

Court of Appeals Decision Establishes Standard for Compliance with Pre-Foreclosure Notice Requirements of RPAPL § 1304

By **Kenneth J. Flickinger**

On Tuesday, February 14, 2023, the New York State Court of Appeals issued a decision in *Bank of America, N.A. v. Kessler*, which will greatly impact many residential mortgage foreclosure actions in New York. The decision reverses the rule created by the Appellate Division, Second Department, in *Bank of America, N.A. v. Kessler*, 202 A.D.3d 10 (2d Dep't 2021). Under the Second Department's "bright-line rule" 90-day pre-foreclosure notices required by Real Property Actions and Proceedings Law ("RPAPL") § 1304 were held to be non-compliant where they included "any additional material or information whatsoever" beyond the statutorily prescribed language. This rule subjected hundreds of foreclosure actions to dismissal since December 2021, as most 90-day notices included additional language advising borrowers of additional protections they may be entitled to while ensuring compliance with other consumer protection laws. The Court of Appeals' decision will rescue many of those foreclosure actions that were subject to dismissal.

RPAPL § 1304 was first enacted by the New York State Legislature and signed by the Governor of New York in 2008 in response to the "Great Recession" of 2007-2009, along with a series of additional amendments to laws governing mortgage foreclosure proceedings. See L 2008, ch 472, § 2 (eff Sept. 1, 2008). The statute requires that, at least 90 days prior to the commencement of a foreclosure action, a lender must give a borrower certain written notices. Subdivision (1) of the statute sets forth the specific language that the 90-day notice "shall include", and subdivision (2) specifies how the requisite notices must be sent. In 2009, several amendments to RPAPL § 1304 were enacted, effective in January 2010, which added a new sentence to RPAPL § 1304(2) to include the requirement that the requisite RPAPL § 1304 notice shall be sent in "a separate envelope from any other mailing or notice". See L 2009, ch 507, § 1-a (eff Jan. 14, 2010). In *Kessler*, the Appellate Division, Second Department, interpreted the "separate envelope" requirement as "strict" and "exacting", holding that RPAPL § 1304 "mandates that no material other than the notices specifically described in RPAPL § 1304 be contained in that envelope." The 90-day notice in *Kessler* included an additional page after the housing counseling agencies list entitled "IMPORTANT DISCLOSURES", which included a notice that the communication is from a debt collector, a notice for borrowers in bankruptcy, and a notice for military personnel/servicemembers. The Appellate Division, Second Department, held that the inclusion of these additional notices violated the "separate envelope" requirement of RPAPL § 1304, requiring dismissal of the foreclosure action. The Appellate Division, Second Department granted the foreclosing plaintiff leave to appeal to the Court of Appeals.

The Court of Appeals' rejected the Appellate Division, Second Department's "bright-line rule" in favor of "a workable rule that balances the practical considerations of the lender and borrower in a way that best advances the clear statutory purpose."

The following are some of the most important excerpts from the Court of Appeals' decision:

[t]he bright line rule adopted by the lower courts effectively defines "any other mailing or notice" as "any additional material or information whatsoever." Although it might be possible to read "other notice" as the lower courts did—such that any deviation from the statutory language, however minor, would void

the notice—that interpretation would stand in great tension with “shall include,” a phrase that contemplates the addition of something else.

Application of a bright line rule here would require the use of a highly constrained definition of “other,” where it is more appropriately read to mean mailings or notices “of a different kind.”

More importantly, to the extent there is any ambiguity about how to interpret the statute, application of a bright-line rule would contravene the legislative purpose.

Prohibiting lenders from concisely informing borrowers of additional rights they may have to avoid foreclosure is manifestly at odds with that purpose.

...section 1304 does not prohibit the inclusion of additional information that may help borrowers avoid foreclosure and is not false or misleading.

Where a lender includes false, misleading, obfuscatory, or unrelated information in the envelope together with the 1304 notice, courts may void such notices. But where, as here, the additional information was not false, misleading, obfuscatory, or unrelated, it should not render the notice void.

A bright-line rule would be both unfair and contrary to the statutory purpose, as it would deprive borrowers of information that could help them avoid foreclosure and penalize lenders who attempt to ensure their customers are better informed.

It could also result in windfalls to borrowers resulting from clerical errors and bona fide attempts by lenders to assist borrowers in avoiding foreclosure.

Based on the Court of Appeals’ decision, 90-day pre-foreclosure notices pursuant to RPAPL § 1304 that include a debt collector disclaimer, a notice to borrowers in bankruptcy, or a notice to servicemembers, are no longer non-compliant based on the inclusion of such language, either in the notice itself, or on a separate page included with the notice. Other information included in such a notice that is “of the same kind” will not render the notice void.

This decision has an even greater impact in light of the Foreclosure Abuse Prevention Act (“FAPA”), which was signed into law on December 30, 2022, and which was summarized in a previous client alert issued on March 24, 2022. Among other things, the FAPA limits a lender’s ability to use the “saving statute” embodied in CPLR § 205(a), such that dismissal of a foreclosure action for non-compliance with the pre-foreclosure notice requirements of RPAPL § 1304 could, under certain circumstances, be fatal. The Court of Appeals’ decision is a relief to the mortgage industry which has been beset by new restrictions and laws that jeopardize the enforceability of mortgages in New York State.