CLAIM PRECLUSION DOES NOT BAR THE LENDER FROM BRINGING A SUBSEQUENT FORECLOSURE ACTION

After the courts have dismissed a foreclosure action involving borrower default, is that simply the end of the road for servicers? A recent decision by the Wisconsin Supreme Court provides clarity in this arena for servicers and financial services law firms operating within the state and could hold broader implications beyond it.

In the case of *Federal National Mortgage Assoc. v. Thompson*, the Wisconsin Supreme Court recently ruled unanimously (7-0) that claim preclusion does not prevent the lender from bringing further foreclosure actions if the borrower remains in default after the initial dismissal.

Andrew Houha, Senior Attorney at the Legal League 100 member firm of Johnson, Blumberg & Associates, LLC, told *DS News*, "This is a great decision for the mortgage servicing industry in Wisconsin. The supreme court got it right on the head—how can you litigate a future default?"

A bit of background: Federal National Mortgage Association had brought a foreclosure action against borrower Cory Thompson and his spouse after they defaulted on their mortgage. Per the State Bar of Wisconsin, an acceleration clause in the original mortgage contract allowed the lender to "accelerate the full amount of unpaid principal plus interest if a number of conditions were met." Those conditions included a default occurring, after which the lender was required to send written notice of intent to accelerate if Thompson didn't catch up. The clause also noted that "the opportunity to cure period could not be less than 30 days from the date the note was mailed or delivered."

BAC Home Loans Servicing, the holder of the note, sued Thompson after he defaulted. However, a circuit court ruled in 2012 that BAC did not prove that it had sent Thompson the proper notice of intent to accelerate, and the case was then dismissed.

In 2014, Bank of America (BOA) had taken over as the loan servicer for Thompson's mortgage. They sent Thompson a new notice of intent to accelerate, due to Thompson having remained in default since 2009. Bank of America initiated a foreclosure action. The circuit court, however, then ruled that BOA "could not re-litigate the same allegations for the time period between 2009 and 2012, since that was the time period covered by the first

lawsuit." However, the court ruled that BOA could pursue foreclosure actions against Thompson for continuing default occurring after the dismissal.

The case finally made its way up to the Wisconsin Supreme Court, which recently affirmed that opinion. Justice Shirley Abrahamson wrote, "Claim preclusion does not bar the lender from bringing a subsequent foreclosure action based upon the borrower's continuing default on the same note." She added, "A different set of operative facts predicated upon separate and distinct defaults on the note is alleged in each lawsuit."

"The original case was litigated extensively, with the judge ruling that there was no evidence of proper acceleration and that the prior plaintiff did not have possession of the note," Houha said. "The Supreme Court recognized with a proper acceleration and by proving possession, any future default is a new cause of action."

You can read the Wisconsin Supreme Court's full opinion by clicking here.