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COURT OF APPEALS  
STATE OF NEW YORK

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BANK OF AMERICA,  
  
Appellant,  
  
-against-  
  
KESSLER,  
  
Respondent.  
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NO. 4

20 Eagle Street  
Albany, New York  
January 4, 2023

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Xavier Austin Reyna  
Official Court Transcriber



1                   ACTING CHIEF JUDGE CANNATARO: Good afternoon,  
2 and welcome.

3                   Our first appeal on today's calendar is number 4,  
4 Bank of America vs. Kessler.

5                   Counsel?

6                   MS. BERGER: Thank you, Your Honor.

7                   Good afternoon. I'd like to reserve three  
8 minutes for rebuttal.

9                   ACTING CHIEF JUDGE CANNATARO: You have three  
10 minutes.

11                  MS. BERGER: May it please the court. My name is  
12 Suzanne Berger, and I am here today for the appellant, Bank  
13 of America.

14                  The question presented is whether RPAPL 1304  
15 prohibits a lender or a servicer from including in the  
16 ninety-day notice, quote, additional material, close quote,  
17 germane to the purpose of the statute, i.e. material that  
18 will further bridge the communication gap between the  
19 lender and the borrower facing foreclosure.

20                  JUDGE GARCIA: So how would a court determine if  
21 that's the case with a particular item included in this  
22 envelope?

23                  MS. BERGER: It would - - - whether it goes to  
24 the fact that the borrower is in default, here the notices  
25 are - - -



1 JUDGE GARCIA: Well, assume the borrowers are  
2 kind of in default - - - that's why you're sending a  
3 notice, right? So what can you put in there? What's the  
4 test?

5 MS. BERGER: For - - - the test is whether it  
6 further helps the borrower and doesn't undermine the  
7 purpose of the statute.

8 So for example, here we have as one example the  
9 bankruptcy disclaimer, so that it tells the borrower if  
10 they have received a discharge in bankruptcy that this is  
11 for information purposes only. That's integral to the  
12 notice so that the borrower receiving the notice doesn't  
13 misunderstand what the notice is trying to tell that  
14 person.

15 ACTING CHIEF JUDGE CANNATARO: Does this rule  
16 create a series of ad hoc disputes over whether it meets  
17 the requirements of your rule, or that it's extraneous,  
18 distracting information?

19 MS. BERGER: I don't think so. I don't think so  
20 for two reasons.

21 One is we've had this rule for ten years, and  
22 until the Kessler case came down in Westchester in 2017, we  
23 didn't - - - there were a few minor cases, but we didn't  
24 have that as an issue. It wasn't being contested.  
25 Everybody understood that as long as the notice was in the



1 proper size font and contained language that was required -  
2 - - and remember, the statute says, "shall include". So  
3 the legislature knew that there might be other things that  
4 were germane.

5 I do not see satellite litigation growing from  
6 this. In fact, if the court were to say, yes, you can have  
7 a Fair Debt Collection Practices Act disclaimer, the mini  
8 Miranda, which some courts post-Kessler have said is - - -  
9 a problem with how the Second Department interpreted  
10 Kessler because it doesn't allow for what's required by  
11 federal law. So if this court were to say, compliant - - -

12 JUDGE WILSON: Judge Marrero said that, right?  
13 In the Southern District.

14 MS. BERGER: Judge Marrero, yes.

15 JUDGE WILSON: Yeah.

16 JUDGE SINGAS: So if it's so widespread and  
17 everyone appreciates it and understand, then what's the - -  
18 - why do we need a separate envelope requirement?

19 MS. BERGER: I believe the intention was not to  
20 put what I'm going to call regular periodic notices in.

21 In other words, it shouldn't be enclosed just  
22 with the monthly mortgage statement or the escrow analysis  
23 you get every year or that the bank's offering a toaster if  
24 you make a - - - you know, open a new account, that it's  
25 only for information focused on the issue, which is that



1 the borrower is facing foreclosure if the default is not  
2 cured within ninety days, and these are various ways the  
3 borrowers can be assisted.

4 They can go to one of the housing counselors in  
5 the region; that is part of the required notice. Or if  
6 they're a service member, for example, they can call the  
7 number that's listed in the additional information provided  
8 in the Kessler notice and get additional help because  
9 service members have additional rights to delay litigation  
10 when they're overseas.

11 JUDGE WILSON: Do you know whether the bank had a  
12 concern that the 1304 notice without the bankruptcy  
13 disclaimer might be viewed as an interference of an  
14 automatic stay?

15 MS. BERGER: There have been cases that have  
16 suggested that, yes. And that depends on the facts and  
17 circumstances.

18 But throughout the nation, courts have said, if  
19 you have the disclaimer, that that's a safe harbor for the  
20 person sending the notice, and that alleviates confusion.

21 And - - - so yes.

22 JUDGE RIVERA: Is the standard strict or  
23 substantial compliance, or do we even have to decide that?

24 MS. BERGER: I don't - - - I have an opinion  
25 about the answer, but I don't think you have to decide



1 that, meaning I think we - - - I will - - - we can presume  
2 that you need strict compliance in the sense that a 1304  
3 notice must be sent to natural persons and other people  
4 having home loans, you know, and so that has to be strictly  
5 complied with.

6 The language of the notice can substantially  
7 comply, I would argue. I don't think you have to get there  
8 because I think this one does comply given the "shall  
9 include" language, which is nonexclusive.

10 The substantial compliance standard would be  
11 helpful in perhaps some satellite litigation, but I don't  
12 think it's necessary for this notice to make that decision.

13 JUDGE GARCIA: If this is affirmed, can't you  
14 refile after dismissal under the provision of the CPLR that  
15 gives you six months?

16 MS. BERGER: In this case, I believe one could,  
17 unless it was dismissed, for example, for a delay in  
18 prosecution or one of the other reasons that are not  
19 allowed under 2005 - - - CPLR 2005.

20 And you know, this default was in 2013. It's  
21 taken a while to wind its way through the courts. The  
22 appellate division sat on it for over two years.

23 So I can't tell you for certain that some judge  
24 might not say there's been delay for that reason and  
25 prohibit it from being refought. I would hope not, based



1 on the facts of this case.

2 I see my time has expired, and I have three  
3 minutes reserved for argument, unless somebody else has a  
4 question right now.

5 ACTING CHIEF JUDGE CANNATARO: Thank you.

6 MS. BERGER: Thank you.

7 MR. WALLSHEIN: May it please the court. Charles  
8 Wallshein for the defendant/respondent, Andrew Kessler.

9 The - - - there are two things I believe that's  
10 squarely before this court. The first is the strict  
11 compliance standard required by 1304, and second is, does  
12 this statute accomplish its purpose.

13 JUDGE TROUTMAN: Where does the statute say it  
14 may only include certain language?

15 MR. WALLSHEIN: Well, that's the "shall"  
16 language, Your Honor. There's two parts. There's the  
17 1304(1), which identifies - - -

18 JUDGE TROUTMAN: Is "shall" inclusive or  
19 excluding?

20 MR. WALLSHEIN: Well, it includes the language  
21 that's provided in the statute, and in 1304(2), it says  
22 only this - - - with no other - - - in no other envelope.  
23 In other words, this is the single-envelope requirement  
24 with nowhere to go to.

25 ACTING CHIEF JUDGE CANNATARO: Section 2 says



1           only this and nothing else in the envelope?

2                   MR. WALLSHEIN:  It says no other notices in the  
3           same envelope.

4                   JUDGE WILSON:  But doesn't that beg the question  
5           of what another notice is and whether other notice is on a  
6           different subject or other notice is something different  
7           from the exact words in the statute?

8                   MR. WALLSHEIN:  This isn't the first time I've  
9           heard that.  I argued this - - -

10                  JUDGE WILSON:  Then you should have a good answer  
11           for it.

12                  MR. WALLSHEIN:  In this particular - - - in this  
13           context, you have to read the two parts together, and I  
14           don't believe that the - - - you know, whether these other  
15           notices, in this particular instance the SC - - - SCRA, the  
16           FDCPA, the mini Miranda, and the bankruptcy notice - - - I  
17           don't think there is - - - it's ever been, like, litigated  
18           whether those are actually notices or not.  I included - -  
19           - or actually the defendant/respondent included it - - -  
20           included the Black's Law dictionary, which is an accepted  
21           definition of notice, in the original brief with the  
22           appellate division and before that with - - - you know,  
23           with - - - at the trial level.  And I don't think that  
24           issue is preserved for interpretation here - - - not that,  
25           of course, this panel can't interpret what a notice is, but





1 I believe that that's - - - issue's been resolved.

2 JUDGE WILSON: I guess I'm thinking of it this  
3 way. If I say, my sandwich shall include mayonnaise and it  
4 shall be on a separate plate, I would be really surprised  
5 to get a plate of mayonnaise.

6 MR. WALLSHEIN: You might, but that's the - - -  
7 that's the reason I think we're here, is that it says,  
8 "nothing else" and, you know, and there these other things  
9 are.

10 But I think the core, if you now - - - if this  
11 court wants to reach the core purpose of the statute, it's  
12 to essentially have the borrower, whoever receives the  
13 notice, to make a phone call or to reach out in an email or  
14 something, I need help; I'm about to go into foreclosure.  
15 That's the purpose of this statute.

16 JUDGE WILSON: So what if the lender - - - what  
17 if the lender put it in huge red type at the front of the  
18 required notice, This is really important; please read it.  
19 That's not - - - it doesn't strictly comply if you read  
20 this language as the only language that can be in there,  
21 but would you have a problem with that? Does that violate  
22 the statute?

23 MR. WALLSHEIN: Well, it's in - - - I think in  
24 twenty-point print. I think it says, This is - - - you  
25 know, at the very top - - -



1 JUDGE WILSON: No, it's - - - yeah, fourteen, I  
2 think.

3 But I'm saying if they added some extraneous  
4 things saying, This is really important; please read. It's  
5 not in the text of the statute if they added that to those.  
6 Is that - - - if you want a strict standard, is there any  
7 exception to that?

8 MR. WALLSHEIN: Well, it's not a matter - - - I  
9 don't think it's a matter of exception, Your Honor. I  
10 believe that when it says that, "use this language," I  
11 think the lender should actually use that language.

12 JUDGE WILSON: Right, but suppose you use that  
13 language and you added something else. And the something  
14 else, let's say, is something that is - - - it has no  
15 substantive content other than, This is super important;  
16 please read this; don't ignore this. But that's added;  
17 that's not in the statutory language.

18 MR. WALLSHEIN: No, no. I understand that.

19 But if the question is are there a certain - - -  
20 are there certain - - - is there certain language that  
21 would be - - -

22 JUDGE WILSON: No, would that void the  
23 foreclosure action, the inclusion of that language?

24 MR. WALLSHEIN: I don't know. And the reason I  
25 don't know is because it's not before us, and - - - it's



1 not really before us. And you know, and I understand this  
2 is the nuance of this argument, right, is that there are  
3 certain things that would be more clear than others, like -  
4 - -

5 JUDGE RIVERA: But I'm confused. If your  
6 argument is it's strict compliance, isn't the next step of  
7 that is, in response to Judge Wilson, if I'm understanding  
8 his question, that no, you can't add another single word,  
9 not even a comma.

10 MR. WALLSHEIN: Well, that's - - - now, that's -  
11 - - that's a little bit more clear, because you couldn't  
12 add a comma because I don't think anybody would argue that  
13 a comma is a notice.

14 But I don't - - - in this particular case, what's  
15 before this panel is, are these other three bodies of  
16 information that appear on the last page of the mailing - -  
17 - do those constitute notices?

18 JUDGE RIVERA: So if the court determined it was  
19 notices, then you concede there's no problem, that there's  
20 compliance? In this case, on the facts of this case.

21 MR. WALLSHEIN: If these are not notices?

22 JUDGE RIVERA: If they are a type of notice.

23 MR. WALLSHEIN: Oh, if they are a type of notice.  
24 Well, they should be - - - they should be clear there's no  
25 notices allowed and these are notices, and it was in this -



1 - - these notices were in this envelope and they didn't  
2 belong there, I would say then the decision would be rather  
3 easy.

4 JUDGE RIVERA: And if they are the type of  
5 notice, if I'm understanding your adversary's argument,  
6 that are permissible under 1304 because they are of the  
7 same - - - let me call it the species as the notice that is  
8 set out as must - - - shall be included -- excuse me, shall  
9 include.

10 MR. WALLSHEIN: Well, that goes again - - - that  
11 goes again to the core meaning of the statute. I think the  
12 legislature realized early on that foreclosure was - - -  
13 there was a crisis, and it says so right in the - - - right  
14 - - - I think the first couple of lines of the - - - of the  
15 legislative memo.

16 And this statute was designed specifically to  
17 keep cases out of the supreme court. And the reason - - -  
18 the thing that they did, and what the governor actually  
19 funded, and the legislature actually funded were housing  
20 counselors that were foremost impartial. They were not the  
21 loan servicer. They were HUD-approved, DHCR-certified  
22 housing counselors. They're someone you can call - - -  
23 now, you keep in mind that when the statute was written, it  
24 had to be written for everybody. It wasn't necessarily  
25 written for Mr. Kessler. It may have been written for



1 somebody who has extreme skill in something else, maybe a  
2 nurse, who doesn't know anything about law.

3 JUDGE SINGAS: Well, how do these additional - -  
4 - the additional information included detract from the  
5 statutory purpose? Or is that something we shouldn't  
6 consider at all?

7 MR. WALLSHEIN: Well, out of the respect to the  
8 court, I will answer that. I mean, of course I will say  
9 that it's not - - - that it shouldn't be before the court  
10 because the language is clear enough that you don't have to  
11 interpret anything. There's no extra - - - there's nothing  
12 extra this court has to do beyond reading the actual plain  
13 language.

14 JUDGE SINGAS: Well, I might agree with you if it  
15 said, "shall only include", but since it doesn't say,  
16 "shall only include", we have to figure out - - -

17 MR. WALLSHEIN: That's the exact problem that  
18 Justice Miller identified in his dissent that was 3-1  
19 below. But if you read sections 1 and 2 together, which is  
20 the rule of statutory construction - - - you read the  
21 statute as a whole, it said, You must have this; shall not  
22 contain that.

23 Now, if we're all - - - you know, as attorneys,  
24 we understand how to read these things, but if you put your  
25 mindset into your average borrower who's probably scared to



1 death - - - they get - - - they're starting to get - - -  
2 maybe they have already received an acceleration letter,  
3 and they're scared - - - literally scared to death. They  
4 don't know where to turn. This letter says, Call a housing  
5 counselor; you can save your home. They want to call that  
6 person.

7 Now, you get a Miranda or you call the loan  
8 servicer, the first thing you hear is, This is an attempt  
9 to collect a debt; anything you say - - - and it says the  
10 same thing in writing on the note on many of these notices.  
11 That's scary. And chances are you're not going to talk to  
12 that person.

13 And this is written, and I think this was in my  
14 brief - - - I tried to really put a lot of accent on it.  
15 In the brief is that all these statutes, especially this  
16 one is written for the least sophisticated consumer, means  
17 it's meant to be understood by everyone.

18 ACTING CHIEF JUDGE CANNATARO: What if an  
19 unsophisticated consumer didn't have Internet and the  
20 lender, in what I would assume would be an effort to  
21 helpful, went to the website and produced the list of  
22 housing counselors and included that with the notice?  
23 These are the housing counselors in your area. That's not  
24 a notice, obviously, so that's - - - you can't include that  
25 because it's not strictly required?



1 MR. WALLSHEIN: That would be on the website, and  
2 that's got nothing to do with what had to be mailed by  
3 regular and certified mail to each borrower.

4 ACTING CHIEF JUDGE CANNATARO: No, but I'm  
5 saying, they know the borrower doesn't have Internet. So  
6 they're just helping a person out by giving them the  
7 information that they would get on the website.

8 MR. WALLSHEIN: I don't really understand the  
9 question.

10 ACTING CHIEF JUDGE CANNATARO: I'm just saying,  
11 they decided to print out the list of housing counselors  
12 and include that in the mailing.

13 MR. WALLSHEIN: Your Honor, there's a lot of  
14 things that a lender could do; this is what the legislature  
15 says the lender must do. And it also says - - - what the  
16 legislature says what the lender cannot do.

17 ACTING CHIEF JUDGE CANNATARO: I know, Counselor,  
18 but we're here to decide what else can they do besides what  
19 they must do.

20 MR. WALLSHEIN: Well, the legislature says  
21 nothing. And I think it's clear, and I think that it  
22 serves a legitimate purpose, and - - -

23 JUDGE RIVERA: Well, under your reading, you  
24 would send out this notice only as set out in 1304(1) - - -  
25 (1) (a), right? And then any other notice, whether it's a



1 type of - - - point that Judge Wilson was making or your  
2 adversary's reference or what went on here, would have to  
3 be in a bunch of separate envelopes. How does that help  
4 the borrower, who is, according to these notices, a person  
5 who may be at risk of foreclosure?

6 MR. WALLSHEIN: You may be speaking, and please  
7 correct me if I'm wrong, to the bright-line rule?

8 JUDGE RIVERA: Um-hum.

9 MR. WALLSHEIN: The bright-line rule, which I  
10 know you're familiar with because you've - - - they're  
11 helpful. The bright-line rule here avoids a case-by-case  
12 analysis in front of different judges - - -

13 JUDGE RIVERA: That may be helpful to the court.  
14 How's it helpful to the borrower? I mean, isn't that the  
15 point of the legislation? This is to help someone - - -

16 MR. WALLSHEIN: They receive - - -

17 JUDGE RIVERA: - - - avoid foreclosure, at least  
18 be given assistance in a foreclosure proceeding.

19 MR. WALLSHEIN: Yeah, that's absolutely true.  
20 But to - - - the question is what's helpful? The  
21 legislature decided that they wanted - - - they wanted the  
22 lenders, the loan service, to send one letter that says, Go  
23 get - - - this is how far you are behind, this is what's  
24 going to happen within - - - could be within ninety days or  
25 at least ninety days, and we want you to call these people





1 because it's gonna - - - we believe - - -

2 JUDGE GARCIA: What about an active service  
3 member who gets that notice without this one, the  
4 additional one, and doesn't realize for days until this  
5 other notice gets here that they may have a completely  
6 independent avenue to get relief here? How is that  
7 consistent with the legislative purpose?

8 MR. WALLSHEIN: Because in the - - - they're  
9 receiving that notice in other mailings.

10 JUDGE GARCIA: But it might come a week later.

11 MR. WALLSHEIN: Well, they haven't started the  
12 foreclosure yet. This foreclosure still hasn't started.

13 JUDGE GARCIA: You're talking about how scary it  
14 is to get a notice that says, I'm a debt collector; isn't  
15 it scary to spend a week thinking, I'm an active service  
16 member whom, you know, is now subject to this. I'm trying  
17 to reach one of these counselors, and I have an independent  
18 government agency established to help specifically me?

19 MR. WALLSHEIN: Well, as Judge Scheinkman pointed  
20 out, there's a way for them to stage their notices - - -  
21 for the lenders to stage the mailings. They could mail all  
22 of this other stuff first and then mail this one, which  
23 says, Just - - - just include five counselors; this is how  
24 far apart - - - behind you are; this is how many days  
25 behind you are; and call these - - - you have an option to



1 call these five independent agencies to help you.

2 JUDGE WILSON: So could they comply with the  
3 statute by putting a required notice in an envelope,  
4 putting a bankruptcy and service person into a separate  
5 envelope, putting those two envelopes into a bigger  
6 envelope, and mailing that? Does that comply with the  
7 statute literally?

8 MR. WALLSHEIN: You know, I've been asked that  
9 question. I would say no because it's still in - - -

10 JUDGE WILSON: Well, it's in a separate envelope  
11 from the other mailing.

12 MR. WALLSHEIN: Well, it's in the same mailing if  
13 it ends up in the house - - -

14 JUDGE WILSON: I didn't say separate mailing.  
15 It's a separate envelope.

16 MR. WALLSHEIN: Well, again, I don't think that's  
17 - - - I don't think that question's before us.

18 JUDGE WILSON: It is if I'm asking you.

19 MR. WALLSHEIN: It's before me now.

20 JUDGE WILSON: Yeah.

21 MR. WALLSHEIN: I would say no because it's in a  
22 single mailing.

23 JUDGE WILSON: Okay. Even though the statute  
24 doesn't say single mailing?

25 MR. WALLSHEIN: It says single envelope, but it's



1           like - - - well, it's a little envelope, one little  
2           envelope, and a big envelope.

3                       Well, it's a good question, and it's - - - I  
4           don't - - - I wouldn't know. I would say no, but again,  
5           not before us. I mean, I'm sure I can research something  
6           about multiple envelopes - - -

7                       JUDGE WILSON: I'm just trying to see how  
8           literally you want us to read the words here.

9                       MR. WALLSHEIN: I think the - - - and I see my  
10          red light is on.

11                      But I think the decision ultimately from this  
12          court would be to look into the legislature's minds  
13          somewhat and say, What did they mean? And they meant - - -  
14          they want to help people. They don't want them to panic.  
15          They don't want them to do nothing. They want them to save  
16          their homes.

17                      Now, clearly I believe that Judge Scheinkman and  
18          the other chief judges and administrative judges for these  
19          - - - they spent a lot of money. They funded - - - they  
20          have in the basement especially of Nassau County; they run  
21          a top-notch - - - top-notch shelf there - - - show there.

22                      And what they do is the housing counselors  
23          usually carry the person through. They do the same thing  
24          in Suffolk; they do the same thing in Queens. And I'm  
25          mentioning these counties because those are the ones I'm



1 familiar with. Also the same thing in Br - - - in Kings  
2 County.

3 These people are helped all the way through the  
4 process, and these - - - the housing counselors, which is,  
5 I would hope - - - I'm glad I had this opportunity to talk  
6 about what they do - - - is they actually help people.

7 And if anything - - - and I believe that the  
8 legislature believes - - - and listen, no statute is  
9 perfect, right? None of them are perfect. But the  
10 legislature says, Accept this one literally. That we want  
11 people - - - and give it the purpose for this panel to read  
12 the purpose - - - call a housing counselor, because we are  
13 going to keep foreclosure cases out of the IAS part.  
14 That's the ultimate goal, and I think this statute does  
15 exactly that.

16 And to start wondering what would be and what  
17 would not be an acceptable notice, helpful or not helpful,  
18 you can send those in other envelopes.

19 ACTING CHIEF JUDGE CANNATARO: Thank you,  
20 Counsel.

21 MR. WALLSHEIN: You put them somewhere else.

22 ACTING CHIEF JUDGE CANNATARO: Thank you.

23 MR. WALLSHEIN: Thank you very much, Your Honor.

24 MS. BERGER: A couple of points.

25 One is with the best of intentions you can mail



1 separate notices on the same day, and they may or may not  
2 arrive on the same day.

3 So I think one way to look at what's a separate  
4 notice, to answer your question, is if you got in the mail  
5 the paragraph - - - the last page, page seven of seven in  
6 this notice, and it came all by itself, would you have any  
7 understanding of what it was trying to tell you? I don't  
8 think so. That's why it's not an "other notice or  
9 mailing". An "other notice or mailing" is something that's  
10 completely - - -

11 JUDGE RIVERA: Well, that's because it's written  
12 in a way that it follows, right?

13 MS. BERGER: Correct.

14 JUDGE RIVERA: As opposed to you could rewrite it  
15 in a way with an appropriate preface that would make it  
16 clear, no?

17 MS. BERGER: Yes. And in fact, lenders do send  
18 out separate notices to service members and so forth, but  
19 this is a reminder to service members that they have  
20 additional rights. And this idea that the legislature  
21 wanted you to call only housing counselors is not - - -

22 JUDGE RIVERA: All my point was that is - - - in  
23 response in part to what you're saying, is whether or not  
24 the court says you can do this doesn't mean you have to do  
25 this.



1 MS. BERGER: That is true.

2 JUDGE RIVERA: Right? You could send it in a  
3 separate envelope if you wanted to - - -

4 MS. BERGER: Yes.

5 JUDGE RIVERA: - - - unless there's a federal  
6 requirement that it be the first mailing and there's some  
7 other issue around that, but let's put that one to the  
8 side.

9 MS. BERGER: But there's a case that's part of  
10 the record where a borrower challenged as a separate notice  
11 the cover page, which had the address of the borrower, and  
12 then the prescribed language was on a second page. And the  
13 court said, well, under Kessler, that's a separate notice  
14 because it has the letterhead of the servicer and it's the  
15 address.

16 So that can't be what - - - we can't read the  
17 statute literally. We don't have to because it says,  
18 "shall include". And if the legislature wanted to say,  
19 "shall only include" - - - they went to back into session  
20 today - - - you know, they can do that.

21 I just wanted to pick up - - -

22 JUDGE RIVERA: Let me ask you this. What if it  
23 said - - - I know it doesn't, but let's just work with this  
24 for a moment - - - shall give notice to the borrower in at  
25 least fourteen-point type, stating. It said nothing else,



1           stating, or stating the following, we'll keep it similar to  
2           the language.

3                       MS. BERGER:  Instead of "shall include?"

4                       JUDGE RIVERA:  Correct.  What about that?  Is  
5           that now exclusive?

6                       MS. BERGER:  I don't think it is exclusive  
7           because it doesn't say "only".  It might be closer to  
8           exclusive, but I would say no.

9                       JUDGE RIVERA:  It's a hard argument, I think, for  
10          you to make on that one.  And it's purely hypothetical, but  
11          that's not the statutory language.

12                      MS. BERGER:  Right, because it says, "shall  
13          include".

14                      And this - - - I was starting to say before that  
15          this idea that this - - - the legislature was focused  
16          solely on housing counselors is not correct because the  
17          prescribed text requires the lender to include a phone  
18          number for the lender or servicer to contact as an option.  
19          It requires in the required language to include a phone  
20          number for department of - - - New York State Department of  
21          Financial Services to call.  So it's giving the borrower  
22          several options to avail themselves of.  The last page of  
23          this notice gives more options.

24                      So I - - - you know, it's hard to understand how  
25          that would be contra to the language.  I think, as the



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court knows, you have to look at - - -

JUDGE RIVERA: Does it matter that it's only one page and two other points? If you had twenty-five pages, would that somehow be undermining the purpose and intent?

MS. BERGER: It could if the twenty-five pages had a lot of material that was not germane here. I gave some examples before. I don't think the number of pages, per se, is what's determinative. I think it's the content and whether it's designed to bridge that communication gap.

ACTING CHIEF JUDGE CANNATARO: Thank you.

MS. BERGER: Thank you.

(Court is adjourned)



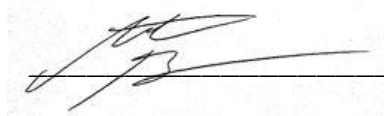


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C E R T I F I C A T I O N

I, Xavier Austin Reyna, certify that the foregoing transcript of proceedings in the Court of Appeals of Bank of America v. Kessler, No. 4 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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