or exegetical inquiry, the majority in *Flesner* concluded that the part of the statute which reads "whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff, his or her

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heirs, executors or administrators may commence a new action" meant that "one, and only one, refiling of a claim even if the statute of limitations has not expired" is prohibited. *Id.* at 254. In doing so the majority read into Section 13-217 an exceptions and limitation that is just not there; mainly that a plaintiff is limited to only one refiling, irrespective of the expiration of the statute of limitations to his claim. There is nothing in the text of Section 13-217 which supports this conclusion.

In focusing on the language quoted above, the court did not consider the statute as a whole or try to limn the legislative intent. It is the words following this language which supply the context by which the statute is to be understood. To the quoted language "*whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff, his or her heirs, executors or administrators may commence a new action*" the court should have also considered the following words "*within one year or within the remaining period of limitation, whichever is greater...*". 735 ILCS 5/13-217. Read as a whole, the plain and simplest meaning of the statute is that if the original time limitation has expired a plaintiff has one year to file suit. If it has not expired the plaintiff has the remaining time to file suit.[3]

This reading is more consistent with the purpose of the statute. Section 13-217 is a saving provision. *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 44, 53 N.E.3d 1. Its purpose is to facilitate the disposition of litigation on the merits and to avoid its frustration upon grounds unrelated to the merits. *S.C. Vaughan Oil Co. v. Caldwell,*

[3] As the dissent in *Flesner* also correctly observed, Section 13-217 use of the language "*may commence a new action*" is not dispositive to import only a single action is allowed while the original time limitation has not passed. *Flesner*, 145 Ill.2d at 262, 582 N.E.2d at 724–25. Indeed, Section 1.03 of the Illinois Statute on Statute specifically states that

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Troutt & Alexander, 181 Ill.2d 489, 497, 693 N.E.2d 338 (1998). Like all savings provisions, it was intended to permit an action dismissed other than on the merits to be refiled within a specified period of time. 54 C.J.S. Limitations of Actions § 347. It was not intended to come into operation during the original statute of limitations. It was meant to operate only when the limitations period could serve to cut off a plaintiff's action. The words "*within one year or within the remaining period of limitation, whichever is greater...*" are the key words of the statute; the ones that make this a "savings provision".

4. The majority did not construe Section 13-217 liberally or in sympathy with the idea that cases should be resolved on their merits, and its interpretation impermissibly infringes on a plaintiff's constitutional right to file suit.

"The law has always favored prompt and fair hearings of issues on their merits and whenever possible has placed practice and procedure in its proper place of secondary importance-as the means employed to accomplish the ends of justice". *Parrino v. Landon*, 8 Ill.2d 468, 472, 134 N.E.2d 311 (1956). The majority in *Flesner* did not construe Section 13-217 liberally. A liberal reading of the statute is one which preserves the substantive rights of the parties so that the litigation is disposed of on the merits. *Gibellina v. Handley*, 127 Ill.2d 122, 134, 535 N.E.2d 858 (1989); *Fleshner v. Copeland*, 13 Ill.2d 72, 76, 147 N.E.2d 329 (1958). The majority applied a narrow interpretation; one that cuts against the prejudice to "remov[e] barriers which prevent the trial of a case on its merits and the facilitation of procedures to accomplish this end." *McMillen v. Rydbom*, 56 Ill.App.2d 14, 29–30, 205 N.E.2d 813 (1965). A liberal reading, as the

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"words importing a singular number may extend and be applied to several …things". 5 ILCS 70/1.03.

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dissent observed, is the one "allows the plaintiff the opportunity to take full advantage of whatever time is available under the applicable statute of limitations, and should that limitations period have run or be on the verge of running, allow the plaintiff one final opportunity to salvage his cause." *Id.* at 263. The case below is a good illustration of how the *Flesner* holding may prevent the trial and disposition of a cause on its merits.

We know why statutes of limitations were created; to discourage the presentation of stale claims and to encourage diligence in the bringing of actions. *Sundance Homes, Inc. v. Cty. of DuPage*, 195 Ill.2d 257, 265–66, 746 N.E.2d 254 (2001); *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.,* 61 Ill.2d 129, 137, 334 N.E.2d 160 (1975). But applying Section 13-217 to bar the refiling of action where the statute of limitations has not expired makes this not a "savings provision", but another limitation on the plaintiff's right to bring suit; and an arbitrary one at that. So not only does the statute not support the interpretation made by the majority, there is no policy supporting that interpretation either.

The Illinois Constitution provides that "[e]very person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and properly". Ill. Const.1970, art. I, § 12; The right to bring a claim and prosecute a case is a vested due process right, it is "property" within the meaning of the Illinois Constitution, which makes it substantive. See *Bd. of Educ. of Normal Sch. Dist. v. Blodgett*, 155 Ill. 441, 449, 40 N.E. 1025 (1895) (the right to bring suit is protected by constitutional guaranties). The plaintiff's right to bring suit by a certain date, within the "statute of limitations" is a restriction on that right but one the legislature deemed reasonable for all the policy

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reasons underlying statutes of limitations generally. See *Williams v. Brown Manufacturing Co.*, 45 Ill.2d 418, 432, 261 N.E.2d 305 (1970) ("the constitutionally established policy of providing a remedy for every wrong inflicted is tempered by the policy of the statute of limitations which bars actions brought after the period of time which the legislature has determined makes the problems of proof so difficult as to pose a danger of injustice."(citation omitted).)

The majority's interpretation severely curtails this right. It bars a plaintiff from using the courts to prosecute his claim on the purely arbitrary basis that the suit had been refiled more than once. The curtailment of this right is particularly egregious to the plaintiff suing under a written contract, like a note in a mortgage foreclosure case, where there can be many breaches and reinstatements over the course of the loan. And whatever the policy underlying the 10 year limitations on suits based on a written contract, like a note and a mortgage,[4] a plaintiff's right to bring suit within that time is a substantive right. The current interpretation of Section 13-217 strips the plaintiff of that right when it denies him the remaining time under the statute of limitations to refile suit.

5. The current interpretation of the rule is unworkable and detrimental to public interests in the context of mortgage foreclosure proceedings.

On top of these problems, we must add the effect the current interpretation of the rule will have on lenders and homeowners who are delinquent on their home mortgage loan. Application of the majority's interpretation to mortgage foreclosure litigation is

[4] The statute of limitations on a breach of contract action commences 10 years from when the breach occurred and the right to foreclose a mortgage is 10 years as well. See, 735 ILCS 5/13-206 and 735 ILCS 5/13-115, respectively.

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unworkable and will detrimentally harm homeowner's seeking to preserve their homes in foreclosure.

Mortgage foreclosure law is the perfect context in which to explore the pernicious knock-on effects of the majority's holding. As a result of the 2008 financial crisis, millions of homeowners defaulted on their mortgage loans.[5] The massive number of defaults challenged not only homeowners, lenders, and servicers but also the court systems which were inundated with thousands more foreclosures and bankruptcies. State court systems responded with mediation programs, alternative dispute processes and moratoriums to help the parties by giving them space to attempt to workout loan defaults.[6] State and federal regulatory authorities also extracted large monetary settlements with lenders and servicers, which often included requirements by the lenders and servicers to put processes in place to actively engage homeowners in home-retention discussions and foreclosure alternatives, such as a loan modification or a forbearance plan. The successful ones that resulted in allowing the homeowner to stay in their home and the foreclosure being dismissed.

All that is in jeopardy now if the current interpretation of rule 13-217 is allowed to stand. If a lender dismisses its case because of a successful loss mitigation plan, and the homeowner again breaches, the second foreclosure will be a deemed a refiling. The

[5] It is estimated that "[a]s many as 10 million mortgage borrowers may have lost their homes" to foreclosures between 2007-2016. *See*, https://www.stlouisfed.org/~/media/Publications/Housing-Market-Perspectives/2016/Issue-3/HMP_issue3_web.pdf. In Cook County alone between 2007 and 2015, over a quarter of a million foreclosures were filed. *See*, Chancery Division Mortgage Foreclosure Mediation Program Progress Report ("Report"), available at: http://www.cookcountycourt.org/Portals/0/Chief%20Judge/Court%20Statistics/Chancery_Division_Mortgage_Foreclosure_Mediation_Program.pdf.

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lender now has no incentive to settle. In fact, it will be futile to even open a dialog with the homeowner on how their home can be saved because the lender will not be able to dismiss the foreclosure without exposing itself to the risk that the homeowner will invoke the single refiling rule if the lender forecloses again. The lender cannot take the risk that the borrower will remain current on the modified loan or under the work-out plan. But if the lender can refile the foreclosure if the homeowner breaches again, it will freely engage homeowners in settlement discussions for all the reasons they have done so in the past. It would not reduce foreclosure filings perhaps, but it will certainly reduce foreclosure decrees and the pernicious affect that the presence of foreclosed properties have on communities. The present interpretation, by contrast, serves no good purpose.

Thus, good cause exists to overturn *Flesner*. Continuing to abide by the hard and fast rule announced in that case is resulting in some lenders being unable to foreclose their mortgages and delinquent mortgagors being able to live in their home for as long as they want without having to pay their mortgage. Abiding by *Flesner* will also compel those lenders who are not already barred from foreclosing but who have already dismissed and refiled a foreclosure action once from offering foreclosure alternatives or work-out plans to their mortgagors because if it results in the lender having to dismiss the foreclosure again, it will be barred from ever refiling. Finally, *Flesner* should be overruled because it was badly reasoned. It relied on faulty precedent and read a limitation into the rule that the legislature did not intend. The dissent in *Flesner* had it right. Rule 13-217 ***does not*** prohibit a plaintiff from dismissing and refiling a suit more than once so long as the statute of limitations has not expired. This Court should take this

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[6] See, e.g., Report, supra n. 5.

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opportunity to correct its prior holding and adopt the dissent's holding as the law of the land.

II. AN ACTION TO FORECLOSE A MORTGAGE IS NOT THE SAME CAUSE OF ACTION AS A SUIT FOR PERSONAL JUDGMENT ON A NOTE.

If the Court is disinclined to reconsider its holding in *Flesner*, or does not overturn it, then the ALFN urges the Court to reaffirm that under Illinois law a *quasi in rem* action to foreclose a mortgage is not the same cause of action as an *in personam* suit based on the note. And, as such, the single refiling rule was not implicated in this case when the Appellant filed its Second Note Action.

To determine, for the purposes of Section 13-217, whether a complaint constitutes a new cause of action or a refiling of a prior action, courts of appeal have utilized the "transactional test" that is used under *res judicata* to determine whether actions are the "same." *Wells Fargo Bank, N.A. v. Norris*, 2017 IL App (3d) 150764, ¶ 21, 83 N.E.3d 1045, 1052, reh'g denied (Aug. 29, 2017). Under the transactional test, "[s]eparate claims are 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. v. City of Highland Park*, 184 Ill.2d 290, 311, 703 N.E.2d 883, 893 (1998); *Schrager v. Grossman*, 321 Ill.App.3d 750, 755, 752 N.E.2d 1 (1st Dist. 2000).

A. A Suit on a mortgage and Suit on a note are separate actions.

A suit to foreclose a mortgage and a suit on a note not only do not seek the same relief, they are distinct actions based on separate agreements representing separate transactions with separate purposes, and thus consisting of separate operative facts. The fact that these transactions may occur in close time proximity or have overlap parties

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does not render them as a "single transaction" for the purpose of the transaction or cause them to be the same action. ("we do not believe that their mere proximity in time and the overlap of some of the parties render them a single transaction, especially in light of the purpose of each of the transactions") *LP XXVI, LLC v. Goldstein*, 349 Ill.App.3d 237, 241, 811 N.E.2d 286, 289 (2d Dist. 2004); *see also*, *Turczak v. First Am. Bank*, 2013 IL App (1st) 121964, ¶ 31, 997 N.E.2d 996, 1001.

That these actions are separate and different is well established under Illinois law. In *Abdul-Karim v. First Fed. Sav. & Loan Ass'n of Champaign*, 101 Ill.2d 400, 407, 462 N.E.2d 488, 491 (1984), this Court was asked whether a mortgagee can foreclose based on a non-monetary default, specifically the due on sale clause in the mortgage, without also bringing an action against the noteholder on the note. This Court answered this question in the affirmative:

> "[T]he note and mortgage are separate undertakings. The note relates to, and contains the contract of the maker to pay the debt and is wholly independent of the mortgage. The mortgage is not dependent upon the note executed by the mortgagors, for its validity. The note which is the evidence of the indebtedness may be made by third parties, or a mortgage may be valid where there is no note given. The mortgage relates only to the real estate pledged as security for the payment of the debt… The mortgage is applicable to the right to apply the security to the discharge of the debt and the note to the liability of the maker for the payment of that indebtedness." *Abdul-Karim*, 101 Ill.2d at 407, 462 N.E.2d at 491, citing *Conerty v. Richtsteig*, 379 Ill. 360, 365-67, 41 N.E.2d 476, 479 (1942).

This Court in *Abdul-Karim* also acknowledged that under Illinois law:

> "*[T]he creditor free to elect to sue on the note or foreclose on the mortgage or both*. In the absence of provisions to the contrary contained in the note or mortgage, the noteholder has the option of filing a personal action against the maker of the note or pursuing whatever remedies the mortgage instrument provides. *In the latter event, the mortgagee gains possession of the property, but he does*

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> *not receive a judgment for any deficiency*." *Abdul-Karim*, 101 Ill.2d at 407-08, 462 N.E.2d at 491-92 (emphasis added).

The enactment of the IMFL did not change these principles, but preserved them. A mortgage foreclosure under IMFL is first and foremost a *quasi in rem* action (*i.e.*, nonpersonal action). *ABN AMRO Mortg. Group, Inc. v. McGahan*, 237 Ill.2d 526, 535, 931 N.E.2d 1190, 1196 (2010). "A *quasi in rem* action is brought against the defendant personally, with jurisdiction based on an interest in property, *the objective being to deal with the particular property or to subject the property to the discharge of the claims asserted*." *Id.* at 533, 931 N.E.2d at 1195 (emphasis added, internal quotation omitted), citing Black's Law Dictionary (7th ed. 1999). In contrast, an *in personam* action (*i.e.*, a personal action), such as an action for a breach of the note, is an "action brought against a person rather than property. An *in personam* judgment is binding on the judgment-debtor and can be enforced against all the property of the judgment-debtor." ACTION, Black's Law Dictionary (10th ed. 2014).

The IMFL allows, but does not mandate that the mortgagee seek *in personam* judgment of deficiency against the mortgagor in a foreclosure action. This can be clearly determined from the language of the statutory short-form foreclosure complaint. Unlike the mandated prayer for relief for "[a] judgment of foreclosure and sale", a prayer for a "[a] personal judgment for a deficiency" is only "*if sought*." *See*, 735 ILCS 5/15-1504(a) (under the heading "Request for Relief"). The IMFL short-form complaint is informational and provides mortgagor with notice of the possibility that a personal judgment for a deficiency may be sought against the mortgagor if it is a party claimed to be personally liable for a deficiency. *See*, 735 ILCS 5/15-1504(a)(M). The statutory

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short-form complaint is not dispositive in answering the question of the whether the foreclosure action seeks personal judgment of deficiency or not.

Indeed, if this Court were to construe the statutory short-form complaint's personal deficiency relief provision as an outright request for relief of personal deficiency judgement, it would cause a mortgagee, simply by filing the short-form complaint, to be in violation of a bankruptcy stay, and possible FDPCA violation, if it forecloses on a mortgage where the mortgagor previously received bankruptcy discharge from liability. Such interpretation would also suggest that the Illinois legislature failed to recognize that some mortgage loans are non-recourse when it designed the statutory short-form complaint, where such relief would not be available. Finally, such interpretation would result in causing the words "*if sought*" to be superfluous or meaningless, which would be contrary to the cannon of statutory interpretation. *JPMorgan Chase Bank, N.A. v. Earth Foods, Inc.*, 238 Ill.2d 455, 461, 939 N.E.2d 487, 490 (2010) (A "statute should be read as a whole and construed "so that no term is rendered superfluous or meaningless").

Therefore, by using the term "*if sought*" the IMFL statutory short-form complaint intends to provide sufficient notice to the mortgagor that such relief *may be sought* and preserves definitive determination as to whether personal judgment for a deficiency is *actually sought* to a later stage of the foreclosure process, namely, the confirmation of the foreclosure sale,[7] as only after the foreclosure sale is complete can it be determined whether deficiency actually exists. *See*, 735 ILCS 5/15-1508(e). As such, only at the time of confirmation of sale can mortgagee seek a personal deficiency; and if sought,

[7] Even at the judgment stage, getting authorization to seek judgment for a deficiency, is not a mandatory relief, *i.e.* the mortgagee can proceed to foreclosure sale without seeking such authorization. *See*, 735 ILCS 5/15-1506.

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only that portion of the proceeding would constitute an *in personam* action. This again supports the conclusion that a mortgage foreclosure is predominantly a different action than an action on the note, and the extent that these actions can partly overlap may only be determined at the time of confirmation of the foreclosure sale.

The Court of Appeals in this case regarded the Mortgage Foreclosure and the First and Second Note Actions as the same action. It did so by deciding that that the same operative facts, *i.e.* breach of the note, gave rise to the Mortgage Foreclosure action based on the filing of the statutory short-form complaint. However, as explained above, the statutory short-form complaint is not dispositive as to whether an *in personam* action will be sought. It only serves to provide general notice of this possibility and preserves the ability to bring this claim to the very end of the foreclosure process. Whether the mortgagee sought an *in personam* judgment, similar to a note action, could not be determined until the point of confirmation and sale. Yet, the prior Mortgage Foreclosure action in this case did not even reach the judgment stage. Accordingly the Court of Appeals erred when it determined, solely on the basis of the IMFL statutory short-form complaint, that the Mortgage Foreclosure included an *in personam* action on the note and thus was the same as First and Second Note Action.

Moreover, the holding by the Court of Appeals in this case, that a mortgage foreclosure action and a note action are based on the same operative facts of breach of the note, is inconsistent with the IMFL and with this Court's decision in *Abdul-Karim*. The Appellate Court's interpretation eliminates the creditor's right "*to elect to sue on the note or foreclose on the mortgage or both*." *Abdul-Karim*, 101 Ill.2d at 407-08, 462 N.E.2d at 491-92 (emphasis added). It forces to creditor to choose one or the other. The Appellate

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Court's reasoning in this case, would serve to bar a creditor that received an *in personam* judgment based on a personal action on the note from being able to enforce that judgment in a foreclosure of the mortgage under the principals of *res judicata*. The same *res judicata* bar would result if the creditor pursues only a mortgage foreclosure in the foreclosure action and seeks to adjudicate personal deficiency on the note in separate action. Such result is contrary to *Abdul-Karim* and to IMFL.

Accordingly, the ALFN believes that the Circuit Court in this case correctly distinguished the *quasi in rem* Mortgage Foreclosure action from the *in personam*, First and Second Note Actions and thus reach the correct conclusion that this case was not barred by the single refiling rule. Accordingly, the ALFN believes that the decision of the Court of Appeal in this case is in conflict with the IMFL and urges this Court to reverse it and reaffirm that a mortgage foreclosure and an action on the note are separate action for the purpose of the single refiling rule.

III. WHEN A MORTGAGEE VOLUNTARILY DISMISSES A FORECLOSURE THE LOAN IS DEEMED DEACCELERATED AND A MORTGAGEE MAY BRING A NEW ACTION BASED ON A NEW DEFAULT DATE WITHOUT VIOLATION OF THE SINGLE REFILING RULE.

If this Court is disinclined to reconsider the majority holding in *Flesner* or does not change it, then the ALFN also urges the Court to clarify that when a mortgage foreclosure is voluntarily dismissed the loan is deemed deaccelerated and mortgagee may bring a new action, a foreclosure or a note action, based on a new default date without violation of the single refiling rule, even if the mortgagee previously dismissed prior action more than once based on a prior default. The ALFN is concerned that the broad assertion by the Court of Appeals in this case, that a breach of the note constitute the same operative fact for a mortgage foreclosure, would be interpreted to bar a mortgagee

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that voluntarily dismisses a foreclosure more than once from refiling a new foreclosure based on a new default date under the single refiling rule.

The IMFL supports construction that a voluntary dismissal of a mortgage foreclosure deaccelerates the mortgage loan. Under the IMFL, the filing a foreclosure complaint is deemed an acceleration of loan. *See*, 735 ILCS 5/15-1504(c)(8). Therefore, it is only logical to conclude that the voluntary action of dismissal would be deemed as reversal of such construction and would be deemed to result in a deacceleration of the loan. The Court's acknowledgement that voluntary dismissal of a mortgage foreclosure constitutes a deacceleration of the loan, would be consistent with its well-established recognition of the mortgagee's right to deaccelerate the debt and waive prior default, as explained by this Court:

> "In a case, however, where a mortgagee or trustee, for his own exclusive benefit and convenience, has taken a contract which assures to him the right, upon failure to make payment of interest, to pay taxes, to keep up insurance, or to perform other conditions and covenants in a mortgage or trust deed, to declare a forfeiture of such conditions, and hold the entire sum to be due and payable, there are none of these conditions which he has not a perfect right to waive. Nor can it be said that, having elected to declare the entire sum due and payable on account of any default, he may not, upon such default having been removed, *or for any other reason satisfactory to himself,* waive his election, and permit the contract of indebtedness to continue under its original terms." *Van Vlissingen v. Lenz*, 171 Ill. 162, 168, 49 N.E. 422, 423–24 (1897) (emphasis added).

With the resumption of payment obligations under the mortgage loan through voluntary dismissal and resulting deacceleration, a mortgagee may waive a default and is entitled to bring a new action, foreclosure or a note action, based on a default of a new installment without violating the single refiling rule. *C-B Realty & Trading Corp. v. Chicago & North Western Ry. Co.*, 289 Ill.App.3d 892, 897, 682 N.E.2d 1136, 1140 (1st

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Dist. 1997) ("a plaintiff may sue on any breach which occurred within the limitation's period, even if earlier breaches occurred outside the limitation period.") This conclusion is grounded in the well-established law that where a money obligation is payable in installments, a separate cause of action arises on each installment. *See, Light v. Light*, 12 Ill.2d 502, 147 N.E.2d 34 (1957); 18 S. Williston, A Treatise on the Law of Contracts § 2026C (3d ed. 1978); 4 Corbin, Contracts § 951 (1951). Thus, a party may bring separate actions on each installment as it becomes due or wait until several installments are due and then sue for all such installments in one cause of action. 1 A. Corbin, Contracts § 950, at 931 (1952). Each missed installment constitutes a new cause of action. *C-B Realty & Trading Corp.*, 289 Ill.App.3d at 897, 682 N.E.2d at 1140; *Thread & Gage Co. v. Kucinski,* 116 Ill.App.3d 178, 184, 451 N.E.2d 1292 (1983).

The idea that the cause of action accrues each time the borrower misses a payment is perfectly illustrated by the realities of mortgage foreclosure litigation. Say the borrower misses a few payments and the lender files a foreclosure. The IMFL provides the borrower the right to reinstate the loan by paying all amounts past due, plus fees and costs incurred by the lender for up to 90 days after the borrower has been served. 735 ILCS 5/15-1602. Upon payment of those amounts, the mortgagee must dismiss the foreclosure. ("Upon such reinstatement of the mortgage, the foreclosure and any other proceedings for the collection or enforcement of the obligation secured by the mortgage shall be dismissed and the mortgage documents shall remain in full force and effect as if no acceleration or default had occurred"). *Id.* What if the borrower defaults again? When the mortgagee files again the borrower will still be allowed to reinstate the loan. If he does so and defaults a third time, under the Court of Appeals' broad assertion, the "single

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refiling rule" would forever bar the mortgagee from foreclosing. One can easily see how the reinstatement rights under IMFL could be exploited to the detriment of the mortgagee.[8] A shrewd litigant will reinstate his loan after the first two foreclosure filings and never have to pay his mortgage again-because the a mortgagee cannot foreclose.

However, it does not have to be a reinstatement that causes the mortgagee to voluntarily dismiss its foreclosure. The mortgagee and borrower might agree to a loan modification, or the borrower might file bankruptcy, both of which happen regularly and for many borrowers more than once. In the case of a loan modification, the Court of Appeals' interpretation of the applicability of the single refiling rule to a mortgage foreclosure action would perversely incentivize a mortgagee to not countenance a loan modification if it meant it had to voluntarily dismiss its case, especially if that case was a second foreclosure filing. Under the bankruptcy scenario, it is not the effect it would have on loan modifications that one has to worry about, but abuse by the borrower. The initiation of a bankruptcy by the mortgage could also require a mortgagee to dismiss pending foreclosure. 11 U.S.C. Section 362 (1); *In re Hall-Walker*, 445 B.R. 873, 876 (Bankr. N.D. Ill. 2011). But what if the borrower files again for bankruptcy in response to a second foreclosure filing? After that action is dismissed, does the Court of Appeal interpretation of the applicability of the single refiling rule to foreclosure action forever preclude the mortgagee from foreclosing again?

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[8] Under the IMFL, a mortgagor is barred from reinstating more than once within a five-year period but only "if the court has made an express written finding that the mortgagor has exercised its right to reinstate pursuant to this Section." 735 ILCS 5/15-1602. Otherwise, "[t]he relief granted by this Section shall not be exhausted by a single use thereof." *Id.*

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The court in *Wells Fargo Bank, N.A. v. Norris, supra,* recognized that it is the missed payment, or the alleged default, that constitutes the "group of operative facts" for purposes of the "single refiling rule". In *Norris,* the lender filed a complaint to foreclose a mortgage in 2008 alleging a default of January 2008. This matter was subsequently dismissed because the parties entered into a loan modification. In 2010, the lender filed a second complaint to foreclose mortgage alleging a default date of June 2009 based on the loan modification. The mortgagor protested alleging they never had entered into a loan modification. The lender dismissed its second foreclosure complaint. Later, in 2012, the lender filed a third foreclosure complaint alleging the same default date as was alleged the 2008 foreclosure. The mortgagor argued, inter alia, that the foreclosure was barred by the single refiling rule.

The trial court rejected the borrower's argument and found the 2008 action was substantially different than the 2010 case and granted summary judgment. The appellate court affirmed. It concluded that "the operative facts" of the two cases were "substantially" different because the 2008 case was based on a breach date of January 2008 while the 2010 cases was based on a breach date of June 2009. ¶ 22. "It is clear from the mortgage foreclosure complaint in each case that the 2010 case did not involve the same cause of action as the 2008 case for the purposes of the single refiling rule." *Id.*

The same rationale was used by district court in *Bank of New York Mellon v. Schulze*, 2016 WL 806548 (N.D. Ill.) to find that the single refiling rule did not bar a subsequent foreclosure.

> "Plaintiff's complaint to foreclose mortgage in the instant case is thus based upon defendants' default on monthly installments of principal, interest, and taxes from August 1, 2010, through the present, constituting a separate and distinct harm from any prior complaint to foreclose the

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> mortgage brought in plaintiff's earlier lawsuits. Defendants' failure to pay monthly installments on the mortgage after the voluntary dismissal of the March 12, 2008, and February 25, 2009, mortgage foreclosure claims in the Circuit Court of Cook County are separate and distinct from the facts underlying those prior actions and give rise to a new cause of action." *Id.*

Norris and *Schulze* should not be read to mean that a subsequent foreclosure is "different" only if it is based on a breach of a modification agreement, as some mortgagors have argued. While that fact was present in both cases, the courts' rationale was based on the different defaults alleged in the complaints. *Norris,* at ¶ 22; *Schulze*, at *3.

In *Brown v. Charlestowne Grp., Ltd.*, 221 Ill.App.3d 44, 581 N.E.2d 831 (2d Dist. 1991), the borrower under a promissory note used a similar line of reasoning to argue that a prior action on a note that alleged a default date different from the instant suit was barred by *res judicata*. The court in *Brown* i the principles discussed above and found that the prior suit which sought interest and principal payments due up to a certain date was not the same for *res judicata* purposes as the subsequent suit seeking interest and principal payments that became due after that date. *Id.* at 46. "[I]t is clear enough that plaintiffs are not seeking to collect the same installments that they sought in their first action. In the second suit, they are seeking the amounts that came due after the first suit was filed as well as future payments". *Id. See also, HSBC Bank v. Culbertson*, 2015 WL 13653002 (N.D. Ill.) (lender's mortgage foreclosure action was not barred by res judicata in subsequently refiled action where, although the principal amount of the debt alleged in in the two cases was the same, the interest, costs, and fees have increased such that it was not seeking the same relief).

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Accordingly, the ALFN urges the Court to clarify that when a mortgage foreclosure is voluntarily dismissed the mortgage loan is deemed deaccelerated and mortgagee may bring a new action, a mortgage foreclosure or a note action, based on a new default date without violation of the single refiling rule, even if the mortgagee previously dismissed prior action more than once based on a prior default.

CONCLUSION

For the reasons stated above, the ALFN requests that this Court to reconsider and overturn its prior interpretation of Section 13-217 in *Flesner v. Youngs Dev. Co.*, 145 Ill.2d 252, 582 N.E.2d 720 (1991), as it was wrongly decided and is unworkable. And find that a suit may be dismissed and refiled more than once, as long as the suit is refiled within the original period of limitation. If the Court is disinclined to reconsider its interpretation of Section 13-217, then the ALFN request the Court to overturn the decision below because the Court of Appeals erroneously conflated a mortgage foreclosure with a suit on the note when those two actions are "not based on the same set of operative facts", where in fact they are separate and district actions based on different transactions and separate purpose. Therefore, the single refiling rule did not bar the this case. Lastly, should the Court decide not to reverse the Court of Appeals decision, the ALFN requests that the Court clarify how the single refiling rule operates in suits where there is a payment default under an instrument requiring monthly or regular payments.

Respectfully submitted,

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I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing 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 30 pages.

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