

Recent Illinois Court Decision Illustrates Pitfalls of Multiple Filings of a Mortgage Foreclosure Action

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While Illinois mortgagees have the option of recouping delinquent mortgage loan debt through different types of lawsuits, the pursuit of this option can violate Illinois' prohibition on refiling the same cause of action. A recent decision illustrates the pitfalls of a mortgagee's numerous lawsuits filed on the same default and debt in reliance upon Illinois' [savings statute](#).

In [First Midwest Bank v. Cobo](#), the mortgagee filed three successive lawsuits in response to the borrowers' default on their mortgage loan. First, the mortgagee filed a foreclosure complaint, which alleged that borrowers were due for July 1, 2011, owed \$214,079.06 in principal, and sought, among other relief, a personal judgment for deficiency. The mortgagee dismissed the foreclosure complaint more than a year later, and two weeks after dismissal, a successor mortgagee filed a complaint for breach of the promissory note. The second lawsuit alleged that the borrowers were due for the same date and the same amount of principal as in the prior foreclosure complaint, and sought principal, interest, and attorneys' fees. Nearly two years later, the successor mortgagee dismissed the promissory note complaint.

Three months after dismissal of the second complaint, the successor mortgagee filed another lawsuit alleging a breach of the note. The third lawsuit alleged that the borrowers were due for the same date and same principal amount as in the prior two complaints. The borrowers moved to dismiss the third lawsuit based on Illinois' single refiling rule. They argued that because Illinois law only permits a claim to be dismissed and refiled once, the most recent lawsuit amounted to the second refiling of the foreclosure complaint. The trial court disagreed, finding that although the actions were closely related, they invoked separate contracts (the mortgage and the promissory note) that gave rise to distinct remedies. Eventually, the trial court entered summary judgment in the mortgagee's favor, and the borrowers appealed.

The Illinois Appellate court vacated summary judgment and dismissed the third complaint on *res judicata* grounds while concluding that Illinois' savings statute only allows a plaintiff to refile a voluntarily-dismissed complaint once. The Court reviewed Illinois' transactional test for purposes of determining whether separate

claims pleaded the same cause of action—namely, do the claims arise from a single group of operative facts and regardless of whether they assert different theories of relief. The Court relied heavily on [LSREF2 Nova Investments, LLC v. Coleman](#), which analyzed the same intersecting issues—a mortgage lien foreclosure and breach of contract on the promissory note—but where the mortgagee litigated a mortgage foreclosure lawsuit to finality, declined to enter a personal judgment against the borrower for deficiency at the foreclosure’s conclusion, and then filed a lawsuit for breach of the promissory note. The appellate court in *Coleman* held that the second lawsuit was barred under the transactional test because the plaintiff could have sought a money judgment for the deficiency in the foreclosure complaint, chose not to, so the second lawsuit, pleading that deficiency, was barred. Applying *Coleman*, the Court in *Cobo* concluded that a complaint requesting foreclosure of the mortgage and a personal judgment from any deficiency involves operative facts arising from both the mortgage and the promissory note and so the third lawsuit, even though a promissory note action, represented an improper second refile of the foreclosure complaint.

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. But, even so, *Cobo* serves as a warning that although owners of mortgage debt in Illinois enjoy multiple avenues to recoup defaulted debt, and can sue on successive installment payments, they are still only permitted to dismiss and refile once under the Illinois savings statute.

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