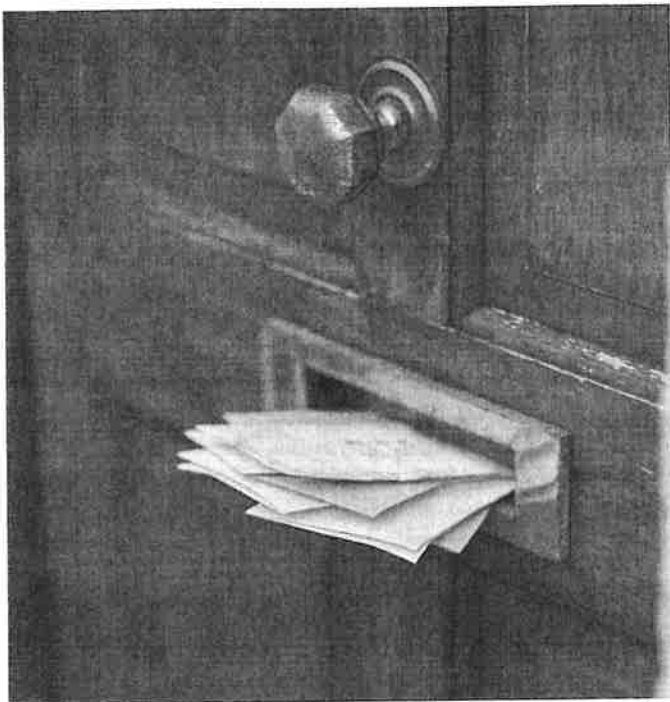


## BERGMAN ON FORECLOSURES

By Bruce J. Bergman

### Foreclosure Notice: Lender Fails Again! (Those Envelope Requirements)



These articles continue to make the point that foreclosing lenders fail so much of the time to demonstrate delivery of a proper pre-foreclosure notice. It has happened yet again (one of so many instances) in a recent case: *HSBC Bank USA, NA v. Schneider*.<sup>1</sup>

The 90-day pre-foreclosure notice pursuant to RPAPL 1304 is of course required in every residential foreclosure.<sup>2</sup> Most often the foreclosing party's problem is in *proving* to the court's satisfaction the mailing based upon the records maintained. The minutiae of this goes on at some length although in the end there is a methodology that foreclosing plaintiffs can and should adopt. (As a separate observation, there is case law on this point.)

In the recent case, though, the court returns to the "separate envelope issue." So there will be no confusion, one aspect – not discussed in this case – is adding to the 1304 notice envelope some additional material concerning the default or a borrower's rights. This has been addressed more recently in a major case from the Court of Appeals banishing the so-called "Kessler Doctrine."<sup>3</sup> In the new case, how-



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ever, the court focuses upon an issue that had previously been disposed of. The requirement is that the 1304 notice must be sent separately, that is, in different envelopes, to each of the borrowers. Mindful that this is an established principle, it should be apparent to all foreclosing parties that if there are two borrowers (even if they are husband and wife), two separate notices must be sent in two separate envelopes.<sup>4</sup> Likewise, if there were three borrowers it would be three separate notices in three envelopes.

In the new case, the foreclosing plaintiff enclosed two 90-day notices in a single envelope jointly addressed to both of the defendants.<sup>5</sup> The court found it easy to rule that such a methodology was improper (citing previous appellate decisions on the subject), thereby affirming dismissal of the foreclosure action against the borrowers.<sup>6</sup> Lender anguish about such punctilious impositions – especially in the absence of empirical data to support the need for the strictness – will understandably continue. But judicial analysis on the subject is hardly elusive or fluid.

The result is obviously serious because the plaintiff lost probably two years, and must begin the foreclosure again. Given the lucidity of the rule in this regard, lenders should never stumble in assuring that the 90-day notice be sent in separate envelopes to each borrower.