GETTING A SECOND BITE AT THE APPLE: THE *RES JUDICATA* EXCEPTION FOR SEEKING FORECLOSURE DEFICIENCIES IN ILLINOIS.

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The legal doctrine of res judicata *bars causes of action that were or could have been argued in a previous legal action. While* res judicata *is routinely enforced by Illinois courts, recent cases demonstrate it has not been consistently applied against consumer lending plaintiffs. Illinois homeowners who were previously foreclosed upon are now being sued a second time by creditors trying to recover the deficiency on the original home loan.*

This Note argues that secondary deficiency lawsuits should be precluded under res judicata *based on Illinois precedent,* res judicata *principles, and compelling policy reasons. Further, the recent Illinois Appellate Court opinions that justify these secondary cases are based on misapplied Illinois precedent and do not consider the changes to the Illinois Mortgage and Foreclosure Law. Under a proper application of Illinois precedent, it is clear that these secondary lawsuits share an "identity of cause of action" with the original foreclosure and thus must be barred under* res judicata.

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I. INTRODUCTION

Linda and Steve Walker purchased a condominium in Chicago, Illinois in the Spring of 2006. Like most first-time homeowners, they took out a mortgage to finance the purchase of the unit. By 2010, the Walkers' adjustable mortgage rate substantially increased, their condo was encumbered with $194,000 of debt, and its fair market price was only $95,000. Linda and Steve were having difficulty making ends meet given their increased mortgage payments. Unable to refinance their loan due to the depreciated value of homes across the country, Linda and Steve defaulted on their mortgage and the bank foreclosed on their condo in 2011. Linda and Steve then rented an apartment and began to rebuild their lives. Just when the Walkers were beginning to forget their prior financial nightmare, it returned. In 2015, a debt collector called Steve Walker, informing him that he currently owes $99,000 plus interest on the remainder of his condo mortgage. The Walkers had no idea they were still responsible for this amount and the prospect of having to pay the deficiency would likely put them back into financial ruin. While the Walkers are a fictitious family, this scenario is one countless families across Illinois are experiencing. Many ask, how can these creditors legally take this type of action against them? To put it bluntly, Illinois courts have allowed this to happen. The courts and creditors have constructed a method to allow these secondary cases to be brought. But if one examines prior Illinois case law, it becomes evident that the recent cases allowing creditors to sue a second time were decided incorrectly.

While the purpose of civil litigation is to provide an opportunity for parties to resolve disputes, there must be limitations on how often civil

litigation can be used. Litigating the same cases over and over can create great hardships for both the parties and the judicial system. To protect against these hardships, courts have long used the legal doctrine of *res judicata*, which is a defense that bars a legal action that already has been or could have been litigated in a prior action.[1] The underlying purpose of *res judicata* is to "[prevent] the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions."[2] *Res judicata* in essence limits parties to only one opportunity for raising any and all legal issues or defenses. Thus, when it comes to litigating your case, you only get "one bite at the apple."[3]

Illinois courts have a long history of using *res judicata* to bar claims that could have been litigated in a previous action between the parties.[4] Yet even with this long history, *res judicata* has not been applied consistently in recent litigation regarding foreclosure remedies. Illinois appellate courts have created something of a *res judicata* "loophole" that allows creditors to bring multiple lawsuits against the same defaulting homeowners, without *res judicata* barring these subsequent suits.[5] The inherent problem with this "loophole" is that it permits creditors to sue the homeowners a second time in order to seek a judgment on the remaining home loan debt, or deficiency judgment, which is a remedy that could have been awarded in the first foreclosure action.[6] These subsequent lawsuits seeking deficiency judgments, or "deficiency suits" not only impair the "public policy of economizing judicial resources as well as the resources of the parties,"[7] but also prevent defaulting homeowners from moving on with their lives after foreclosure. The prospect that one could be sued at any time under the same defaulted home loan provides little incentive to rebuild financially, and under the current Illinois law the defaulting homeowner could be sued for the deficiency up to ten years after the default occurred.[8] Deficiency suits create numerous social

1. *See* WARREN FREEDMAN, RES JUDICATA AND COLLATERAL ESTOPPEL: TOOLS FOR PLAINTIFFS AND DEFENDANTS 7 (1988). *Res judicata*, a product of Roman law, prevented subsequent suits that "involv[ed] the same principle issues and same legal bases" of an earlier suit which had been adjudicated. *Id.* The Germanic doctrine of collateral estoppel was "based on the premise that the parties having dominated the judicial proceedings, their acts created a true estoppel against future relitigation." *Id.* The English common law incorporated both doctrines into the broad category of "estoppel," and courts in the United States apply *res judicata* and collateral estoppel to bar to litigation of issues or claims previously adjudicated. *Id.* at 7, 11. Illinois Courts have inconsistently applied the terms "collateral estoppel" and "*res judicata*." For the purposes of this Note, I use the term *res judicata* to refer to claim preclusion even though some Illinois cases may refer to it as "collateral estoppel."

2. Taylor v. Sturgell, 553 U.S. 880, 892 (2008) (quoting Montana v. United States, 440 U.S. 147, 153–54 (1979)).

3. Org. for a Better Austin v. Keefe, 402 U.S. 415, 423 (1971).

4. *See, e.g.*, Lee v. Hansberry, 24 N.E.2d 37 (Ill. 1939).

5. *See* LP XXVI, LLC. v. Goldstein, 811 N.E.2d 286, 290 (Ill. App. Ct. 2004).

6. *See* Skolnik v. Petella, 34 N.E.2d 825, 827 (Ill. 1941) ("The rule of res judicata embraces not only what actually was determined in the former case between the same parties or their privies, but it extends to any other matters properly involved which might have been raised and determined.").

7. FREEDMAN, *supra* note 1, at 11.

8. *See* Tom Sammons, *Monster in the Closet: Collection Agency or Deficiency Judgment?*, ILL. L. NEWS (Oct. 7, 2010), http://illinoislawnews.net/?p=508.

and judicial hardships, and these are the exact hardships that *res judicata* seeks to prevent. Applying *res judicata* to bar deficiency suits and thereby closing the "loophole" is the fairest and best method for solving the problems that deficiency suits create.

This Note will show that under the proper application of Illinois case law, the recent cases creating the *res judicata* "loophole" were improperly decided and the resulting deficiency suits should be barred under *res judicata*. Part II of this Note dives into the background of mortgages, foreclosures, *res judicata*, its application, and the history of foreclosure law in Illinois. A focal point in this historical analysis lies in the differences between courts of law and courts of equity and the reasons why historically Illinois creditors were provided with a wide array of foreclosure remedies. While Illinois courts still provide these vast remedies to creditors, this Note aims to show that the historical circumstances necessitating so many remedies (which give rise to the *res judicata* loophole) are no longer applicable. The only way to understand how Illinois courts got themselves to where they are now, is by looking backwards. Part III of this Note analyzes the chronology of Illinois case law that shaped how *res judicata* is being applied to deficiency suits today. The three most recent cases, *LP XXVI, LLC v. Goldstein*,[9] *Turczak v. First American Bank,*[10] and *LSREF2 Nova Investments III, LLC v. Coleman*[11] demonstrate that Illinois appellate courts have created a *res judicata* loophole, allowing creditors to engage in multiple suits against the same defaulting homeowner to recover the full amount owed on the loan. In Part IV, this Note seeks to resolve the *res judicata* problem by recommending judicial intervention by the Illinois Supreme Court. Not only would the recommended result allow for the appropriate application of the law, but it is supported by strong public policy arguments that favor consumer debtors and homeowners across the state of Illinois.

II. BACKGROUND

A. Notes and Mortgage: Functions and Defaults

A typical homeowner finances the purchase of a home with a mortgage.[12] A traditional "mortgage" is made up of two separate components. The first component is a promissory note, or loan instrument, which establishes the amount of the loan the homeowner (i.e., debtor) receives from the bank (i.e., creditor), along with the loan's terms, including interest rates, length of time, etc. The second component is a mortgage

9. 811 N.E.2d 286.

10. 997 N.E.2d 996 (Ill. App. Ct. 2013).

11. 33 N.E.3d 1030 (Ill. App. Ct. 2015).

12. *See* 4 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 37.04[1] (Michael Allan Wolf ed., 2000) ("Since 1890 there has been a tremendous increase in the dollar amount of home mortgages, in the percentage of homes mortgaged, and in the percentage of the property value carried in mortgages.").

deed, which is the instrument that secures the home to the obligations on the loan.[13] The mortgage deed gives the bank the right to foreclose on the home should the homeowner default on her loan obligations.[14]

In Illinois if a homeowner defaults on her mortgage payments there are two main courses of action a bank can take to foreclose on the property and recover the remaining amount owed on the loan. Either a bank may initially foreclose upon the property, or they may initially sue the homeowner for a breach of contract.[15] If the bank goes with the first option and initially forecloses on the property, once the property is sold in a judicial sale the foreclosure court can issue a deficiency judgment against the homeowner for the difference of how much the homeowner still owes and the amount received from the foreclosure sale.[16] Because the deficiency judgment is against the homeowner personally, it is known as an *in personam* deficiency judgment.[17]

The second option a bank may take is to initially sue the home owner for a breach of contract. The underlying promissory note to the mortgage is an enforceable contract, and permits a bank to sue the homeowner in a court of law for the amount still owed on the loan.[18] In Illinois, a bank is not required to foreclose upon the secured property.[19] While uncommon, a bank may choose to forego foreclosure if it believes the homeowner has other assets that are more valuable than the worth of the home.[20] More commonly, after receiving a judgment on the promissory note, a bank will enforce the judgment by exercising its authority to foreclose on the home.[21] The judgment remains intact against the homeowner, but is reduced by the amount obtained from the foreclosure sale.

B. Purpose of Various Courses of Action

If creditors will ultimately obtain the same end result, why are there multiple legal routes that a creditor can take? The reason behind these separate courses of action is based on the historical distinction of courts of law and equity, and the types of remedies those courts could provide.[22] Dating back to the Anglo-Saxon era in England, there were only courts

13. BLACK'S LAW DICTIONARY 1026 (7th ed. 1999) (A mortgage is a "conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms. . . . [and] an instrument (such as a deed or contract) specifying the terms of such a transaction.").

14. *See* 4 POWELL, *supra* note 12, at § 37.12[1] ("A mortgage is given to secure the repayment of an underlying debt. Although a mortgage can be given prospectively to secure future obligations, there must be an underlying obligation."); Joseph E. Gotch, Jr., Note, *Creditors' vs. Debtors' Rights Under Alaska Foreclosure Law: Which Way Does the Balance Swing?*, 14 ALASKA L. REV. 77, 77n.1 (1997).

15. *See* NAT'L CONSUMER LAW CTR., FORECLOSURES § 5.1.1 (4th ed. 2012).

16. *See* Farmer City State Bank v. Champaign Nat'l Bank, 486 N.E.2d 301, 306 (Ill. App. Ct. 1985).

17. U.S. Bank Trust, N.A. v. Atchley, 45 N.E.3d 286, 288–89 (Ill. App. Ct. 2015).

18. *See* Gotch, *supra* note 14, at 80.

19. *See* JOHN W. SMITH, THE LAW OF MORTGAGE FORECLOSURE FOR ILLINOIS 115–16 (1900).

20. *See* Gotch, *supra* note 14, at 82.

21. *See id.*

22. *See* Ellis E. Fuqua, *Law and Equity in Illinois*, 41 U. ILL. L. REV. 526, 528 (1946).

of law, which were limited to providing monetary remedies, known today as damages, for property or contract disputes.[23] It became apparent that injustice could still occur in instances where monetary damages proved insufficient, so under the reign of William the Conqueror, chancery courts (also known as courts of equity) came into existence.[24] Chancellors were able to use their powers under the King to "prevent wrongs, or to force a defendant to perform a contract or other obligation," which courts of law could not do at the time.[25] Chancellors were known to exercise "equitable jurisdiction" as they were "not bound by precedent or formal rules,"[26] and thus they were able to grant "equitable remedies" which included "[i]njunctions, decrees for specific performance . . . [and] receiverships."[27] The distinct powers and remedies held by courts of law and courts of equity still exist in the United States legal system, even though most courts are considered to be "merged." While the judiciary of Illinois serves as a prime example of the gradual merger between courts of law and equity, Illinois foreclosure remedies serve as a better example of the residual impact of a two-court system.

Illinois has a long history of separating equitable and legal justice. The Ordinance of 1787 established a general court for the Northwest Territories, but the court was limited to only common-law jurisdiction.[28] An amendment made to the Ordinance in 1805 extended equity jurisdiction by establishing a separate court called the Court of Chancery.[29] In 1816, while Illinois was still a territory, the territorial legislature, "in making provision for the court system for the territory, conferred upon the Circuit Courts both law and equity jurisdiction."[30] After Illinois became a state in 1818, the legislature granted judges of the Illinois Supreme and Circuit Courts the power to exercise equity jurisdiction in addition to legal jurisdiction. While the High Court of Chancery gradually closed, the legislation provided for "the administration of law and equity by the same courts but with separate law and chancery sides."[31] Up until 1933, the practice at law and in equity was regulated by separate statutes,[32] and up until 1970, "the law and equity sides of these courts were maintained as distinct and separate as such a system permits."[33]

23. *See* Jesse G. Reyes, *The Swinging Pendulum of Equity: How History and Custom Shaped the Development of the Receivership Statute in Illinois*, 44 LOY. U. CHI. L.J. 1019, 1025 (2013).

24. *See id.* at 1031.

25. *Id.* (quoting JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 17n.13(1) (3d ed. 1989)).

26. *Id.* at 1032 (quoting David E. Cole, *Judicial Discretion and the "Sunk Costs" Strategy of Government Agencies*, 30 B.C. ENVTL. AFF. L. REV. 689, 704 (2003)).

27. Roger L. Severns, *Equity and "Fusion" in Illinois*, 18 CHI.-KENT L. REV. 333, 340 (1940).

28. *See id.*

29. *See id.* at 334–35.

30. *Id.* at 335.

31. *Id.*

32. *See id.* at 335.

33. *Id.* at 358 "In Cook County, the designation of certain judges as chancellors for the term, made the separation probably more complete there than elsewhere in the state." *Id.* n.79.

While courts of equity and courts of law had jurisdiction over different matters, mortgage foreclosures posed a unique issue, as the power to compel a debtor to sell his home rested in equitable authority, but the power to grant a monetary judgment on the underlying debt rested in legal authority.[34] The resulting effect was to provide creditors with an abundance of remedies, some legal and some equitable, and each with its own pros and cons.

Historically, Illinois law permitted a number of remedies that a creditor may seek, should a debtor home-owner default. One remedy was foreclosure by *scire facias*, which is an action in law that directs the sale of the mortgaged property to pay off the underlying debts and associated costs of the sale.[35] Because a *scire facias* foreclosure was a purely *in rem* proceeding, however, there were multiple issues with this method. A creditor using this process was unable to obtain an *in personam* judgment against the debtor, none of the parties' equitable interests in the property could be determined,[36] and the proceeding also cut off all of the debtor's right to possibly redeem the property.[37] Another remedy a creditor was able to use was a strict foreclosure, which was a chancery action to foreclose on a property. In these actions, however, the defendant was still barred from any equitable right to redeem or recover the property.[38] Additionally, strict foreclosures were highly disfavored by Illinois chancery courts and only used in limited circumstances.[39] In addition to *scire facias* and strict foreclosures, Illinois courts were very generous with the amount of remedies available to creditors:

> He may bring his action upon the note, or put himself in possession of the rents and profits by an ejectment after condition broken, or, if the mortgage be recorded, proceed by scire facias on the record and obtain a judgment to sell the land, or he may file his bill in chancery for a strict foreclosure of the equity of redemption, which the courts will allow under a proper state of circumstances, or file a bill for foreclosure and sale, which is the most usual practice in this state. And the mortgagee may not only choose, from among these various remedies, that which seems most likely to be successful, but he may pursue any or all of them successively or concurrently, until he obtains satisfaction on his debt.[40]

34. *See* Metrobank v. Cannatello, 964 N.E.2d 656, 660–61 (Ill. App. Ct. 2012).

35. *See* 2 HAROLD L. REEVE, THE LAW OF MORTGAGES AND FORECLOSURES IN ILLINOIS 900 (1932).

36. City of Chicago v. Hitt, 166 N.E. 517, 520 (Ill. 1929).

37. 2 REEVE, *supra* note 35, at 900.

38. SMITH, *supra* note 19, at 115.

39. *Id.* at 118 ("As a general rule, a strict foreclosure will not be permitted where there are other incumbrances or creditors or purchasers of the equity of redemption. But where it appears that the property is of less value than the debt secured by the mortgage, and the mortgagor is insolvent, and the mortgagee is willing to take the property in discharge of his debt, it may be allowed.") (quoting Illinois Starch Co. v. Ottawa Hydraulic Co., 23 Ill. App. 272, 278 (Ill. App. Ct. 1887)).

40. HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF MORTGAGES AND DEEDS OF TRUST FOUNDED ON THE LAWS AND JUDICIAL DECISIONS OF THE STATE OF ILLINOIS 417 (1903) (citation omitted).

The key feature of historical Illinois foreclosure remedies was that the creditor may pursue as many remedies as necessary until the debt was fully satisfied. This was likely due to the shortcomings between the separation of equitable and legal remedies.[41] Because most recovery methods only provided the creditor with a partial recovery, it would be unfair to limit a creditor to only one route.

Today, the merger of courts of law and equity in Illinois allows for a much easier recovery process for creditors than what was available in the prior judicial system. These changes, however, have not changed the vast array of foreclosure remedies still available to creditors. Currently in Illinois, a plaintiff may choose to seek a deficiency judgment from either a court of law or the chancery court which issued the foreclosure judgment.[42] In addition to the creditor being able to choose which legal route to take if a debtor defaults, "Illinois does not have any statute requiring that all proceedings on a note secured by a mortgage be brought in one action."[43] Thus, while "the mortgagee is allowed to choose whether to proceed on the note or guaranty or to foreclose upon the mortgage,"[44] Illinois permits creditors to pursue "[t]hese remedies . . . consecutively or concurrently."[45]

C. Deficiency Judgments in Illinois

When a creditor seeks to foreclose on a defaulting debtor's property, the creditor must file a form complaint in the foreclosure court providing the required information about the parties and the requested relief being sought.[46] At this time, the creditor may request "a personal judgment for a deficiency" should the sale of the property not satisfy the full amount owed to the creditor.[47] After the foreclosure judgment is rendered and the property is sold, the foreclosure court conducts a hearing to confirm the sale.[48] The confirmation of sale order, which is signed by the judge following this hearing, approves the sale of the property and provides for "a personal judgment against any party for a deficiency."[49] Deficiency judgments are granted at this time when the deficiency amount can be accurately calculated against the proceeds from the sale of the property.[50] In Illinois, foreclosure courts can issue "a personal or in

41. Severns, *supra* note 27, at 334.

42. *See* Farmer City State Bank v. Champaign Nat'l Bank, 486 N.E.2d 301, 306 (Ill. App. Ct. 1985) ("Upon default, a mortgagee may sue upon the note itself or bring an action to foreclose the mortgage.") (citations omitted).

43. *See* FORECLOSURE LAW & RELATED REMEDIES: A STATE-BY-STATE DIGEST 155 (Sidney A. Keyles ed., 1995).

44. LP XXVI, LLC. v. Goldstein, 811 N.E.2d 286, 289 (Ill. App. Ct. 2004).

45. *Farmer City*, 486 N.E.2d at 306.

46. *See* 735 Ill. Comp. Stat. § 5/15-1504 (2013).

47. *See id.* at § 5/15-1504(a)(3)(T)(iii).

48. *See id.* at § 5/15-1508(b).

49. *Id.*

50. *Id.* at § 5/15-1508(b)(3).

rem deficiency judgment,"[51] with the former acting as a judgment against the debtor, and the latter acting as a lien against the foreclosed property.[52]

Unlike a personal or *in personam* deficiency judgment, which requires payment from the debtor personally, an *in rem* deficiency judgment amounts to "no more than the creation of a lien . . . against the property and the rents, issues and profits therefrom to be paid upon account of the deficiency."[53] This lien applies "during the full period of redemption,"[54] and is only relevant if the debtor exercises the special right to redeem.[55] Under the equitable right to redeem, a debtor has seven months after the foreclosure suit commences to pay off the loan to the creditor (including fees and costs) in order to keep her property.[56] If the property is subsequently sold in a judicial sale and the plaintiff-creditor of the foreclosure suit purchases the property at the sale, a debtor may exercise her "Special Right to Redeem," which permits her to purchase the property from the creditor for the bid price (plus additional costs) within thirty days of the sale.[57] The amount still owed to the creditor (the deficiency) remains as a lien on the property, and the creditor continues to possess the right to foreclose on the property at a later date if the debtor defaults again.[58] Given the sequence of events, a creditor would first have to purchase the foreclosed property, then receive an *in rem* deficiency judgment in the confirmation of sale order, and then hope the debtor exercises her Special Right to Redeem within thirty days in order to maintain the *in rem* deficiency judgment as a lien against the property.[59] If the debtor fails to acquire the funds to repurchase the property

51. *See id.* at § 5/15-1604(b).

52. *See* St. Ange v. Chambliss, 390 N.E.2d 484, 486 (Ill. App. Ct. 1979).

53. *Id.*; *see also* Bank of N.Y. Mellon v. Vandenbrook, No. 2-14-0225, 2014 IL App (2d) 140225-U, at *10 (Ill. App. Ct. Oct. 20, 2014) ("Under early jurisprudence of this state, in part because of the distinction between actions at law and equity, and in part because foreclosure actions were largely considered '*in rem*,' a personal deficiency judgment at law could not be entered in a foreclosure proceeding in the absence of statutory authority." However, "courts in equity had the power to enter decrees directing that rents or other income relating to the property be used to satisfy any deficiency, even in the absence of personal service, as such a judgment was considered to be against the property or 'in rem' and not personal.") (citation omitted).

54. *Bank of N.Y. Mellon*, 2014 IL App (2d) 140225-U, at *10 (citing *St. Ange*, 390 N.E.2d at 486).

55. *Id. See* 735 Ill. Comp. Stat. § 5/15-1604 (2014).

56. *See id.* § 5/15-1603; *see also What is the Special Right to Redeem?* SULAIMAN LAW GROUP [hereinafter *Special Right to Redeem*], http://www.sulaimanlaw.com/Is-This-You/What-is-the-Special-Right-to-Re
deem-.aspx (last visited Sept. 19, 2016).

57. *See* 735 Ill. Comp. Stat. § 5/15-1604; *Bank of N.Y. Mellon*, 2014 IL App (2d) 140225-U, at *10 ("Under section 15–1604 of the IMFL, if the purchaser of residential real estate at a sale is either the mortgagee or its nominee and the sale price is less than the amount required to redeem, then, for a period of 30 days after confirmation of the sale, an owner of redemption may redeem by paying the mortgagee: 1) the sale price, 2) all additional costs and expenses incurred by the mortgagee set forth in the report of sale and confirmed by the court, and 3) interest at the statutory judgment rate from the date the purchase price was paid or credited as an offset. If the mortgagor exercises this right, the mortgagee continues to have a lien on the property to the extent that there is a remaining deficiency.") (citation omitted)).

58. 735 Ill. Comp. Stat. § 5/15-1604.

59. *Special Right to Redeem*, *supra* note 56.

from the creditor, no lien is placed on the property and the *in rem* deficiency judgment nullifies.[60]

In recent years, Illinois foreclosure attorneys representing creditors have sought *in rem* deficiency judgments in the confirmation of sale order, and intentionally foregone their right to receive an *in personam* judgment from the foreclosure court.[61] The rationale is that foreclosure judges are not keen on issuing personal judgments against debtors after already forcing the sale of their homes.[62] Attorneys representing lenders aim to avoid having issues with the foreclosure judges, thus they forego their opportunity to receive a personal judgment in the foreclosure court and instead subsequently file a breach of contract case in a court of law to receive the deficiency owed.[63] In *LSREF2 Nova Investments v. Coleman*,[64] the First District Illinois Appellate Court held that receiving an *in rem* deficiency judgment precludes a creditor from later suing the debtor on the promissory note under the doctrine of *res judicata*. The court's reasoning, however, suggests that there are still ways for creditors to sue on the note after a foreclosure action without being barred by *res judicata*.

D. Res Judicata

Illinois courts providing a plaintiff with the opportunity to seek different remedies in separate suits caused by the default of the same mortgage and note seems to create the type of judicial inefficiency that *res judicata* seeks to prevent.[65] "Res judicata [is] an equitable doctrine [that] prevents the multiplicity of lawsuits between the same parties involving the same facts and issues."[66] The purpose of the doctrine is to promote the "public policy of economizing judicial resources as well as the resources of the parties."[67] *Res judicata* not only "fosters respect for the determinations of the original tribunal," but it also "enhances the predictability and consistency of those determinations."[68] When a court renders a final judgment on the merits of the case, *res judicata* prevents the parties from "relitigating causes of action that were or could have been raised in the earlier lawsuit."[69] Thus, *res judicata* precludes the relitigation of not only the "defenses and grounds of recovery actually presented [in the

60. *Id.*

61. *See* MICHAEL G. CORTINA & AMBER MICHLIG, "*IN REM* IS INCOMPLETE: RE-THINKING A COMMON FORECLOSURE PRACTICE," 57 COMMERCIAL BANKING, COLLECTIONS & BANKR. L. SECTION COUNCIL NEWSLETTER No. 5 at 5 (Feb. 2013), *available at* http://www.salawus.com/pp/publication-228.pdf.

62. *See id.*

63. *See id.*

64. 33 N.E.3d 1030 (Ill. App. Ct. 2015).

65. *See, e.g.*, Piagentini v. Ford Motor Co., 901 N.E.2d 986, 990–91 (Ill. App. Ct. 2009).

66. Turczak v. First Am. Bank & Lebow, 997 N.E.2d 996, 1000 (Ill. App. Ct. 2013).

67. FREEDMAN, *supra* note 1, at 11.

68. *Id.*

69. *Turczak*, 997 N.E.2d at 1000.

prior suit], but also . . . [the] defenses or grounds of recovery which could have been offered but were in fact not offered."[70]

For a court to apply *res judicata* as a bar to a party's claim, the following elements must be established: "(1) a final judgment on the merits has been rendered by a court of competent jurisdiction; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions."[71]

E. "Identity of Cause of Action" and the "Transactional Test"

Nearly all Illinois cases that decide whether a deficiency suit should be barred under *res judicata* center on whether the two suits share an "identity of cause of action."[72] The two other elements of *res judicata* are usually satisfied or conceded by the parties.[73] Courts determine whether two claims share an "identity of cause of action" in order to decide if the present action or suit could have been brought in the prior suit. "This application of *res judicata* is known as preventing 'the splitting of a cause of action.'"[74] Illinois Courts apply the "transactional test" to determine whether two claims share an "identity of cause of action"[75] The transactional test defines separate actions as the same if the two claims "arise from a single group of operative facts, regardless of whether they assert different theories of relief."[76] The present and former suits are compared in the "factual terms" that they raise, and would not be distinguished as separate causes of action simply because they present "variant forms of relief" or "variations in the evidence needed to support the theories or rights" of the cases.[77] Thus, the transactional test centers the court's attention on the facts that the two suits revolve around, rather than the evidence or the remedies sought.

70. FREEDMAN, *supra* note 1, at 11.

71. Hudson v. City of Chicago, 889 N.E.2d 210, 213 (Ill. 2008) (citing Downing v. Chicago Transit Auth., 642 N.E.2d 456 (Ill. 1994)).

72. *See generally* LSREF2 Nova Invs. III, LLC v. Coleman, 33 N.E.3d 1030, 1033 (Ill. App. Ct. 2015); Foster Bank v. Xiaowen Zhu, No. 2-13-1071 2014 IL App (2d) 131071-U, at *2 (Ill. App. Ct. July 30, 2014); *Turczak*, 997 N.E.2d at 1000; LP XXVI, L.L.C. v. Goldstein, 811 N.E.2d 288, 290 (Ill. App. Ct. 2004); Skolnik v. Petella, 34 N.E.2d 825, 827 (Ill. 1941).

73. *See, e.g.*, *Coleman*, 33 N.E.3d at 1033 ("In this case, there is no dispute regarding the presence of the first and third elements of the doctrine of *res judicata* where the circuit court rendered a final judgment by granting relief in the foreclosure action and there is an identity of the parties or privies. The parties dispute the second element, namely, the existence of an identity of causes of action.").

74. FREEDMAN, *supra* note 1, at 15.

75. River Park v. City of Highland Park, 703 N.E.2d 883, 893 (Ill. 1998).

76. *Turczak*, 997 N.E.2d at 1000 (quoting *River Park*, 703 N.E.2d at 893).

77. *River Park*, 703 N.E.2d at 891–92 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. a (1982)). The Illinois Supreme Court adopted the transactional test over the evidence test because the transactional test is a more "liberal" approach in assessing whether a cause could have been raised in the prior proceeding. *Id.* at 893. The evidence test was an alternative test that determines if two cases share an "identity of cause of action" based on the evidence required to succeed on the claim. *Id.* at 892 (quoting Rein v. David A. Noyes & Co., 665 N.E.2d 1199, 1206 (Ill. 1996)).

III. ANALYSIS

In Illinois, it is possible for a creditor to sue on a promissory note after they have already foreclosed on the property without being barred by *res judicata*.[78] This outcome seems to be inconsistent if one examines the Illinois Mortgage and Foreclosure Law ("IMFL"), the transactional test, and the overall purpose of imposing *res judicata* to bar multiple suits. But if one were to examine the history of Illinois foreclosure case law, it is understandable how Illinois courts have come to this result. What is not so clear, however, is how two recent cases, *LP XXVI, LLC v. Goldstein*,[79] and *Turczak v. First American Bank*,[80] reached their unsupported holdings, and why the court in *Coleman* chose to apply *res judicata* so narrowly that creditors still have ample opportunities to bring forth deficiency suits. To fully understand how Illinois courts got into the position they are in now, one must examine the progression of mortgage and foreclosure law in Illinois.

A. Illinois Case Law Progression

Due to the historical separation of Illinois chancery and law courts, the process of foreclosure imposed large burdens on a creditor. Courts of equity had the power to foreclose upon a property and courts of law had the power to render a personal judgment against the debtor, but both courts would greatly hesitate in granting the other court's preferred remedy, even though they had the power to do so.[81] Further, in 1879 the Illinois legislature abolished non-judicial foreclosures ("power of sale" mortgages), requiring that all real estate mortgages occur in a judicial foreclosure proceeding, either at law or in chancery.[82] Since courts of law were generally unwilling to foreclose[83] and chancery courts were unwilling to impose deficiency judgments,[84] it is understandable that creditors were permitted to initiate multiple actions to recover on the note and

78. *See Coleman*, 33 N.E.3d at 1034 (citing Farmer City State Bank v. Champaign Nat'l Bank, 486 N.E.2d 301 (1985)), *appeal denied*, 39 N.E.3d 1003 (Ill. 2015).

79. 811 N.E.2d 286 (Ill. App. Ct. 2004).

80. 997 N.E.2d at 996.

81. Metrobank v. Cannatello 964 N.E.2d 656, 660–61 (Ill. App. Ct. 2012).

82. Reyes, *supra* note 23, at 1045.

83. Judges in law divisions were generally limited to foreclosing under *scire facias*, and since these proceedings removed any of the debtor's right to redeem the property, they were regarded as inequitable and against public policy unless absolutely required. Thus, actions at law generally would not result in the foreclosure of a mortgaged property—only a judgment against the debtor. *See* SMITH, *supra* note 19, at 115, 118.

84. This is because chancery courts could only render deficiency judgments with an authorizing statute, and "[w]ithout a statute to authorize it, a court of equity does not, upon a foreclosure of a mortgage, make a personal decree for any deficiency against the mortgagor." 2 REEVE, *supra* note 35, at 759 (quoting Rosenbaum v. Kershaw, 40 Ill. App. 659, 661 (Ill. App.Ct. 1888)). Some speculate that because the authority to grant a deficiency judgment is not an equitable remedy in nature, chancery judges were unwilling to impose remedies that were only permitted under statutory authority. *But see* Robert Jay Nye & Jonathan D. Nye, *Jury Trial in Illinois: Chancery, Multi-Remedy, and Special Remedy Civil Cases*, 22 LOY. U. CHI. L.J. 625, 678 (1991) ("Suits to foreclose trust deeds and obtain incidental deficiency judgments are equitable in nature.").

mortgage. Yet this does not mean that *res judicata* was never applicable to bar multiple suits by a creditor seeking the same relief—it just made it less applicable.[85]

The only time the Illinois Supreme Court discussed the application of *res judicata* to deficiency suits was in *Skolnik v. Petella*.[86] In *Skolnik,* the defendant, Ms. Petella, purchased property encumbered with debt (via bonds) and "assumed and agreed to pay the indebtedness" of the bonds which were secured to the property.[87] When the defendant defaulted, the creditors filed a foreclosure action against all bondholders, including the signors of the bonds (the original purchasers of the property) and Ms. Petella.[88] In the foreclosure suit, the creditors sought a deficiency judgment against the original signors of the bonds, but not against Ms. Petella (even though the creditor's foreclosure pleadings alleged that Ms. Petella assumed liability for the debt on the bonds).[89] The creditor subsequently filed a deficiency suit against Ms. Petella for the unpaid portion of the bonds.[90]

The Illinois Supreme Court held that the deficiency suit against Ms. Petella must be barred under *res judicata*.[91] The Court stressed that "*res judicata* embraces not only what actually was determined . . . but it extends to any other matters properly involved which might have been raised or determined."[92] In the prior foreclosure case, the court had jurisdiction to issue a deficiency decree against "any one liable for any deficiency over whom it had personal jurisdiction,"[93] including Ms. Petella.[94] The creditor had control over the issues that were adjudicated in the foreclosure case and could have adjudicated the issue of Ms. Petella's liability under the bonds, but chose not to do so.[95] Because the creditor chose not to raise Ms. Petella's liability in the foreclosure suit, and "[p]iecemeal litigation is not to be permitted," the case was properly dismissed under *res judicata*.[96]

The Illinois Supreme Court did not go through an in-depth analysis of whether the three elements of *res judicata* were met, nor did the Court apply the transactional test (which had yet to be adopted) to determine

85. *See 2* REEVE, *supra* note 35, at 726–27 (citing Oliver v. Cunningham, 7 F. 689, 696 (E.D. Mich. 1881); Vansant v. Allmon, 23 Ill. 30 (1859)) ("[A] foreclosure decree is not *res judicata* as to any matter which the defendant was not entitled, as a matter of right, to have litigated in the foreclosure proceedings. . . . But a judgment at law, without satisfaction, on the note secured by a mortgage, is no bar to proceedings to foreclose, for the mortgagee may pursue both remedies at the same time.").

86. 34 N.E.2d 825 (Ill. 1941).

87. *Id.* at 825–26.

88. *Id.* at 826.

89. *Id.*

90. *Id.*

91. *Id.* at 828.

92. *Id.* at 827.

93. *Id.* at 828.

94. *Id.*

95. *Id.*

96. *Id.*

whether the two suits shared an "identity of cause of action."[97] Rather the Court's analysis was straightforward and clear: Because the creditor could have sought a deficiency judgment against Ms. Petella in the foreclosure case, but did not, this matter could not be litigated a second time. The Court understood that barring suits under *res judicata* sustains the rule that "[p]iecemeal litigation is not to be permitted,"[98] and there is an importance in reinforcing the application of *res judicata* across all types of litigation. The Court did not discuss the differences between a foreclosure action and the action on the bonds, because these differences were not important to the case. The remedy sought in the second case could have been received in the foreclosure case; it did not matter if the two cases consisted of two different types of actions.[99] *Skolnik* makes it perfectly clear that in deficiency suits, if the creditor could have received the judgment from the foreclosure court but opted not to, the creditor does not get a "second bite of the apple."

In later cases, Illinois appellate courts deviated from *Skolnik*'s broad holding, allowing more leniency for deficiency suits to be litigated without *res judicata* acting as a bar. In *Emerson v. La Salle National Bank*, the court held that it was an error for the foreclosure court to dismiss the creditor's second count seeking recovery on a guarantee after the creditor's first count for foreclosure and sale of mortgaged property was satisfied.[100] The foreclosure court dismissed the creditor's second count "on the ground that the decree of foreclosure and sale followed by the order approving the report of sale and distribution adjudicated all matters alleged in the complaint and constituted an election of remedies by the plaintiffs."[101]

On appeal, the court reasoned that satisfaction of the first count, foreclosure on the property, had "no basis for the implication that it is addressed to all issues" of the case, and that the creditor's "failure to take a deficiency judgment" but filing of a second count was "consistent with plaintiffs' uncontradicted contention that they intended to proceed to make themselves whole solely under the guaranty."[102] Additionally, because an "action against guarantors of a note is separate from the remedy by foreclosure and sale," and "a personal judgment under a guaranty cannot be obtained in an action based on the statutory short form foreclosure complaint" provided by Illinois foreclosure law, the creditor would not have been able to recover under the guarantee without the

97. The transactional test would not be adopted as the primary test for determining whether two actions share "an identity of cause of action" by the Illinois Supreme Court until 1998 in *River Park, Inc. v. City of Highland Park*, 703 N.E.2d 883, 889 (Ill. 1998).

98. *Skolnik*, 34 N.E.2d at 828.

99. *See* FREEDMAN, *supra* note 1, at 15 ("Res judicata acts as a bar to further litigation of the cause of action between the same parties as to every issue or set of facts or defense raised and *also those which may have been presented*.") (emphasis added).

100. 352 N.E.2d 45, 50 (Ill. App. Ct. 1976).

101. *Id.* at 47.

102. *Id.* at 49–50.

second count added to the complaint.[103] Thus, under *Emerson*, *res judicata* did not bar additional counts added to a foreclosure action which seeks to recover against a party that cannot be joined on the short-form complaint, such as guarantors.[104] It should be noted, however, that *Emerson* applied to two counts within the same proceeding. The court did not discuss the applicability of this holding if the creditors instead initiated two completely separate suits.

Following *Emerson*, the next central case for framing *res judicata* application was *Farmer City State Bank v. Champaign National Bank*.[105] In *Farmer City State Bank*, a bank issued the debtor two promissory notes, each secured by a mortgage to the same property (i.e., traditional residential mortgages). When the debtor defaulted, the bank obtained a personal judgment against the debtor for the first, and smaller, promissory note, and sought to satisfy the judgment by levying the debtor's personal property.[106] When levying property was insufficient to satisfy the first judgment, the bank filed to foreclose on the secured property in order to enforce both promissory notes (the remaining amount owed on the first note and the full amount of the second note).[107] The debtor argued that by allowing the bank to foreclose under both mortgages, the court was impermissibly increasing the judgment the bank had already obtained on the first promissory note.[108]

The court held that receiving a judgment on an underlying promissory note did not preclude a bank from foreclosing on the secured property to satisfy the judgment, because "in obtaining a judgment of foreclosure, [the bank] did not impermissibly increase a prior judgment, but pursued a separate and distinct remedy available to it as a holder of a note secured by a mortgage."[109] The court then went on to say:

> Upon default, a mortgagee may sue upon the note itself or bring an action to foreclose the mortgage. These remedies may be pursued consecutively or concurrently. Where the mortgagee takes a judgment upon the note, the mortgage stands as security for the judgment. If the mortgagee then forecloses the mortgage and obtains a deficiency judgment against the mortgagor, the judgment on the note is merged into the second judgment.[110]

It is likely that the court's statement, confirming that creditors have multiple remedies available in the event of a default, spawned from the history of Illinois foreclosure law and the difficulties creditors faced when having to deal with both law and chancery courts. Further, it is also

103. *Id.* at 50.
104. *Id.*
105. 486 N.E.2d 301 (Ill. App. Ct. 1985).
106. *Id.* at 303.
107. *Id.* at 304.
108. *Id.* at 306.
109. *Id.*
110. *Id.* (citing Jocelyn v. White, 66 N.E.2d 327 (Ill. 1903); Skach v. Lydon, 306 N.E.2d 482 (Ill. App. Ct. 1973); McDonald v. Culhane, 24 N.E.2d 737 (Ill. App. Ct. 1940); Washingtonian Home v. Van Meter, 18 N.E.2d 82 (Ill. App. Ct. 1938)).

likely that because *Farmer City State Bank* involved a bank suing on a note and subsequently seeking to foreclose, a rather uncommon practice, the court was reiterating that suing on a note and later foreclosing to *enforce* a judgment is a legitimate remedy for a creditor in Illinois.[111]

Yet, interestingly enough, the language used in *Farmer City State Bank* has been repeated in numerous Illinois *res judicata* cases as a justification for allowing subsequent suits on promissory notes after a foreclosure suit has already occurred (i.e., deficiency suits).[112] This is a curious application of the case's rule language given that *Farmer City State Bank* discussed only the ability to foreclose after a creditor has already received a judgment on the note—not the ability to seek judgment on the note after the creditor foreclosed.

B. Enactment of the IMFL

In 1987, the Illinois legislature formally integrated the Illinois Mortgage and Foreclosure Law ("IMFL") into the Illinois Rules of Civil Procedure.[113] The IMFL was intended to make foreclosures more efficient and speedy, as "[t]he prior foreclosure laws were scattered throughout various sections of the Illinois Revised Statutes in addition to several areas which were previously only set forth in case law."[114] One of the provisions of the IMFL permits foreclosure courts to issue a deficiency judgment "against *any party* . . . to the extent requested in the complaint . . . ."[115] While chancery courts historically had the authority under statute to provide deficiency judgments,[116] the IMFL integrated the ability to recover a deficiency judgment into the pleadings,[117] the foreclosure judgment,[118] and confirmation of sale portions of the foreclosure proceeding.[119] The ability to fully recover in the revised foreclosure process marked the distinction from the days when a creditor would have to maneuver through both law and equity to recover the unpaid portion of the debt.[120]

One would assume this revised process, allowing a foreclosure court to determine the personal liability of all parties involved, would remove the legal necessity allowing for a creditor to pursue multiple remedies

111. *Id. See* SMITH, *supra* note 19, at 154 ("Suits on notes, secured by mortgage, judgment thereon, and sale thereunder may be regarded as a foreclosure.").

112. *See generally* Turczak v. First Am. Bank, 997 N.E.2d 996 (Ill. App. Ct. 2013); LP XXVI, LLC v. Goldstein, 811 N.E.2d 286 (Ill. App. Ct. 2004); PNC Bank, Nat'l Ass'n v. Chicago Servs. of Ill. LLC Ventures Plus, No. 14 C 2710, 2014 WL 4555592 (N.D. Ill. Sept. 15, 2014).

113. *See* Metrobank v. Cannatello 964 N.E.2d 656, 662–63 (Ill. App. Ct. 2012).

114. Steven C. Lindberg & Wayne F. Bender, *The Illinois Mortgage and Foreclosure Law*, ILL. BAR J., Oct. 1987, at 800, http://alolawgroup.com/content/file/default/IMFL1.pdf.

115. 735 ILL. COMP. STAT. § 5/15-1508(e) (2013) (emphasis added).

116. *See Metrobank*, 964 N.E.2d at 660.

117. 735 ILL. COMP. STAT. § 5/15-1504(a).

118. *Id.* § 5/15-1506.

119. *Id.* § 5/15-1508(e).

120. *See Metrobank*, 964 N.E.2d at 665 ("Deficiency judgment statutes were enacted to allow actions for a personal deficiency judgment and a foreclosure to proceed together in a single proceeding.").

"consecutively or concurrently."[121] Under that logic, the holding of *Skolnik* would be more applicable than ever—if a creditor could have sought a deficiency judgment against a party and chose not to, any subsequent suit against that party for the deficiency would be barred under *res judicata*.[122] While one could reasonably assume this would become the judicial standard following the enactment of the IMFL, this was not the case.

C. Turning Case #1: LP XXVI, LLC v. Goldstein

In *LP XXVI, LLC v. Goldstein*, [123] the plaintiff-creditor appealed the trial court's *res judicata* dismissal after the creditor filed a deficiency suit against the defendant-guarantors after a foreclosure action already took place.[124] Following the sale of the property, the creditor received an *in rem* deficiency judgment, or a lien against the property, in the amount of the deficiency owed.[125] The creditor argued "*res judicata* does not apply to this cause, as it is an *in personam* contract action on the guaranty executed by defendant,"[126] whereas the foreclosure action was an "*in rem* proceeding that operates directly on the property and binds the rights of all persons who hold ownership of lien interests in the property."[127] The court, using the transactional test to determine if the two suits share an identity of cause of action, stated:

> At first blush, a transactional analysis may appear to lead to the conclusion that the action on the guaranty is the same cause of action as the mortgage foreclosure, because the note, mortgage, and guaranty were all executed concurrently and, apparently, as components of a related deal. Such a result, however, overlooks the practical aspects of the interrelated transactions comprising the execution of the note, mortgage, and guaranty, as well as long-settled precedent, and reduces the transactional analysis to the most cursory and formalistic level.[128]

Explaining that the execution of notes are to provide capital, mortgages to secure the note, and guarantees to provide additional assurance, the court reasoned, "[w]hile the three transactions are related, 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."[129] The court further stated that the prior foreclosure action was an action *in rem* that "did not encompass the guarantee," and thus the "defendant's rights under the guaranty were not

121. Farmer City State Bank v. Champaign Nat'l Bank, 486 N.E.2d 301, 306 (Ill. App. Ct. 1985).
122. *See* Skolnik v. Petella, 34 N.E.2d 825, 828 (Ill. 1941).
123. 881 N.E.2d 286 (Ill. App. Ct. 2004).
124. *See id.* at 287–88.
125. *See id.*
126. *Id.* at 288.
127. *Id.* at 289.
128. *Id.*
129. *Id.*

placed in issue or adjudicated."[130] The court stated that the current case was only to enforce the guaranty, and did not effect any part of the prior foreclosure suit.[131] Thus, the action at law was "separate and distinct from the [foreclosure] action, and the principle of *res judicata* [was] inapplicable to the facts of this case."[132] The court justified this determination with the "well settled precedent" that promissory notes, guarantees, and mortgages are three separate contracts that give rise to separate legal remedies, and therefore actions to enforce notes or guarantees do not share an "identity of cause of action" with actions to foreclose on a mortgage.[133]

This decision, however, was inconsistent with Illinois law. First, the court misapplied the transactional test when determining whether the two cases shared an "identity of causes of action." Second, the court overlooked the IMFL and the important revisions it made to Illinois foreclosure law.

1. Goldstein *Court Misapplied the "Transactional Test"*

To determine whether the foreclosure suit and the suit on the guaranty shared an "identity of cause of action," the court applied the transactional test. It ultimately determined that the three transactions—the note, the mortgage, and the guaranty—were not within the same transaction "in light of the purpose of each of the transactions."[134] Because the three contracts serve different purposes, the court reasoned that they could not be within the same transaction.[135] This reasoning was inconsistent with the intended application of the transactional test, adopted by the Illinois Supreme Court in *River Park v. City of Highland Park*.[136]

In *River Park*, the issue was whether two lawsuits, one at issue and one previously dismissed (both regarding a property zoning dispute), shared an "identity of cause of action," justifying dismissal under *res judicata*.[137] A sub-issue, however, was that Illinois appellate courts were applying two different tests to determine if cases share an "identity of cause of action:" The "same evidence test," which bars a subsequent action "if the evidence needed to sustain the second suit would have sustained the first, or if the same facts were essential to maintain both actions,"[138] and the "transactional test," which bars a subsequent action "if a single group of operative facts give rise to the assertion of relief," even

130. *Id.*

131. *Id.* ("The Cook County action did not encompass the guaranty. Further, defendant's rights under the guaranty were not placed in issue or adjudicated. This action, by contrast, is an *in personam* action against defendant to adjudicate his liability under the 'Commercial Guaranty'. . . .").

132. *Id.*

133. *Id.*

134. *Id.*

135. *See id.*

136. 703 N.E.2d 883 (Ill. 1998).

137. *See id.* at 891.

138. *Id.* (quoting Rodgers v. St. Mary's Hosp., 597 N.E.2d 616, 621 (1992)).

if the assertion in the subsequent case is of a different kind or theory of relief.[139] The Illinois Supreme Court adopted the more "liberal" transactional test over the evidence test because the transactional test in operation applies a broader viewpoint in assessing whether two claims share an "identity of cause of action."[140]

The transactional test demonstrates why courts apply *res judicata* in the first place. By including any claim that arises from the same operative facts of the prior claim, the transactional test bars "not only what was actually determined in the former case between the same parties . . . but it extends to any other matters properly involved which *might* have been raised or determined."[141] The *Goldstein* court held that because "a mortgage and an accompanying promissory note securing the mortgage constitute separate contracts, they give rise to legally distinct remedies,"[142] and thus are not considered to have an "identity of causes of action."[143] Yet this holding ignores the fact that an "identity of cause of action" can be found even if the subsequent claim asserts "[a] different kind[] or theor[y] of relief[.]"[144] Even without the transactional test, the doctrine of *res judicata* still bars claims "which *might* have been raised"[145] in the first action. A correct application of the transactional test[146] would have lead the *Goldstein* court to hold that the suits on both the foreclosure and the guaranty were within the same transaction, and thus shared an "identity of cause of action."

The *Goldstein* court not only distinguished the three instruments (the mortgage, note, and guarantee) by the function each served, it also further distinguished the instruments by the type of action used to adjudicate them.[147] The court emphasized that actions enforcing notes and guarantees are *in personam* actions, while foreclosures of mortgages are "*in rem"* actions.[148] It is true that *in rem* actions and *in personam* actions alter a court's personal jurisdiction requirements,[149] and possibly the

139. *Id.* (citation omitted).

140. *See id.* at 893.

141. Skolnik v. Petella, 34 N.E.2d 825, 827 (Ill. 1941) (emphasis added).

142. LP XXVI, LLC. v. Goldstein, 811 N.E.2d 286, 289 (Ill. App. Ct. 2004).

143. *See id.*

144. River Park v. City of Highland Park, 703 N.E.2d 883, 891 (Ill. 1998).

145. *See Skolnik*, 34 N.E.2d at 827.

146. Which is what the Supreme Court intended in *River Park*: "Having adopted the more liberal transactional test for determining whether claims are part of the same transaction . . . 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." This is why they ultimately chose not to use the evidence test. *River* Park, 703 N.E.2d at 893.

147. *See Goldstein*, 811 N.E.2d at 289.

148. *Id.* While the court in *Goldstein* stated that a mortgage foreclosure action is an *in rem* action, a foreclosure is actually a *quasi in rem* action. *See* ABN AMRO Mortg. Group, Inc., v. McGahan, 931 N.E.2d 1190, 1198 (Ill. 2010).

149. *See ABN AMRO*, 931 N.E.2d at 1195 ("'*In rem*' jurisdiction is '[a] court's power to adjudicate the rights to a given piece of property, including the power to seize and hold it."') (quoting BLACK'S LAW DICTIONARY 856 (7th ed. 1999)); *Id.* ("The legal fiction underlying an *in rem* proceeding is that the 'property, not the owner of the property, is liable to the complainant. It treats property, therefore, as the defendant, susceptible of being tried and condemned, while the owner merely gets notice, along with the rest of the world, and may appear for his property or not.'") (quoting R.

types of remedies that may be provided.[150] This distinction, however, between the two types of legal actions, has no bearing on whether the two suits arise from the same transaction for purposes of the transactional test.

First, in determining whether two claims arise from the same transaction, the transactional test does not consider if the claims apply different legal doctrines or seek different forms of relief.[151] The test only examines the operative facts of the two claims and whether those facts are related enough to be regarded as the same transaction.[152] Second, the *Goldstein* court incorrectly placed emphasis on the different remedies the two actions provide and the contrasting types of law applied in each suit, rather than take notice that the guaranty arises from the creation of the mortgage and note. Since a guaranty, note, and mortgage all arise from the same *literal* transaction, it is difficult to believe that the *Goldstein* court correctly applied the transactional test when they held that these instruments are not within the same transaction.[153]

2. Goldstein *Court Ignored Changes by IMFL*

Another weakness in the court's reasoning spawns from the conclusion that the first foreclosure suit and the second guaranty suit constituted "separate and distinct" actions. This conclusion was based on the fact that a creditor cannot seek relief from a guarantor in a single-count foreclosure action.[154] But the court's assertion on this matter was incorrect. The IMFL's enactment provided for an efficient process in which a plaintiff may receive a deficiency judgment from *anyone* liable for the debt, including a guarantor.[155] A guarantor is a "permissible party" that may be added to the foreclosure suit under a "separate count in an action on such guarantor's guaranty."[156] Further, the IMFL pleadings permit for the mortgagee to name the "defendants claimed to be personally liable for deficiency, if any,"[157] and following the sale and confirmation of the

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WAPLES, TREATISE ON PROCEEDINGS IN REM § 1, at 2 (1882)); *see also* BLACK'S LAW DICTIONARY 912 (10th ed. 2014) ("In personam: Involving or determining the personal rights and obligations of the parties . . . . 'An action is said to be *in personam* when its object is to determine the rights and interests of the parties themselves in the subject-matter of the action . . . .'") (quoting R.H. GRAVESON, CONFLICT OF LAWS 98 (7th ed. 1974)).

150. "An action *in personam* is one the judgment of which in form as well as in substance, affects the interests of the parties. It is, as one court phrases it, against a person, founded on the defendant's liability. The judgment binds only the parties litigant . . . . An action *in rem* is one whose judgment is an official decree of the status of a thing as it concerns persons. It is binding on every interested party." Morris E. Cohn, *Jurisdiction in Actions* in Rem *and* in Personam, 14 WASH. U. L. REV. 170, 170–71 (1929).

151. *See* River Park, Inc. v. City of Highland Park, 703 N.E.2d 883, 892 (Ill. 1998).

152. *See id.*

153. LP XXVI, LLC. v. Goldstein, 811 N.E.2d 286, 289 (Ill. App. Ct. 2004).

154. *Id.*

155. *See* 735 Ill. Comp. Stat. § 5/15-1501(a)–(b) (2013) (stating that the necessary and permissible parties in a foreclosure suit include the mortgagor as well as a guarantor).

156. *Id.* at § 5/15-1501(b)(5).

157. *Id.* at § 5/15-1504(a)(3)(M).

property the court may "provide for a personal judgment against any party for a deficiency."[158]

The *Goldstein* court justified it's holding by stating that a creditor cannot be granted a judgment against a guarantor in a single-count foreclosure action. This is true. To receive a judgment against a guarantor in a foreclosure action, the creditor must add another count onto the foreclosure complaint, which simply raises the issue of the guarantor's liability. Yet, the fact that a creditor must add an additional count onto a foreclosure complaint cannot suggest that a guaranty claim is so distinct and separate from a foreclosure claim that the two do not share an identity of cause of action.[159] Rather, the IMFL permits guarantors to be easily added as a party to a foreclosure suit in an effort to "allow actions for a personal deficiency judgment and a foreclosure to proceed together in a single proceeding."[160] It is clear that the old distinctions of legal and equitable jurisdiction over foreclosures and deficiency judgments are no longer applicable after the enactment of the IMFL.[161] Thus, it was an error for the court in *Goldstein* to ignore the changes arising from the enactment of the IMFL, and hold that the distinctions between guarantees and mortgages render the two actions "separate and distinct" transactions.[162]

The Court's decision in *Goldstein* established the basis for the First District Illinois Appellate Court to permit deficiency suits through its ruling in *Turczak v. First American Bank*.[163]

D. Turning Case #2: Turczak v. First Am. Bank & Lebow

In *Turczak*, the debtor-plaintiffs financed the purchase of their home with two separate loans secured by mortgages. When the debtors defaulted on their payments, the creditor holding the first mortgage (the senior lien holder) moved to foreclose on the property. The creditor holding the second mortgage, First American (the creditor-defendant and junior lien holder), sued on the debtors' underlying promissory note and received a default judgment against the debtors for the full amount of the loan.[164] The debtors tried to sell their property via short sale and the senior lien holder agreed to approve the short sale if First American released the mortgage lien it had on the property. First American informed the debtors that they would release their lien only if they were paid $6,000.[165] The debtors filed suit against First American for violating the Illinois Consumer Fraud and Deceptive Business Practices Act.[166]

158. *Id.* at § 5/15-1508(b)(2).
159. *See* LP XXVI, LLC. v. Goldstein, 811 N.E.2d 286, 289 (Ill. App. Ct. 2004).
160. Metrobank v. Cannatello, 964 N.E.2d 656, 665 (Ill. App. Ct. 2012).
161. *See id.* at 661.
162. *Goldstein*, 811 N.E.2d at 289.
163. 997 N.E.2d 996 (Ill. App. Ct. 2013).
164. This default judgment allowed the garnishment of the plaintiff's wages.
165. Turczak v. First Am. Bank & Lebow, 997 N.E.2d 996, 998 (Ill. App. Ct. 2013).
166. *Id.*

The debtors argued that First American engaged in misleading conduct when it required the $6,000 to release its "enforceable second mortgage."[167] They argued that First American "could not have sought to foreclose the second mortgage when it tied the release of the second mortgage to the payment"[168] because after First American obtained "a default judgment on its promissory note, the doctrine of *res judicata* barred any action on the second mortgage."[169] Hence, First American's demand of $6,000 to release its right to foreclose on the property was deceptive, as First American had no legal right to foreclose.[170]

The First District Appellate Court held that Illinois law permits a lender to enforce a mortgage and underlying promissory note through separate suits, and First American's right to foreclose on the property was not extinguished as a matter of law when it received the default judgment on the note.[171]

1. "Well-Settled Illinois Case Law"

The court stated that "well-settled Illinois case law permits lenders to bring separate enforcement actions on the mortgage and the note."[172] The court relied heavily on *Goldstein*, reiterating the understanding that a mortgage and a guarantee have two separate purposes, and thus constitute two separate transactions.[173] It also reasoned that it is "settled" that "the mortgagee is allowed to choose whether to proceed on the note or guaranty or to foreclose upon the mortgage. 'These remedies may be pursued consecutively or concurrently.'"[174]

This "well-settled" case law was not actually well-settled. The *Turczak* court was quoting *Goldstein*, which quoted *Farmer City State Bank*. Yet, it has already been shown that the statement "remedies may be pursued consecutively or concurrently" in *Farmer City State Bank,* was referring to the ability to sue on the note and *then* foreclose as a method of enforcement, back when creditors were limited in their abilities to recover due to Illinois procedural rules regarding foreclosures.[175] *Goldstein* used this *Farmer City State Bank* quote incorrectly when the court applied it to justify a factually different circumstance than that in *Farmer City State Bank*, as the *Goldstein* creditor was foreclosing *first* and then suing on the guaranty. Further, if "well-settled Illinois case law" included

167. *Id.*
168. *Id.*
169. *Id.* at 997.
170. *Id.* at 1000.
171. *Id.*
172. *Id.*
173. *Id.* at 1001 ("The *Goldstein* court held that while the transactions were related, '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.'") (quoting LP XXXVI, LLC v. Goldstein, 811 N.E.2d 286, 290 (Ill. App. Ct. 2004)).
174. *Id.* (quoting *Goldstein*, 811 N.E.2d at 290). *Goldstein* was quoting Farmer City State Bank v. Champaign Nat'l Bank, 486 N.E.2d 301, 306 (Ill. App. Ct. 1985).
175. *See supra* text accompanying notes 104–07.

a reliance on *Goldstein*'s flawed reasoning, this is arguably not "well-settled." This Note has already established *Goldstein*'s application of the transactional test was flawed by emphasizing variations of legal remedies and types of actions over the actual operative facts of the two cases, and ignoring the procedural changes that occurred with the enactment of the IMFL.[176]

The *Turczak* court's assertion of "well-settled" case law was further unsound when the court cited *Citicorp Savings of Illinois v. Ascher*[177] as support, which has highly distinguishable facts, and centers on the effect a foreclosure judgment has on the enforceability of a guaranty, rather than on *res judicata* implications.[178] The court also cited *Du Quoin State Bank v. Daulby*[179] as supporting case law, which held that "previous foreclosure did not resolve defendant's liability under personal guaranty."[180] This citation is misleading as *Du Quoin* was decided in 1983, before the enactment of the IMFL and the changes in the law allowing for recovery from a guarantor within a foreclosure complaint. Thus, the "well-settled Illinois case law" permitting "lenders to bring separate enforcement actions on the mortgage and the note," asserted by the *Turczak* court, was not actually "well-settled" at all.[181] The only well-settled aspect of these cases is the fact that the appellate courts were continuing to use inapplicable rule language from distinguishable cases, believing their holdings to be proper under "well-settled Illinois case law."[182]

2. ABN AMRO *and Remedies*

Next, the court in *Turczak* stated that the recent Illinois Supreme Court holding in *ABN AMRO Mortgage Group Inc. v. McGrahan*[183] did not create any changes from the premise that a suit on a promissory note provides a legally distinct remedy from a foreclosure suit, and the two may be enforced in separate suits.[184] In *ABN AMRO*, the Court held that under the "requirements of Mortgage Foreclosure Law, a foreclosure

176. *See supra* text accompanying notes 141–52.

177. 554 N.E.2d 409 (Ill. App. Ct. 1990).

178. The *Turczak* court cited *Citicorp* as a case that "held that a judgment of foreclosure will not bar a later suit on a guaranty because the foreclosure judgment does not adjudicate the defendant's rights and liabilities under a guaranty contract, and, thus, the doctrine of *res judicata* is not implicated." Turczak v. First Am. Bank, 997 N.E.2d 996, 1001 (Ill. App. Ct. 2013) (citing *Citicorp*, 554 N.E.2d at 409). The court in *Citicorp* actually held that a judgment to foreclose a property and decree a deficiency, entered on count I of the plaintiff's complaint, does not automatically bind the defendant-guarantors to the deficiency judgment sought in count III of the complaint through *res judicata*. The trial court did not discuss the guarantor's liability to the default as there were many limiting clauses, suggesting that the guarantors were not liability for a deficiency judgment at all—which the court ultimately found.

179. 450 N.E.2d 347 (1983).

180. *Turczak*, 997 N.E.2d at 1001 (citing *Du Quoin State Bank*, 450 N.E.2d at 347).

181. *Id.* at 1000.

182. *See* LP XXXVI, LLC. v. Goldstein, 811 N.E.2d 286, 289 (Ill. App. Ct. 2004); *Turczak*, 997 N.E. 2d at 1000.

183. 931 N.E. 2d 1190 (2010).

184. *See Turczak*, 997 N.E.2d at 1001.

proceeding is a *quasi in rem* action"[185] as the cause of action is due to a breach of contract, although the remedy provides equitable relief through the sale of the property.[186] The debtor in *Turczak* tried to argue that because a mortgage foreclosure suit encompasses both an action against the property and a monetary claim for personal liability, the two claims "must be pursued in a single action."[187] The court rejected this argument, stating that "while *in rem* differs from *quasi in rem,* both are alternatives to *in personam* jurisdiction," and "*quasi in rem* proceedings apply a legally distinct remedy from an *in personam* proceeding on a promissory note."[188]

One weakness in the court's usage of *ABN AMRO* is that the case was used to reiterate that a *quasi in rem* foreclosure provides a "legally distinct remedy" from an *in personam* proceeding on a promissory note.[189] This reiteration of a "legally distinct remedy" continues to disregard the rules of the transactional test, which states two claims can share an identity of cause of action "regardless of the number of substantive theories, or *variant forms of relief* flowing from those theories."[190] It is clear that two causes of action can still share an identity even if they utilize a "legally distinct remedy" from one another.[191] Similar to logic used in *Goldstein*, the *Turczak* court's assertion that a *quasi in rem* proceeding is a separate transaction from an *in personam* proceeding illustrates the court's unwillingness to properly apply the transactional test to these types of cases.[192]

Another weakness regarding the application of *ABN AMRO* to the holding in *Turczak* is the court's statement that "*ABN AMRO* does not alter the ability to bring a separate suit on the promissory note . . . ."[193] If anything, *ABN AMRO* support's the plaintiff's contention that the two cases should be pursued in a single action. The Illinois Supreme Court stated in it's opinion for *ABN AMRO* that:

185. *ABN AMRO*, 931 N.E.2d at 1198.

186. *Id.* at 1197. *See also* BLACK'S LAW DICTIONARY (9th ed. 2009) (defining *quasi in rem*: "Involving or determining the rights of a person having an interest in property located within the court's jurisdiction.").

187. *Turczak*, 997 N.E.2d at 1000.

188. *Id.* at 1002.

189. *See id.* But interestingly, this was not even the holding of *ABN AMRO*. The issue in *ABN AMRO* was whether a creditor needed to name a personal representative for a deceased debtor in a mortgage foreclosure proceeding for the circuit court to have subject matter jurisdiction over the action. The creditors argued that a mortgage foreclosure case is an *in rem* proceeding, determining only the rights of the property, and therefore do not require a named defendant. Yet, the Illinois Supreme Court held a foreclosure is a *quasi in rem* proceeding, enforcing obligations created by specific persons in the form of notes, and even though the subject matter regards a property, the rights of the property are only determined by the agreement made by the parties. Thus, in a *quasi in rem* action, there must be a named defendant, and should the debtor be deceased, a personal representative is required for a circuit court to have jurisdiction over the case. *See ABN AMRO*, 931 N.E.2d at 1198.

190. River Park, Inc. v. City of Highland Park, 703 N.E.2d 883, 892 (Ill. 1998) (Emphasis added.).

191. *See supra* text accompanying notes 141–52.

192. *See Turczak*, 997 N.E.2d at 1001. *See also* LP XXXVI, LLC. v. Goldstein, 811 N.E.2d 286, 289 (Ill. App. Ct. 2004).

193. *Turczak*, 997 N.E.2d at 1001.

> [I]n foreclosure actions, the property is not the instrumentality of the wrong, nor is it responsible for the plaintiff's injury. 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 created by that contract, through the property, but against a specific person.[194]

In essence, there would be no foreclosure of the property if the debtor did not breach her underlying obligations on the promissory note. A court *must* examine the liability on the underlying promissory note to foreclose on the secured property, and while a foreclosure suit and suit on the note may render different legal remedies, both cases examine the same facts.[195] Under the transactional test, this clearly establishes an "identity of causes of action" between a foreclosure suit and a suit on the underlying promissory note.

3. Reading of the IMFL

The *Turczak* court then addressed the plaintiff's argument that the IMFL requires "enforcement of the note and mortgage together in a single case."[196] The court rejected this argument, holding that the IMFL only pertains to actions to foreclose on mortgages and "says nothing that would make it applicable to other types of lawsuits, including actions at law for judgment on a promissory note."[197] While the language of the statute states a foreclosure complaint "*may* be joined with other counts or may include in the same count additional matters or a request for any additional relief,"[198] the court stated that the persuasive, non-mandatory language of "may" does not require a plaintiff to join additional counts for relief (such as seeking a deficiency judgment) in the foreclosure suit.[199]

This reasoning demonstrates the distorted understanding of *res judicata* in allowing these deficiency suits to occur. One of the most fundamental aspects of *res judicata* is that it bars not only what was decided in the first case, but also extends to anything else that *could* have been decided in that case.[200] Further, "the principle that *res judicata* prohibits a party from seeking relief on the basis of issues that could have been resolved in a previous action serves to prevent parties from splitting their

194. ABN AMRO Mortgage Group Inc. v. McGrahan, 931 N.E. 2d 1197 (2010).
195. *See id.* at 1196–97.
196. *Turczak*, 997 N.E.2d at 1002.
197. *Id.*
198. *Id.* (quoting 735 Ill. Comp. Stat. § 5/15–1504(b) (2008)).
199. *Id.* ("It hardly needs to be said that 'may' is a permissive, not a mandatory, term.").
200. *See* Hudson v. City of Chicago, 889 N.E.2d 210, 214 (Ill. 2008); River Park v. City of Highland Park, 703 N.E.2d 883, 889 (Ill. 1998); La Salle National Bank v. Cty. Bd. of Sch. Tr., 337 N.E.2d 19, 22 (Ill. 1975).

claim."[201] Under this basic premise of *res judicata*, it does not matter that the IMFL does not *require* the plaintiff to add additional counts for relief into her foreclosure complaint. The fact that a plaintiff *may* seek a deficiency judgment in a foreclosure suit is enough to establish that recovery of a deficiency judgment is an issue that "could have been resolved."[202] Following this understanding, any subsequent action seeking a deficiency judgment should be barred under basic *res judicata* principles alone.

E. Turning Case #3. LSREF2 Nova Investments III, LLC v. Coleman

Illinois appellate courts created a large *res judicata* loophole when *Turczak* held that "a note accompanying a mortgage need not be enforced in a single case,"[203] and "[n]o compelling reasons exist to abandon this settled law."[204] Following this case, creditors could file multiple suits seeking recovery under the same note without being barred by *res judicata*. And while some trial courts addressed concerns about the reasoning of the current case law,[205] *Turczak*'s holding permitted creditors to take more chances in filing subsequent foreclosure suits. This was amplified in the judgment handed down in December 2014 in *LSREF2 Nova Investments III, LLC v. Coleman*.[206]

In *Coleman*, the plaintiff-creditor filed a complaint to foreclose on the defendant-debtor's commercial property and sought a personal deficiency judgment against the debtor for any remaining deficiency.[207] The foreclosure court issued a judgment of foreclosure against the debtor, which provided that "[i]n case there is any deficiency in the amount [due] . . . the plaintiff shall be entitled to a deficiency judgment against the defendant . . . for such amount and for an execution thereon as provided by law."[208] Following the sale of the property,[209] the foreclosure court entered a confirmation of sale order, but instead of providing a personal deficiency judgment against the debtor, the order stated, "[t]here shall be an IN REM deficiency judgment entered in the sum of

201. *Hudson*, 889 N.E.2d at 216.

202. *Id.*

203. *Turczak*, 997 N.E.2d at 1000.

204. *Id.* at 1002.

205. *See* Trial Mem. Op. and Order at 4, Bridgeview Bank v. NG Construction, INC., No. 09 CH 15978, 2009 WL 5874831 (Cook Cnty. Ct. Ch. Jan. 29, 2009) (holding *res judicata* did not bar the plaintiffs claim for breach of contract following a foreclosure suit) ("As a practical matter, the interests of judicial economy are clearly best served by adjudicating both the mortgage and any judgment sought on the note in the same case. After all, the amount of deficiency, if one exists at all, depends on the proceeds generated at the foreclosure sale. Moreover, suing under the note and mortgage in a separate proceeding results in additional fees for the parties and an unnecessary use of judicial resources. . . . Although the court questions the practice of pursuing separate actions to foreclose a mortgage and collect on the accompanying note, this court is bound by established Illinois precedent that allows such a course of action.").

206. No. 1-14-0184, 2014 IL App (1st) 140184 (Ill. App. Ct. filed Dec. 19, 2014), *withdrawn and superseded*, 33 N.E.3d 1030 (Ill. App. Ct. 2015).

207. *Coleman*, 33 N.E.3d at 1030.

208. *Id.*

209. *See* 735 Ill. Comp. Stat. § 5/15-1507 (2014).

$227,416.32 with interest thereon as by statute provided against the subject property."[210]

A year after the property was foreclosed upon, the creditor filed a breach of contract action against the debtor to enforce the remainder owed on the promissory note.[211] The trial court dismissed the action, claiming it was barred under *res judicata*.[212] The defendants then appealed the trial court's decision to the Illinois First District Appellate Court.[213] The issue on appeal was whether the breach of contract action (the deficiency suit) shared an "identity of cause of action" with the prior foreclosure action.[214] This appeal, however, resulted in a very interesting turn of events.

1. Coleman*: "Take One"*

In December 2014, the First District Appellate Court issued a slip opinion reversing the trial court's decision, holding that the creditor's election to recover under the promissory note in a second, subsequent action was not barred by *res judicata*.[215] The court heavily based its reasoning on the legal theories presented in *Goldstein* and *Turczak*.[216] It was noted that a mortgagee "may sue upon the [promissory] note . . . or bring an action to foreclose the mortgage . . . . [and] [t]hese remedies may be pursued consecutively or concurrently.'"[217] The court stated that although a mortgage foreclosure action is a *quasi in rem* proceeding, this "does not alter the ability to bring a separate suit on the promissory note."[218] Thus, in this action, the "[p]laintiff chose to pursue separate, consecutive actions to foreclose on the mortgage and to collect on the delinquent promissory note, as was its right."[219]

The court maintained that this breach of contract suit and the prior foreclosure suit were entirely separate actions, even though the plaintiff sought a personal deficiency judgment against the debtor in the foreclosure suit. The court emphasized that the plaintiff received only an *in rem* deficiency judgment in the foreclosure suit, thus "[n]o personal deficiency judgment was entered" and "[t]here was no decision on the merits of the promissory note."[220]

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210. *Coleman*, 33 N.E.3d at 1031.
211. *Id.* at 1032.
212. *Id.*
213. *See Id.*
214. *Id.* at 1033.
215. *See* LSREF2 Nova Investments III, LLC v. Coleman, No. 1-14-0184, 2014 IL App (1st) 140184 (Ill. App. Ct. filed Dec. 19, 2014), *withdrawn and superseded*, 33 N.E.3d 1030 (Ill. App. Ct. 2015).
216. *See id.*
217. *Id.* at *3 (citing Farmer City State Bank v. Champaign Nat'l Bank, 486 N.E.2d 301, 306 (Ill. App. Ct. 1985)).
218. *Id.* (citing Turczak v. First Am. Bank & Lebow, 997 N.E.2d 996, 1001 (Ill. App. Ct. 2013)).
219. *Id.* at *4.
220. *Id.*

While the court's initial decision in *Coleman* was consistent with the precedent set by *Turczak* and *Goldstein*, it also opened the floodgates for filing deficiency suits in Illinois. The opinion essentially stated that a creditor could ask for a personal deficiency judgment from a foreclosure court, fail to receive that judgment, and still be able to file a new case seeking the *same* deficiency they failed to receive in the first case. If *res judicata* was intended to bar repeat litigation, it should bar cases exactly like this. The ability for a creditor to lose a deficiency judgment in their foreclosure suit and *still* be able to recover in a second case completely defeats the premise of getting "one bite at the apple."

2. Coleman*: "Take Two"*

Yet, in an interesting twist, *Coleman*'s ruling changed. In June, 2015, the First District Appellate Court withdrew and superseded their initial *Coleman* opinion with an entirely different ruling.[221]

This time, the court affirmed the trial court's decision to bar the breach of contract action under *res judicata*. Not only was this decision inconsistent with the precedent set by *Turczak* and *Goldstein*,[222] but the court's reasoning drastically differed from the reasoning seen in these two prior cases. Unlike *Turczak* and *Goldstein*, where much of the analysis is based on the distinctions between *in rem* and *in personam* actions, the *Coleman* court focused its attention on the actions taken by the creditor-plaintiff in the foreclosure proceeding. The court noted that the plaintiff sought a personal deficiency judgment against the debtor in the foreclosure action and that the IMFL permitted the foreclosure court to grant this judgment against the defendant.[223] Because plaintiff's breach of contract action was trying to recover the same deficiency that was sought in the foreclosure action,[224] the court barred the breach of contract action under *res judicata*.[225] *Coleman*'s new decision held that, when a creditor seeks a deficiency judgment in their foreclosure complaint, and the foreclosure court is able to grant a personal deficiency judgment against the defendant, any subsequent suit to collect the deficiency from the defendant is barred under *res judicata*.[226]

The superseding opinion in *Coleman* ruled correctly that the breach of contract action should be barred under *res judicata*. The reasoning that

221. LSREF2 Nova Investments III, LLC v. Coleman, 33 N.E.3d 1030 (Ill. App. Ct. 2015).

222. Note, however, that *Goldstein* was decided in the Second District Appellate Court. It is not controlling authority in First District Appellate Court decisions. That being said, the First District Appellate Court has cited to *Goldstein* numerous times as legal authority, and much First District precedent has been based on the rationale presented in *Goldstein*.

223. *Coleman*, 33 N.E.3d at 1033. *See* 735 ILL. COMP. STAT. 5/15-1508(e).

224. As both the relief was sought in the foreclosure complaint and the statutory requirements were met. *See Coleman*, 33 N.E.3d at 1033n.2 ("In the foreclosure action, the circuit court specifically found defendant was personally served with the foreclosure complaint and, thus, the provisions of section 15-1508(e) of the Foreclosure Law were fully applicable and authorized the circuit court to enter a personal deficiency judgment.").

225. *Id.* at 1034.

226. *Id.* at 1037.

justifies this ruling, however, is flawed. First, the court's reasoning ignores that *res judicata* bars not only what *was* litigated in the first proceeding, but also what *could* have been litigated. Second, the court's analysis of "identity of causes of action" is inconsistent with the prior cases. And third, the court inappropriately distinguished both *Turczak* and *Goldstein* to reach its holding.

3. Limiting Res Judicata *to Only What Was Decided*

The first and largest flaw of *Coleman*'s reasoning is that it is predicated on the actions taken by the plaintiff in the foreclosure case. The court reiterated multiple times that the plaintiff sought an *in personam* deficiency judgment in the foreclosure action, as evidenced by the foreclosure complaint.[227] Because the plaintiff sought this type of relief in the foreclosure action, the court noted that the subsequent breach of contract case was merely an attempt to relitigate this issue and thus it should be barred under the principles of *res judicata*:[228] "Plaintiff, having pursued its remedy for a personal deficiency judgment in the mortgage foreclosure case, is precluded from now seeking a personal deficiency judgment solely on the promissory note in this consecutive action."[229]

The *Coleman* court was correct that *res judicata* bars a plaintiff from attempting to re-litigate the same issue twice. But *res judicata* principles do not stop there. *Res judicata* applies if the plaintiff *could* have raised the issue in the first action. *Res judicata* does not require the plaintiff to have *actually* raised the issue in the first action. By the court stressing in *Coleman* that *res judicata* applied because the plaintiff sought the personal deficiency in the foreclosure action, it strongly suggests that *res judicata* acts as a bar only when the specific remedy is actually sought in the first action. By that logic, if a creditor does not seek a personal deficiency judgment against a debtor in a foreclosure action, then the creditor would not be barred by *res judicata* if the creditor subsequently sues the debtor on the note.

It is true that the court in *Coleman* never expressly stated that the plaintiff would not be barred under *res judicata* if he had *not* sought a personal deficiency judgment in the foreclosure action. But this inference

227. *See id.* at 1033 ("In the foreclosure action, plaintiff sought to foreclose on defendant's property, but also explicitly sought a personal deficiency judgment against defendant."); *id.* ("Plaintiff sought the personal deficiency judgment based on defendant's obligations under both the promissory note and the mortgage."); *id.* at 1034 ("In the foreclosure action, plaintiff sought to recover any amount not covered by the foreclosure sale . . . ."); *id.* at 1035 ("[P]laintiff's claim for a personal deficiency judgment was raised *concurrently* with its request for foreclosure on the property in the foreclosure action . . . ."); *id.* at 1036 (Noting that "[p]laintiff specifically sought a personal deficiency judgment" in the foreclosure action).

228. *Id.* at 1034 ("Although plaintiff contends the current action is brought strictly on the promissory note, the underlying complaint sought to recover from defendant the deficiency which resulted from the foreclosure of the mortgage in the amount determined in the order confirming the sale."); *id.* at 1037 (classifying the plaintiff's "underlying claim as a 'do-over of the first action on the deficiency.'") (quoting Turczak v. First Am. Bank, 997 N.E.2d 996, 1000 (Ill. App. Ct. 2013)).

229. *Id.* at 1035.

is supported by the court's language in the opinion, especially when reconciling *Coleman*'s holding with *Farmer City State Bank*.[230] The court maintained that "a mortgagee may pursue a foreclosure action and bring a lawsuit on the note consecutively or concurrently."[231] And in *Coleman*, the "plaintiff's claim for a personal deficiency judgment was raised *concurrently* with its request for foreclosure on the property in the foreclosure action."[232] This seems to suggest that *res judicata* would not bar a creditor from foreclosing on a mortgage and then suing on the note *consecutively*, so long as the creditor does not seek a personal deficiency judgment in the first action.

But this is exactly why the court's rationale in *Coleman* is an issue. *Res judicata* should bar *any* deficiency suit on a promissory note. If a creditor *could* have raised the issue of a personal deficiency judgment in the foreclosure action,[233] any subsequent action on a note or guaranty should be barred under *res judicata*. It does not matter whether a creditor *actually* sought a personal deficiency judgment in the foreclosure action.[234] *Coleman*'s reasoning appears to disregard that *res judicata* bars not only what was decided in the prior action, but also what could have been decided.[235] Thus, while the court reached the correct ruling—that the plaintiff's breach of contract action should be barred by *res judicata*—the holding did not go nearly far enough to appropriately apply *res judicata* to these deficiency suits.

4. Coleman *Court's New Understanding of "Operative Facts"*

The second main issue with the court's reasoning in *Coleman* is how the court came to its conclusion that the two actions, the foreclosure action and the breach of contract action, shared an "identity of cause of action." One would assume that the court would use a an analysis similar to those in both *Goldstein* and *Turczak*. In *Goldstein*, the court misapplied the transactional test, stating that while a note, guaranty, and mortgage are all related, "we do not believe that their mere proximity in time and the overlap of some of the parties render them a single transaction."[236] And both *Goldstein* and *Turczak* opinions claimed that the differences between *in rem* (or *quasi in rem*) and *in personam* actions create such distinctions that the two types of actions cannot share an "identity of

230. *Id.* at 1034–35 (discussing Farmer City State Bank v. Champaign Nat'l Bank, 486 N.E.2d 301, 301 (Ill. App. Ct. 1985)).

231. *Id.* at 1034 (citing *Farmer City*, 486 N.E.2d at 301).

232. *Id.* at 1035.

233. Which they can, pursuant to the Illinois Mortgage Foreclosure Law. *See supra* text accompanying notes 112–20.

234. *See* Skolnik v. Petella, 34 N.E.2d 825, 827 (Ill. 1941) ("The principles of res judicata . . . are much broader in their scope, taking in not only all that was adjudicated in the prior action, but all that might have been.").

235. Which is ironic, given that the *Coleman* opinion states itself, "[*r*]*es judicata* bars not only what was actually decided in the first action but, also, whatever could have been decided." *Coleman*, 33 N.E.3d at 1034 (internal citations omitted).

236. LP XXVI, LLC v. Goldstein, 811 N.E.2d 286, 289 (Ill. App. Ct. 2004).

cause of action."[237] The *Coleman* court, however, used neither of these arguments in their analysis of whether the two actions shared an identity of cause of action.[238]

Instead, the *Coleman* court's analysis followed suit by continuing to stress the fact that the creditor-plaintiff sought an *in personam* deficiency judgment in the foreclosure action.[239] When asking "whether the claim raised in the underlying lawsuit could have been resolved in the prior lawsuit," the court answered "yes," because the remedy the plaintiff sought was the same remedy the plaintiff previously sought from the foreclosure court.[240] "We, therefore, conclude that plaintiff's claim . . . and its claim for a personal deficiency judgment in the foreclosure suit arise from a single group of operative facts—the deficiency which resulted from after the foreclosure sale based on plaintiff's default—albeit on different causes of action against defendant."[241] Thus, the court, in applying the transactional test and asking whether "a single group of operative facts give rise to the assertion of relief,"[242] determined that the deficiency arising from the debtor's foreclosure and default were the "operative facts" between the two cases.

This is problematic for two reasons. First, under the transactional test, the "single group of operative facts" must give rise to the assertion of relief in both cases. *Coleman* stated that the operative facts of both suits were "the deficiency which resulted from after the foreclosure sale based on plaintiff's default."[243] But those "operative facts" only applied to the breach of contract suit, not the foreclosure suit. The foreclosure arose from the defendant's default on the note and mortgage—not from the "deficiency which resulted from the foreclosure sale."[244] If the court is going to argue that two "claims 'arise from a single group of operative facts,'" then those operative facts should actually apply to both claims, not just one.[245] The court could have easily fixed this issue by stating the single group of operative facts between both cases were the defendant's default on the note and mortgage. This method, however, would require *res judicata* to be applied much more broadly than the court intended it to be applied.

The second issue with *Coleman*'s application of the transactional test is merely one of consistency. While *Turczak* did not have an inde-

237. *Id.* at 288; Turczak v. First Am. Bank, 997 N.E.2d 996, 1000 (Ill. App. Ct. 2013).

238. The court did briefly, however, address *in personam* and *in rem* actions when distinguishing its holding from *Farmer City State Bank*. *See Coleman*, 33 N.E.3d at 1035.

239. *Id.* at 1034.

240. *Id.*

241. *Id.*

242. River Park, Inc. v. City of Highland Park, 703 N.E.2d 883, 891 (Ill. 1998) (internal citations omitted).

243. *Coleman*, 33 N.E.3d at 1034. It is possible that the court made an error in their opinion with "plaintiff's default," rather than "defendant's default," given the fact that the defendant was the debtor in this case.

244. *Id.* at 243.

245. *Id.* (quoting *River Park*, 703 N.E.2d at 891).

pendent transactional test analysis, *Goldstein* did.[246] *Goldstein*'s analysis of "operative facts" discussed the differences between notes, guaranties, and mortgages in terms of their purpose and function.[247] *Goldstein* stated that the differences between these three instruments prevent them from being a "single transaction." Thus, an action on a note or guaranty and an action on a mortgage must arise from different operative facts.[248] *Coleman*'s transactional test analysis and *Goldstein*'s transactional test analysis, regarding the same instruments (a note, guaranty, and mortgage) and similar actions (a foreclosure and breach of contract), could not be more different from each other. Going forward, parties in similar disputes will likely have a difficult time anticipating how the court will apply the transactional test given these two conflicting methods.

5. The Real Coleman *Issue:* Turczak *and* Goldstein

Putting the flawed rationale in *Coleman* aside, there is another large issue with *Coleman*'s opinion: It cannot be properly reconciled with *Turczak* and *Goldstein*. Rather than stating that *Turczak* and *Goldstein* were decided incorrectly, the court in *Coleman* addressed these two cases as being factually distinguishable.[249] The way *Coleman* attempts to distinguish these cases, however, demonstrates how broad the holdings and language in *Goldstein* and *Turczak* are, and how ineffective *Coleman*'s narrow application of *res judicata* is.

Coleman tries to first distinguish *Goldstein* on the fact that *Goldstein* addresses a subsequent action on a guaranty, while *Coleman* is addressing a subsequent action on a promissory note.[250] It is true that the two cases focus on two different instruments, but much of the language in *Goldstein* compares guaranties to promissory notes, and distinguishes both of those instruments from mortgages.[251] There is nothing in *Goldstein* to suggest that guaranties should be evaluated differently from promissory notes. In fact, the *Goldstein* court held that "the doctrine of *res judicata* does not apply to *notes* and guaranties accompanying mortgages."[252] Thus, it seems odd that the court in *Coleman* tried to distinguish *Goldstein* on the basis that the two cases addressed different instruments, when *Goldstein*'s holding is equally applicable to both notes

246. LP XXVI, LLC v. Goldstein, 811 N.E.2d 286, 289 (Ill. App. Ct. 2004).

247. *Id.*

248. *Id.*

249. *Coleman*, 33 N.E.3d at 1035–36.

250. *Id.* at 1035 ("The facts here are different. The instant suit is not based on a personal guaranty, but on the promissory note that secured the mortgage.").

251. *See Goldstein*, 811 N.E.2d at 289. The court in *Goldstein* explained that mortgages and promissory notes constitute separate contracts and provide "legally distinct remedies," which cannot "be pursued in a single-count foreclosure." *Id.* The court then compared promissory notes to guarantees, stating if promissory notes "cannot be used as a basis for relief in a single-count foreclosure action, then the guaranty accompanying the mortgage and note likewise cannot be used as a basis for relief in a single-count foreclosure action." *Id.*

252. *Id.* at 290 (emphasis added).

and guaranties. Thus, this "distinguishable" fact hardly distinguishes these two cases at all.

The court in *Coleman* also tried to distinguish *Goldstein* by stating "there is no indication in *Goldstein* that the plaintiff had sought a personal deficiency judgment in the foreclosure action, nor that the foreclosure court had personal jurisdiction over the guarantor."[253] The *Coleman* court is correct in noting that there is nothing indicating the creditor in *Goldstein* actually sought a personal judgment against the guarantor in the foreclosure action. But the *Coleman* court was wrong to state that there was nothing in the *Goldstein* opinion indicating that the foreclosure court even had personal jurisdiction over the guarantor. The *Goldenstein* opinion stated *twice* that the guarantor was a party to the foreclosure proceeding, and the issue regarding the guaranty could have been solved in the foreclosure action.[254] Thus, *Coleman*'s only valid distinguishing factor from *Goldstein* is that in *Coleman*, we know the plaintiff sought a personal judgment in the foreclosure, but in *Goldstein*, we do not know if the creditor sought a personal judgment in the foreclosure. This does not provide much clarity in terms of why *Coleman*'s holding does not directly contradict the opinion in *Goldstein*.

The court also tried to factually distinguish *Coleman* from *Turczak*. It does this by distinguishing the *Coleman* plaintiff, who first filed an action to foreclose and then filed a breach of contract action, from the creditor in *Turczak*, who first filed on the promissory note.[255] While it is true that the creditor in *Turczak* filed its first action on the note, this fact was irrelevant to the court's holding.[256] The court in *Turczak* stated that there were "a number of cases holding a note accompanying a mortgage need not be enforced in a single case," but the specific fact that the creditor in *Turczak* pursued an action on the promissory note before it sought to foreclose,[257] was not discussed by the court at all in *Turczak*'s opinion. It seems that this factual distinction does not do much to differentiate *Turczak* from *Coleman*, as the *Coleman* court tried to use a factual basis that is not even relevant in *Turczak*'s decision. Thus, the fact that *Cole-*

253. *Coleman*, 33 N.E.3d at 1035.

254. *See Goldstein*, 811 N.E.2d at 288 ("Here, defendant focuses on the Cook County action, noting that, while it was a foreclosure on the property . . . defendant was made a party to the suit. As such, defendant contends that the current action on the guaranty was one that could have been raised in the Cook County action."); *Id.* at 290 ("Defendant also asserts that *res judicata* should apply here, because the action on the guaranty could have been raised in the Cook County foreclosure action."). It should be noted that if the guaranty could have been raised in the foreclosure action mentioned in *Goldstein*, the foreclosure court must have had personal jurisdiction over the guarantor pursuant to the IMFL.

255. *Coleman*, 33 N.E.3d at 1036.

256. *See* Turczak v. First Am. Bank, 997 N.E.2d 996, 1001–02 (Ill. App. Ct. 2013) ("[W]ell-settled Illinois case law permits lenders to bring separate enforcement actions on the mortgage and the note . . . . Foreclosure suits on property, a *quasi in rem* proceedings, apply a legally distinct remedy from an *in personam* proceeding on a promissory note. No compelling reasons exist to abandon this settled law.").

257. Note that in *Turczak*, the creditor was not seeking to foreclose but rather the debtor sued the creditor for fraud when the creditor asserted it still possessed foreclosure rights. *Id.* at 998.

man and *Turczak* can hardly be reconciled poses a large issue for litigants in the future.

F. Implications of Coleman *and Policy Concerns*

Coleman did something beneficial—it barred a deficiency suit under *res judicata*. This opinion, however, while closing the door to some deficiency suits, still left open a large window for creditors to get through. The court in *Coleman* continued to stress that the plaintiff sought a personal deficiency judgment in the foreclosure action, suggesting that *actually* seeking this remedy is what lead the court to bar the subsequent case under *res judicata*.[258] While discussing *Farmer City State Bank*, the *Coleman* court claimed it was the fact that the plaintiff raised the issues on the note and foreclosure *concurrently* in the foreclosure action that prevented the plaintiff from raising the note issue a second time.[259] Yet, the court also stated, "[a]lthough the court in *Farmer City State Bank* did not address *res judicata* principles, courts have relied on that decision in finding that *res judicata* did not bar a subsequent claim when there was a foreclosure action and a purely *in personam* action at issue."[260] This suggests that a "purely *in personam*" action, such as a breach of contract action on a promissory note, still would not be barred by *res judicata* post a foreclosure action, even if that remedy could have been sought in the foreclosure action.

So how can creditors still file deficiency suits after foreclosing, now that *Coleman* has slightly changed the rules? Simple, by not asking for a deficiency judgment in the first foreclosure action. Given *Coleman*'s language, it is abundantly clear that the plaintiff was barred from the second suit because he asked for a deficiency in the first. If a creditor does not seek a deficiency in the foreclosure action, then under *Coleman*, *res judicata* should not apply to a subsequent breach of contract suit to recover the deficiency. Thus, *Coleman* has created a large window for creditors to continue with this repeat litigation.

Why is this so problematic? For several reasons. First, this outcome completely undermines the purpose of *res judicata*. As the Illinois Supreme Court has repeatedly stated, "'the purpose of *res judicata* is to promote judicial economy'"[261] and to protect "the defendant from harassment and the public from multiple litigation."[262] Forcing a defendant to litigate the same issue over and over can impose immense financial, emotional, and even physical hardships.[263] Further, courts would be overwhelmed if there was no rule against claim-splitting. Thus, *res judica-*

258. *See supra* text accompanying notes 226–28.

259. *Coleman*, 33 N.E.3d at 1034–35.

260. *Id.* at 1035.

261. River Park, Inc. v. City of Highland Park, 703 N.E.2d 883, 896–97 (Ill. 1998) (citing Henstein v. Buschbach, 618 N.E.2d 1042, 1046 (Ill. App. Ct. 1993)).

262. Rein v. David A. Noyes & Co., 665 N.E.2d 1199, 1208 (Ill. 1996).

263. *See id.* at 1207 (discussing that *res judicata* "is founded on the premise that litigation should have an end and that no person should be unnecessarily harassed with a multiplicity of lawsuits.").

ta prevents parties from "later seeking relief on the basis of issues which might have been raised in the prior action."[264] In the *Coleman* court's decision to preserve *Goldstein*, *Turczak*, and *Farmer City State Bank* as good law, the court demonstrated that a creditor may foreclose on a defaulting homeowner and still be permitted to subsequently file an action on a promissory note—so long as the creditor did not seek a personal deficiency judgment in the foreclosure suit. The entire notion that a personal deficiency judgment *could* be raised in a foreclosure suit does not seem to be enough for the court to bar these deficiency suits altogether under *res judicata*—even though it is exactly what *res judicata* principles require.

Yet, a looming question regarding deficiency suits still exists: If banks are able to receive personal deficiency judgments in the foreclosure action, why are they foregoing that relatively easier option and instead filing a separate action on the note? There are a few reasons for this. First, as mentioned earlier in this Note, some attorneys representing lenders want to maintain good relationships with the foreclosure courts, and thus they refrain from asking the foreclosure judges to impose personal judgments against the defaulting-homeowners.[265] This is mainly due to the fact that foreclosure judges disfavor entering personal judgments against a defendant who has already lost their home.[266] Thus, by splitting the claim into two actions, the lender can foreclose on the home and also receive the deficiency without causing friction with the foreclosure courts. The second reason a party would want to file a separate action on the note is because that party is a debt buyer, rather than the original lender. Many banks sell the remainder owed on the promissory notes (after the bank foreclosed and kept the amounts from the foreclosure sale) to debt collection agencies for pennies on the dollar.[267] It is these agencies who tend to file deficiency suits against the defaulting homeowners.[268]

This implicates the policy concerns behind why deficiency suits should be barred entirely. While the court in *Coleman* held that *res judicata* bars subsequent action on a note when a creditor seeks the same relief in the foreclosure action, the court demonstrated that a creditor may *still* file a second action on the note, as long as the claim for the deficien-

264. *Id.* at 1206.

265. *See supra* text accompanying notes 60–62.

266. *See* Cortina & Michlig, *supra* note 61, at 5 ("It is understandable why courts do not want to enter *in personam* judgments for deficiencies in residential mortgage foreclosure cases. The debtor has lost their home already and adding a personal judgment for a deficiency seems almost cruel.").

267. Lisa Parker, *There's a New Player in the Mortgage Mess,* NBC CHICAGO (July 7, 2010), http://nbcchicago.com/news/business/mortgage-mediation-97981324.html ("Debt collectors are not governed by the same strict regulations as are lenders, and are part of an industry notorious for past abusive collection efforts. Housing advocates worry that more banks will turn to this method, because it will save them money and messy situations."). *See also* Erica Crohn Minchella, *The Next Time Bomb: Deficiency Judgments and Second Mortgages*, ERICA MINCHELLA LAW (Mar. 25, 2014), http://www.ericaminchellalaw.com/2014/03/the-next-time-bomb/ ("There are enough Note Buyers out there who will gladly buy the debt for pennies on the dollar and sue or try to collect on the full balance."); Sammons *supra* note 8.

268. *See* Sammons *supra* note 8.

cy was not raised concurrently in the foreclosure proceeding. By not barring subsequent actions on the note, a defaulting homeowner could still be a party to two separate cases, both of which regard the same mortgage, promissory note, and default. Not only do multiple suits create immense hardships for these debtors, but a homeowner will also have no way of knowing if or when a subsequent action on the note could arise. In Illinois, the statute of limitations for a breach of contract action is ten years.[269] This is ten years for defaulting homeowners to rebuild their lives and financial status, but then have it all uprooted by a creditor spontaneously filing an action on the promissory note.[270] This is not only unfair to defaulting homeowners, as this type of claim-splitting is largely prohibited in all other areas of Illinois law, but this is also the type of legal instability that prevents parties from being able to move on with their lives. And it is this type of instability that *res judicata* seeks to prevent.

IV. RECOMMENDATION

There is a simple way to resolve this issue. The Illinois Supreme Court should grant certiorari and ultimately rule that subsequent suits to recover a deficiency on a promissory note or guaranty share an "identity of cause of action" with the initial foreclosure proceeding, and thus should be barred under *res judicata*. The Court should use the transactional test adopted in *River Park v. City of Highland Park*[271] and hold that the formation of a promissory note (and/or guaranty) and mortgage share a proximity in time and origin, and that their collective treatment confirms the parties' expectations and understandings of how these instruments shall be utilized.[272] Thereby, a promissory note, mortgage, and guaranty are considered to be within the same transaction and set of operative facts. The Court should further assert that, although the actions on a mortgage and promissory note/guaranty seek different remedies based on different theories of relief, these different forms of relief do not preclude the two claims from being within the same transaction.[273]

The Court should further assert that the language in *Farmer City State Bank*[274] is outdated and should no longer be applied for *res judicata*

269. Minchella, *supra* note 266 ("Homeowners should remember that a judgment can be kept alive for 20 years and the right to sue on a Note is valid for 10 years after the last payment is made on the Note.").

270. Michelle Conlin, *The Foreclosure Nightmare That Won't Go Away*, FISCAL TIMES (Oct. 14, 2014), http://www.thefiscaltimes.com/2014/10/14/Foreclosure-Nightmare-Won-t-Go-Away.

271. 703 N.E.2d 883, 893 (Ill. 1998).

272. *See id.* (stating that when determining if two actions are within the same transaction, courts should give weight "to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit confirms to the parties' expectations or business understanding or usage.") (quoting RESTATEMENT (SECOND) OF JUDGMENTS §24 at 196 (1982)).

273. *See id.* ("[P]ursuant to the transactional analysis, 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.").

274. Farmer City State Bank v. Champaign Nat'l Bank, 486 N.E.2d 301 (Ill. App. Ct. 1985).

purposes. It is no longer the case that an action to foreclose and an action on the note are two separate causes of action that may be "pursued consecutively or concurrently."[275] *Farmer City State Bank* was decided before the enactment of the IMFL, and thus the necessity for pursuing two separate claims is null.[276] The IMFL permits a mortgagee to recover a deficiency judgment from a note holder or guarantor in a foreclosure action. Because a creditor is able to seek relief against a note holder and/or guarantor in the foreclosure action, a creditor's failure to do so will only result in *res judicata* barring any subsequent action seeking the same relief. The Supreme Court of Illinois should also confirm the holding of *Skolnik v. Petella*: If a creditor has the ability to seek a deficiency judgment from a foreclosure court and forgoes that option, a second action to recover must be barred under *res judicata*.[277] This verification from the Court would extend *Coleman*'s holding further to bar not only what a creditor *did* seek in the foreclosure action, but also bar what the creditor *could have* sought.

V. CONCLUSION

Res judicata is used to preserve judicial resources and to promote efficiency and justice in the legal system. It is used to prevent a defendant from being harassed by a multiplicity of suits and to provide resolve following the end of a case. *Res judicata* should bar creditors from filing deficiency suits after a foreclosure has occurred, and Illinois case law supports this position. In the name of equity to the homeowners who believed foreclosure would be the end to their financial nightmare, and in the name of judicial efficiency for Illinois courts, deficiency suits must be barred.

275. *Id.* at 306.

276. *See supra* text accompanying notes 153–61. This statement by the court, however, does not require *Farmer City State Bank* to be overturned. Because *Farmer City State Bank* was about a creditor suing first on a promissory note, and then *enforced* the promissory note by moving to foreclose, this is not an action that must be barred by *res judicata*, as the enforcement of a judgment by foreclosing on a security is different from re-litigating a suit entirely (which is what occurs if a creditor first forecloses, then sues on the note).

277. 34 N.E.2d 825, 828 (Ill. 1941).