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Westchester County Clerk's Index No. 54780/14
Appellate Division–Second Department Docket No. 2018-00886

Court of Appeals

of the

State of New York

BANK OF AMERICA, N.A.,

Plaintiff-Appellant,

– against –

ANDREW KESSLER,

Defendant-Respondent,

– and –

REIKO KESSLER and "JOHN DOE," said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

BRIEF FOR *AMICUS CURIAE* USFN – AMERICA'S MORTGAGE BANKING ATTORNEYS IN SUPPORT OF BANK OF AMERICA AND REVERSAL

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INTEREST OF AMICUS CURIAE

USFN ─ America's Mortgage Banking Attorneys® ("USFN") is a national, not-for-profit association of law firms that practice primarily in matters of real estate finance. Founded in 1988, USFN consists of organizations that represent the nation's largest banks, mortgage lenders, mortgage servicing companies, and government sponsored enterprises in connection with foreclosure, bankruptcy, loan modifications and other workouts, inventoried properties, and litigation related to these areas. Membership also includes industry-affiliated suppliers of products and services.

USFN was established to promote competent, professional, and ethical representation among its membership and for the mortgage servicing industry, and to represent the collective interests of its membership in the mortgage servicing industry. As part of its mission, USFN also supports the interests of its members and the mortgage servicing industry through education, political and governmental advocacy, and by encouraging the use of industry standard procedures, technologies, and best practices.

USFN has a particular interest in this matter because New York mortgage foreclosure practice is a core business of several of its members and their clients. Judicial decisions involving RPAPL 1304 affect key business processes of USFN members and greatly impact the legal advice provided to the clients they serve.

PRELIMINARY STATEMENT

Real Property Actions and Proceedings Law ("RPAPL") 1304 (the "Statute") requires that a lender, assignee, or a mortgage loan servicer of a home loan send out a notice to borrowers at least 90 days before filing for foreclosure. The statute mandates inclusion of language advising, among other things, as to the length and amount of the default, and that foreclosure may be brought after 90 days, along with a list of local housing counseling agencies. While well-intentioned, judicial interpretations over the years have radically expanded the Statute's scope and taken it far astray from its initial purpose, which is to provide homeowners with the necessary resources for resolving the default before a foreclosure action is filed. Today, the Statute has instead been employed almost exclusively to achieve inequitable dismissals of viable actions.

The Second Department's decision in this matter only exacerbates the situation further. For the first time, it held that properly mailing out the notice with the required language was not enough. If there was any additional language included at all, even as little as one word not specifically prescribed by statute, the letter was no longer statutorily compliant and any case based on the notice was subject to dismissal. The practical effect of the ruling was that tens of thousands of foreclosures that were valid on December 14, 2021, became fatally defective and subject to potential dismissal on December 15, 2021. Interestingly, the notice found to be in

violation was a form that the Second Department took no issue with for over a decade, as it consistently found that notices with the same additional language and disclaimers were compliant. However, the *Kessler* majority chose to disregard those previous rulings and what was the custom and practice in New York foreclosures for over a decade.

The decision's effects have been immediate and widespread. Many homeowners with active foreclosures brought dismissal motions citing the decision, and those who lost previously on the merits brought renewal motions seeking to revive the defense. Even homeowners who never previously argued the defense whatsoever sought to raise it late in the action and for the first time, emboldened by both *Kessler* and related decisions which permit a second round of litigation in a foreclosure so long as that litigation involves RPAPL 1304. In applying *Kessler's* ruling, trial courts are constrained to follow the harsh result even if not in complete agreement.

It is indisputable that this decision has had a monumental impact on New York foreclosures and the mortgage servicing industry. No single ruling has been more consequential in terms of the number of existing foreclosures placed at risk, and other defaulted loans that had to be halted in the pre-foreclosure process while new, *Kessler*-compliant notices were created and sent. It has also put mortgage servicers in a virtually impossible situation—comply with *Kessler* if they want to foreclose,

even at the risk of violating various federal statutes (the FDCPA, the Bankruptcy Code, and the Servicemembers Civil Relief Act, to name a few) that intersect with the requirement of RPAPL 1304. Under the current status quo, either a lender strictly complies with *Kessler* and opens itself up to litigation risk, or mitigates litigation risk and has its foreclosure be subject to dismissal.

For the reasons discussed at length in the plaintiff's opening brief, and on the grounds of statutory interpretation, the *Kessler* decision should be reversed. The error in *Kessler* also lies in a similarly incorrect standard of review for the RPAPL 1304 defense, which is that of "strict compliance." This is the threshold the Second Department itself invented over a decade ago, which would ultimately lay the groundwork for the *Kessler* decision. The strict compliance standard has no clear roots in this Court's precedent—nor did the Second Department ever claim it did. And its application has led to inequitable results that warrant revisitation of the merits. The aims and purpose behind RPAPL 1304 can be just as effectively, and equitably, implemented through the still-rigorous but more practical standard of "substantial compliance." USFN respectfully requests that this Court so rule.

ARGUMENT

I. THE ORIGIN OF RPAPL 1304 AND ITS INTERSECTION WITH FEDERAL STATUTES

RPAPL 1304, effective on September 1, 2008, created a pre-foreclosure notice requirement that fell under the umbrella of the Home Equity Theft Prevention Act ("HETPA") (signed into law on July 26, 2006 and effective February 1, 2007). While the original version of section 1304 applied only to borrowers with "high-cost," "sub-prime," and "non-traditional" home loans, the Legislature described it more broadly as a measure to "provide[s] additional protections and foreclosure prevention opportunities for homeowners at risk of losing their homes." Assembly Introducer Mem in Support, Bill Jacket, L 2008, c. 472, at p. 5. The Legislature further cited as a basis the "mortgage crisis" stemming from the recession of 2005-2006, which resulted in a record number of foreclosure filings in 2007. *Id*. The bill hoped to address the mortgage crisis by "providing additional protections and foreclosure prevention opportunities for such homeowners," and by establishing "further protections in the law to mitigate the possibility of similar crises in the future." *Id*. at p. 6.

In furtherance of these goals, RPAPL 1304 would require lenders and mortgage servicers to send a pre-foreclosure notice to advise borrowers of HUD-approved housing counseling agencies in areas where they reside because "a majority of distressed homeowners do not attempt to contact their lender prior to the

commencement of foreclosure proceedings." *Id*. The intent was for homeowners to become better educated about their options and have sufficient time—in the form of the 90 day period—to seek assistance and resolve their default, which in turn would reduce the overall number of foreclosures. But RPAPL 1304 was not enacted to eliminate foreclosure actions, nor was it ever the Legislature's intent to give homeowners a weapon against lenders, mortgage servicers, and their assignees. Instead, the pre-foreclosure notice requirement was to be used for informational purposes so that distressed homeowners could seek out assistance before the commencement of a foreclosure action. The Legislature sought to prevent some foreclosures by encouraging settlement communications before commencement. It did not seek to prevent foreclosure *en masse*.

Post-enactment, the statute was amended several times. The first amendment, effective January 14, 2010, is the most significant to this discussion (the "2009 Amendment"). *See* L.2009, c. 507, § 1-a. The 2009 Amendment expanded the pre-foreclosure notice requirement to include *all* home loans while also expanding the definition of what is considered a "home loan." It also required lenders, mortgage servicers, and their assignees to mail the pre-foreclosure notice in "a separate envelope from any other mailing or notice." *Id.*; *see also* Assembly Introducer Mem in Support, Bill Jacket, L 2009, c. 507.

Once again, the Legislature cited the mortgage crisis as the impetus to protect a "larger population of distressed homeowners to benefit from consumer protection laws and foreclosure prevention opportunities currently available only to borrowers of 'high-cost,' 'subprime' and 'non-traditional' home loans." Assembly Introducer Mem in Support, Bill Jacket, L 2009, c. 507, at page 1. This amendment would, the Legislature hoped, "reduce the number of foreclosures in the State, while preserving the remedy of foreclosure where a settlement is not possible." *Id.*, at pages 5-6.

Though the history is unclear on the exact reason for adding the "separate envelope" language, logic dictates that the Legislature sought to ensure the notice was not buried in an envelope with other mailings concerning the loan, such as a different default notice required under the terms of the mortgage or even a monthly mortgage statement. The "separate envelope" requirement would result in the 90-day notice being sent as a standalone mailing for defaulted homeowners to review independently.

Notwithstanding, there was no discernible legislative intent to prevent or discourage additional disclosures that may be required in accordance with other laws, including but not limited to the Federal Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq*. The purpose behind the FDCPA is "to eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not

competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). Consistent with that aim, those defined as "debt collectors" under the statute are required to make a certain disclosure commonly referred to as the "mini-Miranda" on all communications that seek to collect a debt. *See* 15 U.S.C. § 1692e(11). This is a rigid requirement—the failure to provide a mini-Miranda disclosure is a violation of the statute, regardless of a debt collector's intent. *See Vangorden v. Second Round, Limited Partnership*, 897 F.3d 433, 438 (2d Cir. 2018). The initiation of foreclosure proceedings in New York is generally considered to be an "attempt to collect a debt" under the FDCPA, triggering certain obligations such as the provision of the mini-Miranda. *See Cohen v. Rosicki, Rosicki & Assocs., P.C.*, 897 F.3d 75, 83 (2d Cir. 2018).

The pre-foreclosure notice requirement of RPAPL 1304 intersects with the requirements of the FDCPA. Indeed, because the FDCPA was enacted to "promote consistent State action to protect consumers against debt collection abuses," it aligns with the purposes behind RPAPL 1304. As a result, not only are most prospective foreclosing plaintiffs required to provide the mini-Miranda with the RPAPL 1304 notice, but there can be no doubt that homeowners benefit from its inclusion. To rule instead that a mini-Miranda disclosure violates the "separate envelope" requirement of RPAPL 1304, as the Second Department has done in decisions that have followed

in reliance upon *Kessler* (*e.g., CitiMortgage, Inc. v. Dente*, 200 A.D.3d 1025 (2d Dept. 2021)), is inconsistent with not only RPAPL 1304 but also the FDCPA.

What lenders and mortgage servicers must consider when sending a 90-day notice also goes beyond the FDCPA because borrowers have access to other protections related to the collection of a debt. One such example is when a borrower declares bankruptcy. Under 11 U.S.C. § 362(a), the filing of a bankruptcy petition "operates as a stay" against, *inter alia*, the commencement or continuation of a lawsuit against the debtor or the enforcement of a lien against property of the estate. If the debtor receives a discharge in bankruptcy, this acts to prevent a creditor from seeking to collect personally from the discharged debtor. 11 U.S.C. § 524(a)(2). However, the bankruptcy discharge does not thereafter prevent foreclosure proceedings against real property owned by the debtor. *See, e.g., Deutsche Bank Trust Co. Americas v. Vitellas*, 131 A.D.3d 52, 62-63 (2d Dept. 2015).

Bankruptcy discharge or not, RPAPL 1304 still applies, with the only crossover impact being the removal of the prohibition on filing within 90 days of the notice. *See* RPAPL § 1304(3). To address the fact that an individual with a bankruptcy discharge is no longer personally responsible for the debt even though potentially subject to foreclosure proceedings, the industry-accepted method since the enactment of RPAPL 1304 is the inclusion of a brief statement advising that the notice is for informational purposes only and is not an attempt to collect a debt or

re-impose personal liability. But the *Kessler* majority found this inclusion violates RPAPL 1304 and instead favors a scheme where this information cannot be concurrently provided to potentially impacted homeowners.

Another statute that intersects with RPAPL 1304 is the Servicemembers Civil Relief Act ("SCRA"), 50 U.S.C. § 3901, *et seq.*, which protects borrowers in active military service in an effort to "prevent default judgments from being entered against members of the armed services in circumstances where they might be unable to appear and defend themselves, and thus permits servicemembers to stay or suspend certain civil obligations." *Dae Hyuk Kwon v. Santander Consumer USA*, 742 F. App'x 537 (2d Cir. 2018). The plaintiff's 90-day notice in this case also contained a commonplace disclaimer alerting homeowners to these SCRA protections. But the *Kessler* majority again found this inclusion violates RPAPL 1304 and instead favors a scheme where this information cannot be concurrently provided to potentially impacted homeowners.

While not addressed by the *Kessler* majority, it is apparent that lenders and mortgage servicers face a dilemma in sending communications that can be construed as an attempt to collect a debt on an obligation that may have been discharged in bankruptcy and/or is subject to protections under the SCRA. *See, e.g., Garfield v. Ocwen Loan Servicing, LLC*, 811 F.3d 86 (2d Cir. 2016) (an attempt to collect a debt after a discharge in bankruptcy may violate the Bankruptcy Code). Indeed, the

absence of a mini-Miranda disclosure or SCRA disclaimer with the 90-day notice implicates the FDCPA to the extent that such communication may be deemed to be misleading.

Generally, "[w]hether a collection letter is 'false, deceptive, or misleading' under the FDCPA is determined from the perspective of the objective 'least sophisticated consumer.'" *Easterling v. Collecto, Inc.*, 692 F.3d 229, 233 (2d Cir. 2012). In crafting the least sophisticated consumer standard, Courts have been conscious to require that the interpretation be reasonable, and those deemed to be debt collectors are not in violation when borrowers claim a "bizarre or idiosyncratic interpretation of a collection notice." *Id.* at 233-234. By this standard, Courts have held that notices are misleading if they contain language that overshadows or contradicts other informational language, if they use formats or typefaces which tend to obscure important information, or if the notices are capable of more than one reasonable interpretation, at least one of which is inaccurate. *See Clomon v. Jackson*, 988 F.2d 1314, 1319 (2d Cir. 1993).

In application, the flexible "least sophisticated consumer" standard has not proven to be unworkable. USFN submits that an application of a similar framework to the "separate envelope" requirement of RPAPL 1304 would likewise be both appropriate and workable. There is no suggestion in this case (or various post-*Kessler* decisions) that the additional language in the 90-day notice overshadowed,

contradicted, or obscured the statutory text. Nor would a reasonable interpretation of either the bankruptcy rights advisement or the possible availability of SCRA protections find that language to be inaccurate. In other words, even the "least sophisticated consumer" would not be confused or distracted by these notifications. Common sense, filtered through the good faith intent of lenders and mortgage servicers to help homeowners through an undoubtedly stressful process, not only demands these inclusions, but a holding that doing so does not constitute a violation of RPAPL 1304.

II. THE EVOLUTION OF THE SECOND DEPARTMENT'S INTERPRETATION OF RPAPL § 1304

Perhaps the biggest challenge faced by lenders and mortgage servicers since the enactment of RPAPL 1304 is the evolving standard of compliance. Every time the judiciary has given what appeared to be a definitive ruling that sets the bar concerning foreclosure matters, there has then come a subsequent decision that quickly rendered the prior threshold obsolete. This has led to waves of dismissals at various points over the years, subsequent changes by servicers to mailing practices and record-keeping, or the form of the notice, only for the cycle to repeat shortly after.

Kessler—though undoubtedly the most consequential—is only the latest in a line of decisions from the Second Department that have made the foreclosure landscape unsteady. An examination of jurisprudence over the years shows that

Kessler departs from previously issued decisions, which were themselves departures from those that came before.

A. Review of Pre-*Kessler* Jurisprudence on RPAPL 1304

The original landmark RPAPL 1304 decision came over a decade ago. In *Aurora Loan Servs., LLC v. Weisblum*, 85 A.D.3d 95, 103 (2d Dept. 2011), the Second Department held that compliance with RPAPL 1304 is a condition precedent to the commencement of a foreclosure action and that the burden of showing "strict compliance" lies with the foreclosing plaintiff. The *Weisblum* plaintiff had not mailed the notice to one of the two identified "borrowers" in the loan documents, which fell short of "strict compliance" with the statute and resulted in dismissal.

Two years later, in *Deutsche Bank Nat. Tr. Co. v. Spanos*, 102 A.D.3d 909 (2d Dept. 2013), the Second Department more closely examined the mailing requirements of RPAPL 1304. In doing so, it held that failure to submit an affidavit of service demonstrating that the notices were properly mailed falls short of showing "strict compliance" with the statute. But over time, what this "affidavit of service" had to look like has evolved. In *Invs. Sav. Bank v. Salas*, 152 A.D.3d 752 (2d Dept. 2017), the Second Department issued one of the first in what would become a series of decisions rejecting a foreclosing plaintiff's testimony supporting the service of the 90-day notice due to insufficient mailing proofs. *Salas* focused on the absence of testimony of a "standard office mailing procedure" and no "independent proof of

the actual mailing." *Id.* Decisions like *Salas* led to waves of dismissals of otherwise viable foreclosures where servicers' records showed that the notice had in fact been mailed and their representatives attested to same, the borrowers had no proof that it hadn't been mailed; yet the supporting records maintained were just not as compelling as what the Second Department wanted to see.

Following *Salas*, the Second Department also tackled the issue of how a successor plaintiff could demonstrate compliance with RPAPL 1304. This had particular salience given that mortgage loans are often transferred after the commencement of foreclosure. In what had become a trend of finding for the homeowner, the Second Department held that the successive servicer could not submit the mailing records of a 90-day notice sent by the previous servicer without the affiant having personal knowledge of the prior servicer's mailing practices. *See Aurora Loan Servs., LLC v. Vrionedes*, 167 A.D.3d 829 (2d Dept. 2018). And more recently, in *M&T Bank v. Barter*, 186 A.D.3d 698 (2d Dept. 2020), the Second Department went so far as to find that a certified mail receipt to support the certified mailing of the notice was not sufficient where the receipt was undated—even with testimony from the affiant as to the actual date mailed. By this point, RPAPL 1304 was such a moving and difficult target that a plaintiff prevailing on the issue had become the exception rather than the rule.

Although the threshold to prove the mailing kept being heightened, the Second Department would occasionally also signal that certain inaccuracies in the form of the notice would not be fatal. Notably, in *Citibank, N.A. v. Crick*, 176 A.D.3d 776, 778 (2d Dept. 2019), the Second Department ruled that "although the notice contained a factual inaccuracy, the inaccuracy did not involve information required under RPAPL 1304 and, on the record before this Court, the defendants did not otherwise establish, *prima facie*, that the notice failed to strictly comply with RPAPL 1304." Decisions like *Crick*—while favorable to servicers—only increased the confusion of what was and was not acceptable when it came to RPAPL 1304 compliance.

All told, pre-*Kessler*, a clear theme of the RPAPL 1304 decisions from the Second Department is that what was once good enough for compliance, would not be good enough for very long. However, even these earlier harsh decisions and waves of dismissals could not have foretold how *Kessler* would not just alter the landscape of RPAPL 1304 compliance but usher in a complete sea change.

B. How *Kessler* Moved the Goalposts to Unprecedented Territory—Solving the Problem That Wasn't

Below the Second Department held for the first time that the inclusion of any language beyond the statutory text—even potentially a single word—is a failure to strictly comply with RPAPL 1304 and warrants dismissal. Not only was this inconsistent with previous jurisprudence regarding the same form of notices, but it

purported to solve a problem that didn't actually exist. At its core though, *Kessler* blindsided the practice area because of the way it deviated from previous Second Department rulings on 90-day notices containing the same exact disclaimer language. Just in the year leading up to *Kessler*, alone, the Second Department (including panels containing Justice Duffy, who authored *Kessler*, and Justices LaSalle and Mastro, who joined in on the majority decision) ruled favorably numerous times on 90-day notices with the same "offending" language. *See, e.g., McCormick 110, LLC v. Gordon*, 200 A.D.3d 672 (2d Dept. 2021) (affirming plaintiff's compliance with RPAPL 1304 where 90 day notice contained bankruptcy rights advisement); *Ditech Fin., LLC v. Naidu*, 198 A.D.3d 611 (2d Dept. 2021) (same, where 90-day notice contained FDCPA mini-Miranda); *United States Bank N.A. v. Morton*, 196 A.D.3d 715 (2d Dept. 2021) (same as *Naidu*). In fact, one of those decisions came down a mere two weeks before *Kessler*, with Justice Duffy on the panel. *See Bank of N.Y. Mellon v. Pigott*, 200 A.D.3d 633 (2d Dept. 2021) (affirming plaintiff's compliance with RPAPL 1304 where 90-day notice contained FDCPA mini-Miranda and bankruptcy rights advisement). Certainly, nothing in the Second Department's lengthy jurisprudence on 90-day notices in the same form as that in issue in *Kessler* would have foreshadowed the decision.

For over a decade after the 2009 Amendment, everyone involved in New York foreclosure practice—servicers, homeowners, plaintiffs' counsel, defense counsel, and the judiciary—proceeded as if these additional disclaimers were acceptable. Servicers would send out 90-day notices with the statutory text that further contained relevant notifications or disclaimer language, homeowners would receive and understand the import of those 90-day notices, and the judiciary would review whether the servicers had mailed those notices as the statute required, and upon a finding that they did, strike the RPAPL 1304 defense. Trial court judges who had been previously presented with the *Kessler* defendant's "separate envelope" argument (along with Justice Miller from the Second Department, who authored *Kessler's* dissent) rejected the position out of hand.

The *Kessler* majority, however, implemented a fundamental shift. It held in December of 2021 what no one had for the previous 12 years—that these 90-day notices sent by virtually every servicer since the 2009 Amendment were in fact fatally defective, and required dismissal of otherwise viable foreclosures. The *Kessler* majority determined that RPAPL 1304 compliance was nothing like what every servicer, homeowner, trial court judge, and practicing foreclosure attorney thought it to be. Virtually every 90-day notice was defective, and the vast majority of pending foreclosures subject to dismissal.

USFN submits that it cannot be the case that the fundamental understanding of RPAPL 1304 by competing stakeholders for over a decade was entirely wrong, and that every reviewing judge (including many from the Second Department and on the *Kessler* majority panel), plaintiffs' and defendants' counsel, and all the party litigants were operating under a mistaken understanding of the Amendment. Quite simply, New York foreclosure law previously had it right, where the custom and practice of sending 90-day notices with relevant and helpful information beyond the statutory text is not a violation of the "separate envelope" provision. That is where the *Kessler* majority should have landed, but instead, as has been the case before, the Second Department fundamentally altered what is needed to bring a viable foreclosure in New York.

C. The World *Kessler* Has Wrought

Predictably, *Kessler* has not ended the heightening of the threshold for RPAPL 1304 compliance. In *CitiMortgage, Inc. v. Dente,* 200 A.D.3d 1025 (2d Dept. 2021), issued a mere week after *Kessler*, the Second Department not only clarified that *Kessler* encompassed the inclusion of an FDCPA mini-Miranda but that the standard was whether "additional material" beyond the statutory text had been sent in the same envelope. This meant *Kessler* could, in theory, cover anything at all such as, *inter alia*, a one-sentence cover letter, the provision of a contact

number or mailing address in a footer, or literally any verbiage not taken directly from the statute.

Dente also shed further light on how the Second Department would broadly apply *Kessler* irrespective of the case's procedural posture by reaffirming that the defense could be asserted at any point prior to the entry of judgment of foreclosure and sale—including where, as in *Dente*, the defense had been pleaded in a contesting answer and stricken on summary judgment, only to be raised again in response to a motion for judgment of foreclosure and sale. The regime suggested by *Dente* permits defendants in foreclosure a "double contest"—even a loss on summary judgment that strikes all defenses does not preclude a later challenge to RPAPL 1304 compliance at the judgment of foreclosure and sale stage in a post-*Kessler* world.

But further muddying the waters, the Second Department has also appeared to deviate from *Kessler* in another recent decision. In *Emigrant Bank v. Cohen*, 164 N.Y.S.3d 863 (2d Dept. 2022), it found that the plaintiff complied with RPAPL 1304 even where there had been an inaccuracy in the stated default amount, which the statute requires be included. But how does that square with *Kessler*, where including a single word beyond the statutory text fails the compliance standard? The Second Department seems to be saying that it is acceptable to provide inaccurate required information; yet unacceptable to include additional language that may help homeowners understand the intersection of the 90-day notice with their other rights.

USFN submits that there is no squaring these inconsistent decisions, and that the global impact of *Kessler* is more confusion produced than ever, which is the exact opposite of what the *Kessler* majority's bright-line rule was supposed to solve.

III. THE BLANKET APPLICATION OF "STRICT COMPLIANCE" REVIEW FOR ALL ASPECTS OF RPAPL 1304 IS UNFOUNDED AND SHOULD BE REJECTED

To arrive at the *Kessler* ruling, the Second Department majority had to employ a standard unforgiving enough to support it. Enter "strict compliance"—the Second Department's standard of review for the RPAPL 1304 defense for over a decade. Though this heightened threshold has become so routine it instinctually feels as if it came from the statute itself, that is not the case. The language "strict compliance" appears nowhere in RPAPL 1304. Instead, its origins derive from the *Weisblum* decision, *infra*, where the Second Department—expanding upon the statutory text—held that the statute is a condition precedent to foreclosure with which foreclosing plaintiffs must strictly comply.

In *Weisblum*, issued a little over a year after the 2009 Amendment, the Second Department was tasked with determining whether the plaintiff had complied with the statute where only one of the two identified "borrowers" in the loan documents had been sent the 90-day notice. At the time of the decision, the Second Department was coming off another decision where it found that a companion statute, RPAPL §

1303,[1] was a condition precedent to foreclosure. *See First Nat. Bank of Chicago v. Silver*, 73 A.D.3d 162 (2d Dept. 2010). Seizing on the *Silver* ruling, the language of the statute, and the legislative history, the Second Department held in *Weisblum* that "proper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition." 85 A.D.3d at 106.

How "strict compliance" came to be the central aspect of *Weisblum* is less clear. Foregoing any analysis or citation to legal precedent, the Second Department stated only in conclusory terms that because RPAPL 1304 was a condition precedent to foreclosure, the "failure to show strict compliance requires dismissal." *Id.* at 103. The phrase then appears only one additional time in the decision, when it is blankly recited as the standard a foreclosing plaintiff must meet on an application for summary judgment. *Id.* at 106. The Second Department ultimately concluded that mailing the notice to only one of the two identified "borrowers" in the loan documents fell short, warranting dismissal.

One can read *Weisblum* and still come away confused though as to whether "strict compliance" was truly the standard moving forward—in the latter part of the decision, the Second Department noted that it was the "substantial failure to comply

[1] This statute requires, *inter alia*, that a form notice be provided to mortgagors joined as defendants to a foreclosure, to be delivered along with the summons and complaint.

with RPAPL 1304" that led to the outcome, and declined to comment on whether there could ever be "a defect or irregularity in the content of an RPAPL 1304 notice [that] might be so minimal as to warrant the exercise of the court's discretion under CPLR 2001 to avoid dismissal of the action." *Id.* at 107-108. Looking back to *Silver* for further clarity is similarly unhelpful as it offers virtually none, and if anything casts serious doubt that "strict compliance" should be the standard of review. It is true that in *Silver* the Second Department did find that the history of HETPA and statutory text warranted that RPAPL 1303 be deemed a "condition precedent" to foreclosure, but it never described the burden of showing compliance as "strict." *Id.* at 109. Rather, the language in the concluding paragraphs is couched as "showing compliance" and "requiring compliance," with the word "strict" not making an appearance. *Id.*

Another unusual aspect of *Weisblum* as the genesis of "strict compliance" is that the decision itself was reversed in part years later. In *Citibank, N.A. v. Conti-Scheurer*, 172 A.D.3d 17 (2d Dept. 2019), the Second Department rejected *Weisblum* insofar as it found that a defendant-borrower must do more than just baldly deny the receipt of the RPAPL 1304 notice to obtain dismissal. Whereas *Weisblum* found that type of denial sufficient for dismissal, *Conti-Scheurer* did not.[2]

[2] Certain trial judges have gone much further than *Conti-Scheurer* in criticizing *Weisblum*. For example, in *JPMorgan Chase Bank, N.A. v. Lebovic*, 2018 N.Y. Misc. LEXIS 4931 (Sup. Ct. Suffolk Cty. Oct. 31, 2018), Judge Quinlan noted that cases like *Silver* and *Weisblum* represented

But this also begged the question of whether, if *Weisblum* was wrongly decided in at least one respect, other aspects of the decision would survive and continue to be the guiding star for RPAPL 1304 analysis.

Rather than address that potential quandary though, the Second Department instead chose to expand the application of "strict compliance" to other aspects of the statute. Most relevantly, in *US Bank v. Haliotis*, 185 A.D.3d 756, 758-759 (2d Dept. 2020), it held that the "strict compliance" standard should also be applied to the issue of whether the 90-day notice was sent in a "separate envelope" apart from other mailings and notices. Under *Haliotis*, a foreclosing plaintiff would be required to "specify" that the notice was sent separately in order to obtain summary judgment. *Id.*

All told, *Silver* begot *Weisblum* begot *Conti-Scheuer* begot *Haliotis* begot *Kessler*. But nowhere in any of those decisions—not once—was the origin of "strict compliance" discussed, nor was this Court's precedent ever cited as support for it. Perhaps that is why, in the only previous case in which this Court had the issue of RPAPL 1304 compliance before it, *CIT Bank N.A. v. Schiffman*, 36 N.Y.3d 550 (2021), it never mentioned "strict compliance" as the standard a foreclosing plaintiff

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circumstances where there were "significant problems" with compliance such as the failure to send or serve the notice to a borrower entitled to receive, which in his view, meant the Second Department had really been examining whether "substantial compliance" had been met. In their plain failure to do what the statutes minimally require, those plaintiffs had not substantially complied.

must meet to prove the mailing of the notice. Opting for a different tack, this Court rejected a rigid approach for RPAPL 1304 analysis and employed a more flexible, fact-specific framework.

Schiffman only began the discussion though, as this Court was not tasked in that case with a review of the plaintiff's compliance, but rather the issue of what threshold a defendant must meet to rebut compliance. Nevertheless, this Court has—in other contexts—opined on the issue of "strict compliance" and also its more forgiving cousin, "substantial compliance." The issue has come up a number of times in the context of New York's Election Law, and for certain provisions of that statute this Court has agreed with the more inflexible approach—"strict compliance . . . reduces the likelihood of unequal enforcement, [as] the sanctity of the election process can best be guaranteed through uniform application of the law." *Matter of Seawright v. Bd. of Elections in the City of New York*, 35 N.Y.3d 227, 233 (2020). Other areas where this Court has upheld a standard of "strict compliance" include the terms of a letter of credit or notice provisions of an insurance contract. *See United Commodities-Greece v. Fidelity International Bank*, 64 N.Y.2d 449, 455 (1985); *Argo Corp. v Greater NY Mut. Ins. Co.*, 4 N.Y.3d 332, 339 (2005).

Perhaps more common throughout its history, however, are instances where this Court finds that "substantial compliance" with a statute meets the legislative mandate. In a century-old decision, *Purdy v. New York*, 193 N.Y. 521 (1908),

concerning the issue of statutorily required notice to the city prior to initiation of a personal injury lawsuit, this Court held that only "substantial compliance" with the statute's rigid description requirements was needed. Similarly, for compliance with a provision of New York Education Law's notice requirements, described as a "condition precedent" to an action against a school district or board of education, "all that is required is substantial compliance with the statute regarding the degree of descriptive detail in a notice of claim." *Parochial Bus. Sys., Inc. v. Bd. of Educ.*, 60 N.y.2d 539, 547 (1983). And in a different area of Election Law concerning the required sheets for an independent nominating petition, this Court found that "substantial compliance" suffices—for example where required information has not been omitted even if some other defect exists. *See Cairo v. Harwood*, 42 N.Y.2d 1098 (1977). This Court has also employed a "substantial compliance" requirement in its interpretation of the Rules, in particular CPLR § 403(a), commenting that "mere technical irregularities in the commencement process should be disregarded if a substantial right of a party is not prejudiced." *Matter of Garth v. Bd. of Assessment Review for Town of Richmond*, 12 N.Y.3d 176, 181 (2009).

Other times, this Court has favored a more hybrid approach—that is, "strict compliance" with what is deemed to be an aspect of utmost importance, and only "substantial compliance" with what are considered secondary aspects such as form. For example, in *In re Application of Board of Comm'rs*, 52 N.Y. 131, 133-134

(1873), a case concerning real property rights, this Court found that "[w]hile the law requires a strict compliance with every requirement of a statute by which an individual may be divested of his property against his will, especially every requirement essential to the protection of the rights of the property owner, it looks to the substance rather than to the form, and, if there is a substantial compliance with every essential condition and requisite of the statute, it is sufficient. . . ."

More recently, in *Hutson v. Bass*, 54 N.Y.2d 772, 773-774 (1981), concerning interpretation of a provision of Election Law governing cover sheets on candidate petitions, this Court noted that "[w]hile substantial compliance is acceptable as to details of form, there must be strict compliance with statutory commands as to matters of prescribed content." And in yet another matter concerning a provision of Election Law, *Gross v. Albany County Bd. of Elections*, 3 N.Y.3d 251, 258-259 (2004), this Court found that while the legislative framework supported a rigid approach of requiring "strict compliance," "there are instances where inconsequential deviations from the letter of the law will not be fatal," particularly where there has been "substantial compliance with statutory directives."

It is USFN's respectful position that the Second Department's insistence on an unyielding "strict compliance" standard for every aspect of RPAPL 1304 that comes before it—whether mailing requirements, form of notice, prescribed language, or inclusion of additional language—is an approach not warranted in this

Court's precedent or in the enacting statute's legislative intent. As the Second Department itself observed in *Weisblum*, the legislative intent behind HETPA was "to provide a homeowner with information necessary . . . to preserve and protect home equity," "to bridge that communication gap [between distressed homeowners and their lenders] in order to facilitate a resolution that avoids foreclosure," and to advise homeowners "of housing counseling services available in the borrower's area" with sufficient time to work out a resolution. 85 A.D.3d at 107. A framework that requires "substantial compliance" with RPAPL 1304 would not impede any of those goals. Indeed, for a showing of "substantial compliance," lenders would still need to prove the notice was mailed to borrowers and the 90-day period then waited out before foreclosure was commenced, that the prescribed statutory text was included in the notice, and that local housing counseling agencies were provided to the borrower. But the standard would allow trial courts—in their discretion—to excuse minor deviations or irregularities to the form, or, as relevant here, the inclusion of benign information at the end of a notice not found in the statutory text that is designed to give context to borrowers regarding how the notice may intersect with other of their rights.

That manner of review would be no different from cases like *Purdy*, *Parochial*, and *Cairo, supra*, where this Court prioritized the inclusion of mandatory language in a notice over otherwise minor or inconsequential deviations in form.

There was no dispute in this case or any of its (growing) progeny that the notices in question contained the statutory text—every word of it. In fact, in this case, the defendant homeowner admitted to receipt of the notice containing all the statutory text. (R. 338-339). Yet applying "strict compliance" still allowed the Second Department to dismiss this otherwise viable foreclosure action for "failure" to comply with a condition precedent when there was no plausible dispute that the statute had been complied with in virtually every respect. A more forgiving standard of "substantial compliance" would eliminate these types of absurd results, while still honoring the legislative intent and purpose behind RPAPL 1304. And it would allow trial courts to make determinations on a "case by case" basis—just as this Court contemplated in *Schiffman*—regarding whether the plaintiff's compliance was "substantial" enough to meet the statute's mandate.

For those reasons, and though *Kessler* is subject to reversal even using the "strict compliance" standard, USFN respectfully requests that this Court reconsider the threshold for compliance with RPAPL 1304 that is being used by the lower courts and enact a change from the inflexible "strict" to the still-rigorous but more practical "substantial."

CONCLUSION

For these reasons, Amicus Curiae, USFN — America's Mortgage Banking Attorneys®, respectfully requests that it be permitted to participate as an Amicus Curiae in this proceeding and that, on the merits, the Second Department be reversed in its decision below, and that the Court adopt a review standard of "substantial compliance" for what a foreclosing plaintiff must show to defeat a defense arising under RPAPL 1304.

Dated: New York, New York
November 21, 2022

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: November 21, 2022

Respectfully submitted,

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Sworn to before me on November 21, 2022

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