

## Closing in on Foreclosures

### Lawmakers revisit association rules after homeowners behind on fees lose homes.

By Jim Wasserman  
Associated Press

*(Updated Sunday, August 8, 2004, 5:52 AM)*

CHULA VISTA -- When Melissa Colburn first opened the letter that said her home had been sold out from under her for \$5,150 in a foreclosure auction, she thought it was a joke.

It wasn't. The association in her private community, the Villas at East Lake Shores, wanted \$990 in late dues and had sold her \$230,000, two-bedroom town house in this San Diego suburb without telling her or taking her to court, using a process called nonjudicial foreclosure.

After months of legal battles with the association and a San Diego law firm specializing in foreclosures, Colburn has her home back. But her case, along with others like it, has galvanized homeowner activists to change the legal system that governs life in what has become the nation's fastest-growing type of neighborhood.

As millions of Americans have moved into the 260,000 neighborhoods run by private associations, they've been hit by rules on pets and door colors, and hemmed by restraints on landscaping. If they're late with their association dues, sometimes by as little as \$120, the associations, backed by a network of property managers and attorneys, can foreclose on their homes.

Lawmakers throughout the nation have tried but mostly failed to stem what they see as a runaway problem. Now, however, California stands on the verge of banning foreclosure entirely in many instances, making nonjudicial foreclosure more difficult and rolling back the fee system that makes foreclosure lucrative to a small cadre of lawyers.

If approved this month by the Legislature and signed by Gov. Schwarzenegger, these changes will reshape how these neighborhoods work, especially how they collect their dues once residents get behind or don't pay.

"If California succeeds in this, that's going to send shock waves across the country," says Marjorie Murray, lobbyist with the Congress of California Seniors, which sponsored the bill because many retirees live in private communities. The 36 million-member American Association of Retired Persons is also lobbying lawmakers to pass it.

Unlike municipal governments seeking late property tax payments, homeowners associations are quicker to seek foreclosure and for sums far less than the price of a used car, studies show.

California counties must wait out five years of unpaid property taxes before they can auction a home. Across the country, most counties must give owners up to a year after foreclosure to buy back the house, according to the National Association of Counties.

Mortgage lenders also typically wait far longer to foreclose and work harder to work out alternatives, says Doug Duncan, chief economist of the Washington, D.C.-based Mortgage Bankers Association.

No definitive figures on foreclosure proceedings for unpaid homeowners' fees exist nationally. An unofficial survey of California's homeowners association lawyers released in June reported 19,450 foreclosure filings statewide over the past five years, and the sale of 145 homes for unpaid assessments. That figure may be low. One association attorney in Orange County, Larry Rothman, says he has processed 8,000 foreclosures in Southern California alone.

Foreclosures are a growing concern in other states as well.

Texas homeowner activists reported 15,000 association-driven foreclosure filings between 1985 and 2001, with 1,500 filed by just one Houston attorney.

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A 2001 survey by Oakland-based Sentinel Fair Housing, which looked at Alameda, Contra Costa, San Mateo, Santa Clara and Sacramento counties, found that \$2,557 was the median amount of back assessments on foreclosures in private communities. By comparison, the study found, debtors in more than 4,000 nonassociation foreclosures owed a median amount of \$190,000.

Association attorneys vigorously defend their practices and cast late-paying homeowners as the bigger threat to association life.

Some say lawmakers are responding to a disgruntled 3% of homeowners.

"I have been practicing law in this field for 30 years, and in that time, I can think of no cases in which an owners association really abused its assessment collection authority," says Sacramento attorney Curt Sproul.

### **Rule opens door to fees, penalties**

The law that allows today's practices sprang up in the 1980s, as California's number of association-run communities exploded.

Some residents didn't pay their bills, construction defects abounded and many associations lacked adequate reserves to maintain their properties.

In 1985, the Legislature emerged with the Davis-Stirling Common Interest Development Act, a law bearing the name of one of its co-sponsors, then-Assembly Member Gray Davis, a Los Angeles Democrat who would later become governor and then be recalled in a historic 2003 election.

Among the 17 pages of law regulating how associations govern, budget and assess their members were 12 lines to better motivate association residents who didn't pay on time, those whom Davis then called "deadbeats."

They would pay higher penalties and fees. With those higher costs came a greater risk of foreclosure, because if late-paying homeowners didn't pay the steadily escalating amount of money, the associations and their lawyers would start to foreclose.

That wasn't what the law intended, says California Western School of Law professor Katharine Rosenberry, who helped write the law as a legislative consultant.

"I recall almost no discussion about foreclosure during the hearings. It wasn't a hotly debated issue at all," says Rosenberry, who later became president of the Community Associations Institute, the association industry's trade group.

However, a legislative analysis of the bill in 1985 shows association boards complained that late fees were too low and wanted a crackdown on homeowners.

Some legislators thought Davis-Stirling too harsh and backed an alternative that would ban foreclosure for unpaid sums under \$1,500. Assembly Member Alister McAlister, D-Milpitas, introduced it during a period of public outrage and media coverage after a hometown constituent, Jeanette Swindle, lost her home in 1984 -- over \$205 owed her homeowners association.

Although McAlister's bill later died, it did pass the Assembly, where Davis called it "a vote for deadbeats, pure and simple."

Davis-Stirling allowed associations to bill for the costs of collection, automatically charge attorneys' fees without a judge's permission, impose a 10% late fee on the amount owed and collect up to 12% interest on the entire bill.

### **Law boosts collection business**

The law became a boon for lawyers and collectors, who received a tenfold increase in fees for pursuing delinquent homeowners. It also helped create what critics called legal "foreclosure factories" -- law firms and collection agencies that earn \$1,500 to \$2,000 filing nonjudicial foreclosure proceedings against individual homeowners behind on dues.

"They go in there and find a resident who gets a little behind and hit him with an assessment, and then tack on thousands of dollars in attorneys' fees," says Evan McKenzie, an Illinois political science professor who wrote the 1994 book "Privatopia," a history of U.S. homeowners associations.

California foreclosure attorneys frequently tout their aggressive tactics on Web sites, promising property managers and associations easy, no-cost foreclosure proceedings that charge all fees to delinquent homeowners.

Los Angeles-based California Association Lien Collections posts its fee schedule online: \$175 for a demand letter, \$295 plus costs to record the lien, \$300 plus costs for a notice of default and \$125 plus costs for a notice of sale.

Since the homeowner, not the association, pays those fees, the association has little incentive to hold down costs.

Association Lien Services, a division of the Los Angeles law firm Swedelson and Gottlieb, tells clients that once they've turned over the collection to ALS "the association should not have any further contact with the homeowner regarding the delinquent assessments and should not accept any money from the homeowner."

In the case of Tom and Anita Radcliff, retirees who had their home in Copperopolis, in the foothills east of Stockton, foreclosed on for \$120 in late dues, family members said no one from the association office ever visited to tell them of the mounting consequences over a small debt. Their association used nonjudicial foreclosure to auction off their \$285,000 home for \$70,000 last December.

In contrast, if a county wants to auction off a home for late property taxes, state law requires a visit to the homeowner.

Over the past 19 years, thousands of Californians have received demand letters from association attorneys, followed by warnings, notices of foreclosure proceedings and fees higher than the original debt -- and 99% have paid up. While homeowner advocates call the system predatory, association boards, collectors and lobbyists say it works.

"At any one of these stages, payment in full can stop additional legal fees from accruing," says attorney Debora Zumwalt, who oversees assessment collections for the San Diego-based law firm, Epstein Grinnell and Howell. "Simply recording a lien or obtaining a small claims judgment against an owner rarely motivates an owner to bring his or her amount current."

### **Back to the legal drawing board**

But, increasingly, California legislators disagree, saying homeowners lack sufficient protections. By all indications, the Legislature is days away from passing legislation to throw out foreclosure entirely as a method for homeowners associations to collect debts under \$2,500. Already bills doing that have passed the Assembly and Senate. They're awaiting final votes this month before going to Schwarzenegger. The bipartisan push is motivated in part by the high-profile cases of Colburn and the Radcliffs.

Associations need to be able to collect their dues, says Sen. Denise Ducheny, D-San Diego, the leading force in California behind curbing foreclosure powers. "At the same time they need to look at other debt collection procedures before they go to these extreme measures."

Her legislation would send collectors to small claims court, boot attorneys out of the collection process and stop fees that typically dwarf the original amount owed.

Colburn, whose troubles started when her association stopped sending her bills, says judges should "be watching the shop. If someone can take your home for a small amount of money, somebody should be looking at it to protect people."

Molly Foley-Healey of the Virginia-based Community Associations Institute calls Ducheny's approach an anti-consumer bill masquerading as a benefit to consumers.

With the \$2,500 threshold, she says, homeowners will quit paying their dues up to that point, which will force associations to punish other residents with higher dues to make up the losses.

In the coming days, those on both sides of the debate say they'll be watching what happens in California, often a trendsetter for other states.

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