

**COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT**

**ARLYNE M. DIAMOND, Ph.D,**

**Petitioner,**

**vs.**

**SUPERIOR COURT OF THE STATE OF  
CALIFORNIA, COUNTY OF SANTA CLARA,**

**Respondent,**

**CASA DEL VALLE HOMEOWNERS  
ASSOCIATION,**

**Real Party in Interest.**

**Case No. H038734**

**Related Writ No. H038536**

**Santa Clara County  
Superior Court  
Case No.: CV099053**

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**Hon. Mark Pierce, Judge  
Dept. 9**

**APPLICATION OF AARP FOR LEAVE TO FILE  
AMICUS CURIAE BRIEF AND PROPOSED  
BRIEF IN SUPPORT OF PETITIONER**

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**APPLICATION OF AARP FOR LEAVE TO FILE  
AMICUS CURIAE BRIEF AND PROPOSED BRIEF  
IN SUPPORT OF PETITIONER**

**To the Honorable Presiding Justice Rushing and the Honorable Associate Justices of the Court of Appeal for the State of California, Sixth Appellate District:**

Pursuant to Rule of Court, rule 8.200(c), AARP respectfully requests leave to file the accompanying brief as amicus curiae in this proceeding in support of Petitioner's request for a preemptory writ of mandate or other appropriate relief. A copy of the brief accompanies this application.

AARP has appeared before other courts in cases that specifically addressed homeowners' rights in foreclosure actions. AARP advocated for amendments to the Davis-Sterling Act to give condominium owners increased notice and other rights when faced with foreclosure actions initiated by homeowner associations.

No party other than AARP and its counsel authored the proposed amicus brief in whole or in part or made a monetary contribution to the preparation or submission of the brief.

**STATEMENT OF INTEREST**

AARP is a nonpartisan, nonprofit organization of members age 50+ dedicated to assuring that older Americans have independence, choice and control in ways beneficial and affordable to them and to society as a whole. AARP Public Policy Institute's analysis indicates that as of 2003, 46 percent of owners in single-family homeowner association communities

were over the age of 50, as were 56 percent of owners in condominium/coop communities.<sup>1</sup> AARP California further specifically advocated for the passage of the amendments that are at issue in this case.

## ARGUMENT

### **I. ALTHOUGH HOMEOWNER ASSOCIATIONS GENERALLY OPERATE TO THE MUTUAL BENEFIT OF RESIDENTS, SOME ASSOCIATIONS HAVE ENGAGED IN EXCESSIVE LITIGATION WHICH CAN BE DEVASTATING TO OLDER HOMEOWNERS.**

Approximately eight million Californians live in a home located within a Common Interest Development (CID). (Zupanic, *Review of Selected 2005 California Legislation: Civil: Keeping Homes Off The Auction Block: California Limits Foreclosures By Homeowners Associations* (2006) 37 McGeorge L.Rev. 199, 203.) While homeowner or condominium associations play a valuable role in modern America, and generally operate amicably to the mutual benefit of residents, some associations unfortunately have engaged in excessive, expensive litigation.<sup>2</sup>

The use of foreclosure as an enforcement tool on those having difficulty paying homeowner special assessments can be devastating and

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<sup>1</sup> Kochera, *In Brief A Bill of Rights for Homeowners in Associations: Basic Principles of Consumer Protection and Sample Model Statute* (July 2006) AARP Public Policy Inst. <<http://bit.ly/W6tUha>> [as of Nov. 13, 2012].

<sup>2</sup> Kochera, *supra*; see also Diament, *Foreclosures by Homeowner Associations*, AARP Bulletin (Aug.10, 2011) <<http://www.aarp.org/home-garden/housing/info-08-2011/foreclosure-by-homeowners-association-outrage.html>> [as of Nov. 13, 2012].

particularly severe for older homeowners, whose homes typically represent their single largest asset. (Kochera, *supra*.) Frequently these homeowners, like the homeowner in this case, are current on their mortgage and the only threat of foreclosure comes from the Homeowner Association in the complex they live in. Unfortunately, some associations pursue foreclosure even after homeowners are in the process of repaying special assessments for repairs. (*Id.* at p.5.) Older people have a harder time adjusting to unexpected housing or other living costs because they face higher healthcare and drug costs and often live on fixed incomes. (Trawinski, *Nightmare on Main Street: Older Americans and the Mortgage Market Crisis* (July 2012) AARP Public Policy Institute, p. 4 <<http://bit.ly/QggLDE>> [as of Nov. 13, 2012].)

**II. CALIFORNIA CONTINUES TO SUFFER FROM HIGH RATES OF FORECLOSURE AND A LACK OF HOUSING THAT IS AFFORDABLE FOR EVEN MIDDLE-INCOME FAMILIES.**

Since 2008, an estimated 1.2 million homeowners in California have lost their homes to foreclosure, and another 800,000 are estimated to receive foreclosure notices. (Nguyen, *California: Ground Zero for America's Foreclosure Crisis* (July 2011) New America Media <<http://bit.ly/nnK1JZ>> [as of Nov. 13, 2012].) California has the second highest rate of foreclosures in the nation, second to only Nevada.

(CNBC.com, *States with the Highest Foreclosure Rates*, at 10 (July 2011) <<http://bit.ly/QCpTEL>> [as of Nov. 12, 2012].)

From 2007 to 2011, the number of older Americans who were seriously delinquent on their mortgages increased 456 percent, from 1.1 percent in 2007 to 6.0 percent in 2011. (Trawinski, *supra*.) People aged 50+ who are delinquent on their housing costs are more likely to develop depressive symptoms, and are likely to cut back on food purchases and prescription drugs. (Alley et al., *Mortgage Delinquency and Changes in Access to Health Resources and Depressive Symptoms in a Nationally Representative Cohort of Americans Older Than 50 Years*, 101 *American J. of Public Health* 2293(Dec. 2011).<sup>3</sup>) Because of California's unusually high housing costs, many Californians are forced to spend less on food, clothing, healthcare and other necessities because they are unable to afford the cost of housing. (California Budget Project, *Locked Out 2008: The Housing Boom and Beyond* (Feb. 2008) p. 4.)

### **III. THE TRIAL COURT ERRED IN HOLDING THAT "SUBSTANTIAL COMPLIANCE" SATISFIES THE PURPOSE OF THE ACT.**

The most frequently cited reason for passage of the 2005 amendments to the Davis-Stirling Act (the Amendments) was to provide greater protection to homeowners in light of the fact that the home is one of the most valuable assets a person may ever own. (Zupanic, *supra*, at p.

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<sup>3</sup> Available at <http://www.ncbi.nlm.nih.gov/pubmed/22021301>.



204, fn. 4, citing Assem. Comm. on Housing and Community Development, Comm. Analysis of Sen. Bill 137 (2005-2006) (June 29, 2005), p. 5 [noting seniors particularly were in need of protection]). Specifically the Amendments sought to “reform the process and methods by which homeowner associations may collect delinquent assessments” and to impose certain requirements when a Homeowner Association sought to use the remedy of foreclosure. (E.g., Assem. Com. on Housing and Community Development, Comm. Analysis of Sen. Bill No. 137 (2005-2006 Reg. Sess.) June 29, 2005, p. 4.) In addition to losing their homes, delinquent homeowners may lose any equity they have built up over the years, resulting in a “double tragedy”. (Zupanic, *supra*, at p. 204.) AARP advocated for enhanced protections for homeowners who owned homes in condominium complexes and other CIDs after finding that excessive, expensive foreclosure litigation was being initiated against homeowners by associations nationwide. (Kochera, *supra*, at pp. 4-7.)

The Legislature’s purpose in the Amendments was clearly to provide enhanced protection for the homeowner. (See, e.g., Sen. Com. on Judiciary, Analysis of Sen. Bill No. 137 (2005-2006 Reg. Sess.) Mar. 29, 2005, p. 9.) The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. “Statutes should be construed so as to be given a reasonable result

consistent with the legislative purpose." (*People v. Superior Court* (1969) 70 Cal.2d 123, 132.)

The Amendments constitute remedial legislation and as such should be liberally construed in favor of the homeowner. (*Prunty v. Bank of America* (1974) 37 Cal.App.3d 430, 436, 441-442 [Holding that since the "spirit" of Code of Civil Pro. § 580b was to protect the borrower, the statute must be afforded a liberal construction in light of the legislative purpose].)

The requirement in the Amendments that the homeowner association vote before foreclosing on a delinquent assessment lien and record that vote in its minutes was intended to add transparency to the foreclosure process and create an additional safeguard against the use of foreclosure as an automatic remedy without regard to individual circumstances. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 137 (2005-2006 Reg. Sess.) Mar. 29, 2005, p. 9.)<sup>4</sup> The additional requirement of the publication in the minutes of the board decision is not simply a measure designed to protect homeowner's privacy, as the trial court concluded, but the publication serves as an additional protection for the homeowner and can not be disregarded. (Civil Code § 1367.1(d)(1).)

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<sup>4</sup> Available at < [http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb\\_0101-0150/sb\\_137\\_cfa\\_20050329\\_171022\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_0101-0150/sb_137_cfa_20050329_171022_sen_comm.html)>.

Citing Civil Code section 4, the trial court erred in holding that “substantial compliance” with the notice provisions of the Amendments was sufficient. While Civil Code section 4 abrogates the common law rule of strict construction, that section specifically provides that the Civil Code’s provisions “are to be liberally construed with a view to effect its objects and to promote justice”. (Civ. Code § 4.) The legislature here intended mandatory compliance with the notice provisions. Specifically, Civil Code section 1367.1(l)(1) provides:

An association that fails to comply with the procedures set forth in this section *shall*, prior to recording a lien, recommence the required notice process. (Italics added)

The use of the word “shall” coupled with the legislative intent to protect homeowners clearly indicates that the notice provisions are mandatory and should be followed. Failing to comply with these provisions eviscerates the intent of the legislature and harms homeowners, a result the legislature did not intend.

## CONCLUSION

For all the foregoing reasons, the trial court decision should be reversed.

Respectfully Submitted,

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Dated: November 20, 2012

## CERTIFICATE OF COMPLIANCE

I, BARBARA JONES, certify as follows:

I am counsel of record for amicus curiae. I hereby certify that the attached brief uses a 13 point Times New Roman font. According to the word processing program, Microsoft Word, I used to prepare this brief, the text of the brief (excluding signatures and this certificate) and contains 1435 words in length.

Dated: November 20, 2012

Respectfully submitted,

/s/Barbara A. Jones  
Barbara A. Jones  
Attorney for AARP

**PROOF OF SERVICE**

I am employed in Washington DC. I am over the age of 18 years and am not a party to the within action. My business address is 601 E Street, NW. On November 20, 2012, I caused the foregoing documents described as:

**Application of AARP For Leave To File Amicus Curiae Brief and Proposed Brief In Support of Petitioner**

to be served on the interested parties in this action as follows:

by placing  the original  a true copy thereof enclosed in sealed envelopes addressed as follows:

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**The foregoing document was filed with the Court of Appeal as follows:**

Clerk of the Court (Orig & 4 copies)  
Electronic Copy via Court's website  
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Pursuant to Cal. Rule of Court, rule 8.212 (c) one copy of the proposed brief was served electronically on the California Supreme Court's electronic notification address

X **BY OVERNIGHT DELIVERY:** I caused such envelope to be placed for collection and delivery on this date in accordance with standard federal express overnight delivery procedures.

/s/Jacqueline Crawford  
Jacqueline Crawford