

S.5829 (Salazar)/A.5841 (Lavine)

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BILL S.5829 (Salazar)/A.5841 (Lavine)
SUBJECT Anti-Kessler
DATE May 30, 2023
OPPOSE

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The Business Council strongly opposes S.5829 (Salazar)/A.5841 (Lavine).

The bill overturns a recent unanimous Court of Appeals decision in *Bank of America N.A. v. Kessler*. In the *Kessler* decision, the Court held that a pre-foreclosure notice sent to a residential mortgage borrower is not automatically voided under RPAPL § 1304 when the lender includes additional information or disclosures that would help the borrower avoid foreclosure, even though not explicitly enumerated in that provision.

In *Kessler*, the borrower received “a seven-page notice containing all of the language required by the statute.” The last page of the notice included two federally required foreclosure notices, which described supplementary rights of borrowers in bankruptcy and additional service for military servicemembers. These additional federal notices included information of the borrower’s rights and options to remediate the situation and stated, “additional protections they may have beyond those identified in the statutory notice language.” The borrower asserted that the additional disclosures included with his pre-foreclosure notice violated RPAPL § 1304. However, the Court disagreed and held that “shall include” is “a phrase that contemplates the addition of something else.”

By requiring the lender to send a notice including *only* (emphasis added) the language provided in statute and mail the notice separately, this legislative proposal severely limits a lender’s ability to concisely inform a borrower of additional rights and resources available to them to circumvent foreclosure. The Court of Appeals, in its opinion, stated that the statute “should be read broadly to help borrowers avoid foreclosure,” and the plaintiff’s assertion was “manifestly at odds” with the original legislative intent of RPAPL § 1304 as a remedial statute.

As the Court of Appeals noted in its opinion, “a bright-line rule would also lead to nonsensical results.” For example, if a notice had the required statutory language verbatim, but added “THIS IS EXTREMELY IMPORTANT, PLEASE PAY ATTENTION!” at the top of the notice, in a foreclosure proceeding the notice would be void and the foreclosure action dismissed.

This bill is anti-consumer and will only harm homeowners in danger of foreclosure. Instead of encouraging lenders to provide additional information and resources to help a borrower prevent foreclosure, **this bill penalizes lenders who attempt to help their customers avoid foreclosure.**

Further, this bill contains a retroactive punitive provision that would result in the dismissal of thousands of lawful foreclosures just because a lender went above and beyond what is required in RPAPL § 1304 and provided additional information about a borrower’s rights, tools and resources to avoid foreclosure. This will surely deter future investment in New York’s housing market at a time when we should be focusing on attracting investment and creating affordable housing solutions.

This bill is clearly at odds with the original legislative intent and will only deprive homeowners of useful tools and resources to prevent foreclosure. For these reasons, The Business Council strongly opposes S.5829 (Salazar)/A.5841 (Lavine) and urges the Legislature to reject passage.

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