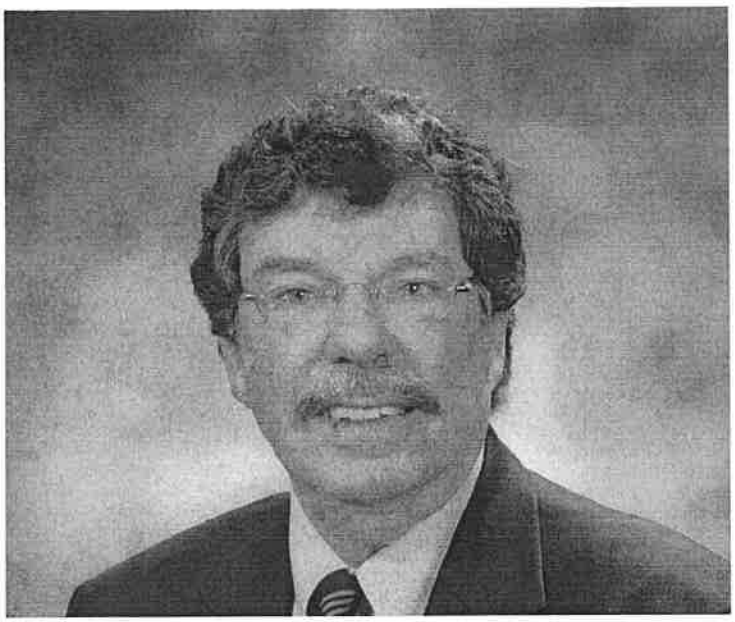

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EXPERT OPINION

Add'l Info in Pre-Foreclosure Notice OK – Kessler Doctrine Reversed

On Feb. 14, the Court of Appeals rendered an important decision in 'Bank of America, N.A. v. Kessler,' reversing the lower courts on the subject of pre-foreclosure notices.

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5 minute read

By Bruce J. Bergman | February 27, 2023

As of Feb. 14, 2023 the so called, and for lenders, infamous, "Kessler Doctrine" is gone—per a very well reasoned ruling of the Court of Appeals [*Bank of America, N.A.* v. *Kessler*, __N.Y.3d__, __N.E.3d__, __N.Y.S.3d__ (Ct. of Appeals 2023)].

Lenders and servicers who make home loans will be quite familiar with the requirements in New York for a 90-day pre-foreclosure notice pursuant to RPAPL §1304. That familiarity notwithstanding, lenders are regularly defeated on summary judgment motions—or find the foreclosure dismissed outright for some glitch in the notice or inability to prove that it was sent. That is, lenders are so often banished, unable to meet the dictates.

One current and particularly frustrating aspect of this is the proviso that the 1304 notice be sent in an envelope separate from any other notice. Mr. Kessler's lender ran afoul of this when, after he had defaulted in September 2013 and the foreclosure action reached the summary judgment stage, the trial court and later the Appellate Division dismissed the foreclosure because the 1304 notice contained information beyond what RPAPL §1304 mandated. This ruling caused an untold number of other notices to fail, and led lenders, fearing that their existing mailings would suffer the same fate, to withdraw them and begin the notice or foreclosure process all over again.

This very serious dilemma has been an effectively routed by the Court of Appeals position that the inclusion of concise and relevant additional information does *not* void an otherwise proper notice sent to borrowers pursuant to RPAPL §1304. In addition, the decision held that section 1304 does not prohibit the inclusion of additional information that may help borrowers avoid foreclosures, so long as it is not false or misleading. The other side of that is, where a lender *does* include false, misleading obfuscatory or unrelated information in the envelope together with the 1304 notice, then courts may void such notices.

Reasoning of the Decision

While it may be enough for lenders to know that additional helpful/non-misleading information can be included in the 1304 notice envelope, avoiding possible future problems might be aided by understanding the Court of Appeals rationale a bit further. The first part of the analysis was to glean why Section 1304 was enacted in the first instance. It was, the court said, designed to help lenders and borrowers communicate to avoid foreclosure actions at the outset—an opportunity for the parties to early on reach a solution.

How the actual Kessler notice compared to this goal is telling. The lender's letter contained in addition to the required verbiage, mention that the mortgage holder was a debt collector, that if the borrower was in bankruptcy there was no obligation upon the borrower to discuss the loan with the lender and finally that if the recipient was in the military, additional protections are provided and the borrower was urged to call the lender. (That these statements were actually helpful would be immediately apparent.)

The next aspect of the decision reviewed how statutes are to be interpreted; first that interpretation must be so as to avoid an unreasonable or absurd application of the law. (Good point!) In that regard, RPAPL §1304 does not say that the notice must contain *only* the cautionary language, but instead that the notice " shall include" that language. In turn, "include" indicates that more can be added to the notice. Thus, while the statute says that the notice "shall include" certain information, the notice in the Kessler case did that very thing.

Another compelling inquiry was how strict a rule should be when additional information is added to the statutorily required language? The court found that a strict rule, that is, excluding everything else, would demand use of a highly constrained definition of "other" where that more appropriately should be read to mean mailings or notices "of a different kind." These would be items such as a pre-acceleration default notice, notice disclosing interest rate changes to borrowers with adjustable rate mortgages, monthly mortgage statements or notices disclosing to the borrower a transfer of the loan servicer—none of which applied in the Kessler case. (These are categories to be observed, however, for any future notice which may add information.)

Based upon this, the court discerned that an uncompromising rule would lead to nonsensical results. For example, had the plaintiff sent the required language verbatim, adding only, "THIS IS EXTEMELY IMPORTANT, PLEASE PAY ATTENTION!," an unyielding rule would require the notice to be deemed void and the foreclosure action dismissed. In the end, prohibiting lenders from concisely informing borrowers of additional rights they may possess to avoid foreclosure is manifestly at odds with the purpose of the statute.

Conclusion

Adding to the earlier statements of the Court of Appeals in rejecting the Kessler Doctrine was the holding that accurate statements which further the underlying statutory purpose of offering information to borrowers that is, or may become relevant to avoiding foreclosure, will not constitute the "other notice" otherwise required to be placed in yet another envelope.

It seems wise for lenders to avoid any debate about the language in the 1304 notices so that something additional which is believed to be helpful might somehow be defined as "other." But in most instances, the additional information will be helpful—indeed meaningful—and can be included, now most often without fear of a court declaring it to be "other" and thus void.

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