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A Case Of The Denials

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On May 3, 2017, the Court of Appeal for the State of California certified for publication its ruling in *Berman v. HSBC Bank USA, N.A.*¹ This was truly a case of the denials dealing with: denial letters, a lender allegedly in denial, and a borrower being denied. The court didn't hold back within its opinion making it abundantly clear that the statutes must be strictly complied with, despite any alleged frivolous intentions or other delay tactics being used by the borrower.

The nonjudicial foreclosure process in California is primarily governed by statute. This becomes problematic when the relevant sections utilize subjective terms like "material" and "reasonable." In a highly litigious industry like ours, it's not surprising that these terms routinely become the focal point of lawsuits. One of these recent cases, *Berman v. HSBC Bank USA, N.A.*², focused on what constitutes a "material violation" of the California Homeowner's Bill of Rights.

The appellate court reversed the trial court's ruling by holding that the listing of a 15-day appeal period in a denial letter (instead of providing the required 30 days) amounted to a "material violation" of the California Homeowner's Bill of Rights.

Cal. Civ. Code 2923.6(d) reads as follows, "If the borrower's application for a first lien loan modification is denied, the borrower shall have at least 30 days from the date of the written denial to appeal the denial and to provide evidence that the mortgage servicer's determination was in error." Furthermore, the statute provides in relevant part that the servicer, "shall not record a notice of default or, if a notice of default has already been recorded, record a notice of sale or conduct a trustee's sale until the later of: (1) Thirty-one days after the borrower is notified in writing of the denial ..."

In this case, the borrower never appealed the denial and a trustee's sale never occurred. Nonetheless, the court held that by providing the borrower with 15 days within the letter instead of the required 30 days, a "material violation" of the statute had occurred. This "material violation" triggered the injunctive relief available to the borrower under Cal. Civ. Code 2924.12, and the court ruled that this would remain in place until the court determines that the lender has corrected and remedied the violation – which can be done by issuing an amended denial letter providing a period of no less than 30 days for the borrower to appeal.

At the conclusion of the opinion, the court addressed Respondent's claim that the "meritless action is nothing more than a delay tactic" by commenting that any alleged frivolous intent would have no bearing on the Appellant's right to relief. Simply put, the occurrence of the "material violation" triggered the injunctive relief provided in the statute. In responding to Respondent's comments as to the delays caused by the litigation, the court rather blatantly calls out the "stubborn refusal to correct [the] error in the intervening two and one-half years."

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This case reinforces the importance of reviewing notice templates and business processes at the state level to ensure full legal compliance. Notably, there are many provisions under the California and Nevada Homeowner's Bill of Rights that go above and beyond the federal CFPB servicing regulations. One of these areas is the consumer/borrower right to appeal.

In California, if a complete application for a first lien loan modification has been submitted and subsequently denied then the statute provides a qualifying borrower with at least 30 days from the date of the written denial letter to appeal the decision.³ In Nevada, if a complete application for a foreclosure prevention alternative has been submitted and subsequently denied then the statute forbids the servicer from proceeding



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with the next foreclosure milestone until at least 31 calendar days after the borrower was sent the written denial statement.⁴ Under the relevant CFPB regulations, a qualifying consumer is afforded the right to appeal a denied loan modification if their application was submitted at least 90 days before a scheduled foreclosure sale or if no foreclosure sale had been scheduled.⁵

Although these requirements read similarly, there are important differences. For example, the CA HBOR and CFPB regulations provide the right to appeal decisions concerning loan modifications, but the NV HBOR statutes open the appeal to any foreclosure prevention alternative. Additionally, although the CFPB's right to appeal is only triggered if the consumer had submitted the package at least 90 days before a scheduled foreclosure sale or if no foreclosure sale had been scheduled, in California and Nevada the statutory sale period can be less than 30 days. Therefore, there can be situations where because a sale date has not been set when the consumer submits an application the CFPB regulations can be triggered at what would end up being around 30 days before the sale.

Nuances like with the above denial/appeal provisions underscore the importance of working with local counsel to ensure full compliance with both federal and state law.

¹ *Berman v. HSBC Bank USA, N.A.*, 11 Cal. App. 5th 465, 2017 Cal. App. LEXIS 416 (Cal. App. 3d Dist. Apr. 11, 2017)

² *Id.*

³ Cal. Civ. Code 2923.6

⁴ NRS 107.530

⁵ 12 CFR 1024.41(h)



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