Health and Safety

Chapter 376: Grandpa’s RCFE has a Confession—It’s Foreclosed

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Code Section Affected
SB 897 (Leno); 2011 STAT. Ch. 376.

I. INTRODUCTION

When sheriff’s deputies arrived to evict elderly residents from a San Jose care home in September 2009, the deputies were met with shock.¹ The residents, several who were bedridden, had no idea the bank had foreclosed the home.² Indeed, before the legislature enacted Chapter 376, administrators of residential care facilities for the elderly (RCFE) did not have to tell residents about a facility’s financial state.³ Unfortunately, the San Jose case was not an isolated incident—forty-one “RCFEs were in foreclosure or had been foreclosed between January 2009 and March 2010.”⁴

An RCFE is defined as “a housing arrangement chosen voluntarily by persons 60 years of age or over, or their authorized representative, where varying levels and intensities of care and supervision, protective supervision, or personal care are provided, based upon their varying needs . . . .”⁵ There are approximately 8,000 RCFEs in California; “the vast majority of RCFEs are located in single-family dwellings with a mortgage on the property.”⁶

¹. Laurie Udesky, When Foreclosure Threatens Elder-Care Homes, N.Y. TIMES, Apr. 18, 2010, at A27A.
². See id. (“Neither the residents nor their families had been warned about an eviction . . . .”). The sheriff’s department worked with agencies to transfer the residents elsewhere, instead of forcibly evicting them. Id.
³. Id.
⁴. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 897, at 3 (May 24, 2011).
⁵. CAL. HEALTH & SAFETY CODE § 1569.2(k) (West 2008).
⁶. 2011 Cal. Stat. ch. 376, § 2(a)–(b); see also SENATE FLOOR, COMMITTEE ANALYSIS OF SB 897, at 4 (Sept. 7, 2011) (“According to . . . data from 2007, approximately three-quarters of RCFEs are licensed for six or fewer residents; the remaining RCFEs have an average licensed capacity of approximately 60 residents.”).

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Banks foreclosed numerous homes in the wake of the 2008 housing market collapse. Indeed an April 2010 analysis by the New York Times revealed that “more than 100 elder-care homes in the Bay Area were under foreclosure in the last six months, and that as many as 700 residents—who often need help with bathing, eating and other daily activities—may have faced eviction.” The New York Times also reported that the California Department of Social Services (DSS), which regulates RCFEs, does not require RCFE administrators to submit a long-term financial plan; instead a facility only needs to show it has enough cash to operate for a minimum of three months.

Senator Mark Leno introduced Chapter 376, the RCFE Residents Foreclosure Protection Act of 2011, because “elderly residents, who are often frail . . . can suffer irreparable [physical and emotional] injury when they are required to move . . . by peace officers.” Chapter 376 requires an RCFE to notify its residents and the State if the facility faces foreclosure or bankruptcy.

II. LEGAL BACKGROUND

A. Existing Legal Protections for RCFE Residents

The California Residential Care Facilities for the Elderly Act of 1985 (the Act) regulates community-based elderly housing. Legislation prior to the Act concerning elderly housing primarily focused on state-run hospitals. The Act requires RCFE administrators to receive a state license. In addition, the Act gives DSS the power to regulate RCFEs. These regulations require RCFEs to, among other things, maintain a “clean, safe, [and] sanitary” facility at all times, and follow detailed instructions on how to deal with residents who require

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7. See William Heisel, California Home Foreclosures Top 236,000 in 2008, L.A. TIMES, Jan. 28, 2009, at A1 (noting that the foreclosure wave was triggered in 2007).
8. Udesky, supra note 1.
9. Id.
12. CAL. HEALTH & SAFETY CODE § 1569.686(a) (enacted by Chapter 376).
14. See id. (enacting HEALTH & SAFETY § 1569.1(c)) (noting that the primary purpose of earlier legislation was to “ensur[e] that residents of state hospitals would have access to safe, alternative community-based housing”).
15. Id. (enacting HEALTH & SAFETY § 1569.10); see also id. (enacting HEALTH & SAFETY § 1569.2(a)) (defining an administrator as “the individual designated by the licensee to act on behalf of the licensee in the overall management of the facility” who may be the same person as the licensee).
16. See id. (enacting HEALTH & SAFETY § 1569.1(h)) (requiring “that residential care facilities for the elderly be licensed as a separate category within the existing licensing structure of the State Department of Social Services”).
oxygen administration. DSS can perform spot inspections and unannounced visits to ensure compliance. The Act provides that violators will be guilty of a misdemeanor, and can be fined up to $1,000 or imprisoned in county jail for up to a year. Further, the Act allows the Director of DSS to temporarily suspend an RCFE’s license “to protect residents or clients of the facility from physical or mental abuse, abandonment, or any other substantial threat to health or safety.”

In addition to the Act, the State Long-Term Care Ombudsman also protects RCFE residents by resolving complaints with their facilities. Members of the ombudsman’s office have the right of entry into RCFEs to investigate complaints. The office also operates a twenty-four hour hotline “to receive telephone calls concerning any crises discovered by any person in a long-term care facility.” Finally, the office can refer complaints to DSS.

In 2010, the legislature passed Senate Bill 1329 (S.B. 1329), which was substantially similar to Chapter 376. Notably, S.B. 1329 imposed mandatory penalties on an RCFE if a facility violated a provision of the statute. Governor Schwarzenegger vetoed S.B. 1329 in September 2010.

III. CHAPTER 376

Chapter 376 requires a RCFE to “notify the [DSS], the State Long-Term Care Ombudsman, all residents, and . . . their legal representatives, in writing, within two business days” if the facility experiences or is aware of certain events that indicates the RCFE is in “financial distress.” These events include “[a]
notice of default, notice of trustee’s sale, or any other indication of foreclosure . . . issued [against] the property.” 30 Chapter 376 also mandates that the RCFE notify these parties if the RCFE is the subject of an unlawful detainer action, or files for bankruptcy. 31 If the RCFE fails to comply with the notification requirements imposed by Chapter 376, it may have to pay a civil penalty of up to $100 for each day it fails to provide notice, not to exceed $2,000. 32

Additionally, a RCFE may face harsher penalties if the facility relocates a resident without giving them proper notice of the facility’s financial distress. 33 If a resident is relocated without proper notice of the facility’s financial distress “and suffers transfer trauma or other harm to his or her health or safety” DSS may revoke the RCFE’s license or permanently prevent the facility from operating within California. 34 Chapter 376 does not apply to facilities that have obtained “a certificate of authority” from the state. 35

IV. ANALYSIS

A. “Transfer Trauma” and the Need for Additional Notification Requirements

In theory, if a RCFE provided adequate notice of its financial distress, residents and their families would likely seek out another facility that could adequately provide for their needs. 36 If the administrator handled this notification with care, they could potentially alleviate the stress or concerns experienced by

30. HEALTH & SAFETY § 1569.686(a)(1) (enacted by Chapter 376).
31. Id. § 1569.686(a)(2)–(3) (enacted by Chapter 376). An RCFE must also provide notice if it is notified that a utility company intends to terminate service or the licensee receives a written notice of rent default; see id. § 1569.686(a)(4)–(5) (enacted by Chapter 376). Furthermore, when the DSS receives notice, it “shall initiate a compliance plan, noncompliance conference, or other appropriate action.” See id. § 1569.686(b) (enacted by Chapter 376).
32. Id. § 1569.686(c) (enacted by Chapter 376).
34. HEALTH & SAFETY § 1569.686(c) (enacted by Chapter 376). Transfer trauma is a serious medical condition that can occur when an elderly resident is relocated from their home or care facility. Udesky, supra note 1.
35. HEALTH & SAFETY § 1569.686(e) (enacted by Chapter 376). Facilities that have obtained a certificate of authority have the express authorization of the State to enter into “one or more continuing care contracts at a single specified continuing care community.” Id. § 1771(c)(5) (West Supp. 2011). Continuing care retirement communities (CCRCs) are subject to stricter standards than RCFEs: they must obtain a state certificate of authority, an RCFE license, and a Skilled Nursing Facility License if they offer such services. CAL. DEP’T SOC. SERVS., CONTINUING CARE RETIREMENT COMMUNITY, http://www.calcerc.ca.gov/ (last visited Apr. 13, 2012) (on file with the McGeorge Law Review).
36. See Udesky, supra note 1 (noting one RCFE administrator who claimed if her facility was in trouble she would provide adequate notice so her residents could “find alternative housing”).
residents and their families. However, under existing law, RCFE administrators have no incentive to notify their residents because such notification might cause residents to leave at a time when the RCFE is most in need of additional funds. As a result, an administrator might prefer staying silent to avoid losing business.

The events in San Jose illustrate what can happen when residents are unaware of an RCFE’s financial distress. In the worst-case scenario, residents confronted with a sudden relocation might experience a severe emotional and physical condition known as “transfer trauma.” People who suffer from transfer trauma may experience depression and loss of trust as well as changes in eating habits and increased risk of falling. The condition can be fatal and some studies have found that death can occur just hours or days after transfer to a new facility.

Chapter 376 supplements existing law protecting RCFE residents by requiring a facility to notify its residents in case of a foreclosure or bankruptcy. According to the California Advocates for Nursing Home Reform (CANHR), one of the bill’s co-sponsors, these additional notification requirements “will ensure that residents will be better able to plan for a possible move and avoid dangerous last-minute evictions.” Given that RCFE administrators might not report their financial distress without the threat of a legal penalty and that residents may experience transfer trauma as a result, Chapter 376 provides a simple method for notifying residents in order to avoid potential hardship for elderly residents.

Chapter 376 gives RCFEs a maximum of two business days to notify residences of an event indicating financial distress. This timeframe forces an RCFE administrator to act quickly, but provides the time to prepare a careful

37. Supporters of Chapter 376 believe the notice requirements in the bill provide this relief. See, e.g., SENATE FLOOR, COMMITTEE ANALYSIS OF SB 897, at 6 (May 24, 2011) (noting that Bet Tzedek Legal Services, a co-sponsor of the bill explains that “notice to RCFE residents will . . . give them additional time to prepare for possible transfer to a new facility”).

38. See id. (reporting that the Ombudsman of San Mateo “handled eight foreclosures of elder-care homes in the last two years, and few owners gave warning to residents or their families . . . . [The RCFE owners] themselves are going through hell. They’re losing their homes and their businesses.”).

39. Id.

40. Id.

41. See id. (noting proponent arguments that some residents of RCFEs are “more vulnerable to emotional and physical trauma and placement in facilities that cannot meet their care”); Udesky, supra note 1 (quoting a gerontologist who explains that if patients with dementia are forced to relocate suddenly this “abrupt change could cause severe anxiety and decline known as transfer trauma”).


43. Id.

44. CAL. HEALTH & SAFETY CODE § 1569.686(a)(1), (3) (enacted by Chapter 376).

45. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 897, at 5 (May 24, 2011) (noting the arguments in support of the bill).

46. HEALTH & SAFETY § 1569.686(a) (enacted by Chapter 376).

47. Id.
notification that reduces the risk of transfer trauma and allows residents and their families to make an informed decision about whether to remain with the facility.  

B. Administrator Concerns and Unintended Consequences

Some RCFE administrators argue that telling residents about a facility’s financial condition, even if the facility can survive its current fiscal problems, may cause residents to leave. For example, one administrator of a foreclosed facility thought she had reached an agreement with her lender to prevent foreclosure but did not tell her residents: “There’s no need to alarm the families,” she told the New York Times. While DSS can use discretion in enforcing Chapter 376, such discretion would be little consolation to RCFE administrators who have lost residents. Another administrator explained that her facility was foreclosed by mistake. Indeed, if an RCFE is accidentally foreclosed—a low, but possible risk given the foreclosure “robo-signing” controversy—Chapter 376 might have the unintended consequence of forcing some fiscally-sound RCFEs out of business as its residents move to other facilities. Chapter 376 requires a facility to notify its residents in case of any foreclosure notice, even a mistaken one. Despite these concerns, CANHR, one of Chapter 376’s co-sponsors believes that residents would be better off knowing about the facility’s financial condition in advance, rather than face a sudden—and possibly traumatic—forced relocation. But if an RCFE is foreclosed by mistake, residents who choose to leave may experience unnecessary stress as they and their families try to find a new facility.

48. **SENATE FLOOR, COMMITTEE ANALYSIS OF SB 897**, at 6 (May 24, 2011) (noting that AARP, one of the bill’s supporters, states that notice allows “residents [to] consider whether to reevaluate their continued residence”).
49. Udesky, supra note 1.
50. **Id.**
51. **HEALTH & SAFETY §1569.686(c)** (enacted by Chapter 376).
52. See, **e.g.**, Udesky, supra note 1 (quoting an RCFE administrator who says her facility was foreclosed by mistake).
53. **Id.**
54. See Scott J. Paltrow, **Banks Still Robo-Signing, Filing Doubtful Foreclosure Documents**, REUTERS (July 18, 2011), http://www.reuters.com/article/2011/07/18/foreclosure-banks-idUSL3E7II1UC20110718 (on file with the McGeorge Law Review) (describing the controversy in which employees at some financial institutions signed off on thousands of foreclosure documents without ever reading or checking the paperwork. A recent investigation revealed the practice still occurs, although “the vast majority of homeowners in foreclosure are in fact delinquent on their mortgage payments.”).
55. **HEALTH & SAFETY § 1569.686(a)(1)** (enacted by Chapter 376); see also Udesky, supra note 1 (noting how Wells Fargo, which owned the mortgage on the San Jose property, did not know of the home’s RCFE status, but delayed the eviction upon knowledge).
56. **See SENATE FLOOR, COMMITTEE ANALYSIS OF SB 897**, at 5 (May 24, 2011) (“CANHR believes that the notification provided for in the bill will ensure that residents will be better able to plan for a possible move and avoid dangerous last-minute evictions.”).
57. See, **e.g.**, Udesky, supra note 1 (describing one woman’s “hideous conversation” with an RCFE
C. Fiscal Impact

When Senator Mark Leno introduced Chapter 376, it contained language that was substantially similar to S.B. 1329, which Governor Schwarzenegger vetoed in 2010.\(^{58}\) The governor noted that S.B. 1329 “would represent a new unfunded workload and redirect scarce resources that are currently dedicated to immediate health and safety issues.”\(^{59}\)

Chapter 376 differs from S.B. 1329 in two important ways: (1) S.B. 1329 imposed a mandatory civil penalty on RCFE offenders while Chapter 376’s penalty is discretionary;\(^{60}\) and (2) S.B. 1329 did not require DSS to take action when it receives notice, while Chapter 376 does.\(^{61}\)

Does Chapter 376 satisfy Governor Schwarzenegger’s concerns about a new unfunded mandate? The Assembly Committee on Appropriations observed that costs “associated with the increased notification requirements would be minor and absorbable within DSS resources” and that the state may even save money because it would prevent the Attorney General from “becoming involved in litigation surrounding the closure [of an RCFE].”\(^{62}\) In contrast, the Department of Finance (DOF)—under Governor Brown—also opposed the bill, claiming it would add budgetary costs of “$41,000 . . . in fiscal year 2011–12 and $68,000 . . . in 2012–13 and annually thereafter due to an increase in DSS workload.”\(^{63}\) DOF also argued that DSS’ new responsibilities, on the whole, would be “unabsorbable without redirecting existing resources from other high priority licensing activities.”\(^{64}\) Finally, DOF argued that any civil penalties collected from RCFEs would not be significant because facilities in foreclosure “will not have the financial resources to pay additional civil penalties.”\(^{65}\)

DOF’s argument is credible because the plain language of Chapter 376 requires DSS to take action whenever it receives notice from an RCFE about potential financial distress.\(^{66}\) Because Chapter 376 requires DSS to take on more

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60. Compare S.B. 1329, supra note 26 (noting that violators “shall be liable”), with HEALTH & SAFETY § 1569.686(c) (enacted by Chapter 376) (noting that violators “may be liable”).

61. Compare S.B. 1329, supra note 26 (noting that “[u]pon receipt of notification the department may initiate a compliance plan, noncompliance conference or other appropriate action”), with HEALTH & SAFETY § 1569.686(b) (enacted by Chapter 376) (“the department shall initiate a compliance plan, noncompliance conference, or other appropriate action”) (emphasis added).

62. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 897, at 1 (July 12, 2011).

63. See CAL. DEP’T OF FIN., BILL ANALYSIS OF SB 897, at 1 (May 17, 2011) (estimating that the cost would arise from hiring one “permanent Licensing Program Analyst” to perform the site visits and enforce compliance).

64. Id.

65. Id.

66. See HEALTH & SAFETY § 1569.686(b) (enacted by Chapter 376) (noting the department shall take
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responsibilities than S.B. 1329 mandated, and without additional funding provided, it appears the legislature did not ameliorate Governor Schwarzenegger’s concerns. Nevertheless, CANHR, one of Chapter 376’s co-sponsors argues that the bill is worth the costs if it prevents transfer trauma and other consequences that may come from a sudden change in facilities.

D. Enforcement Issues

When Chapter 376 was introduced, it imposed mandatory civil penalties on facilities that violated its provisions. Subsequent amendments to Chapter 376 removed the mandatory penalty; the final version of the bill states violators “may be liable for civil penalties . . . .” This new language no longer requires DSS to impose a penalty on a RCFE that violates the statute and creates the possibility that a facility might not be punished if it fails to notify residents of its financial distress. Although the language of Chapter 376 gives regulators some flexibility, the discretionary nature of Chapter 376 means that state budget cuts might impact investigations into potential violations.

V. CONCLUSION

Images of elderly persons evicted from their homes are heartbreaking and cruel—they suggest a lack of respect and concern for some of California’s most vulnerable citizens. Chapter 376 requires RCFE administrators to notify their residents if the RCFE’s property is foreclosed upon. Chapter 376 penalizes RCFE administrators who would not disclose their facility’s financial distress in

“appropriate action” upon notice); CAL. DEP’T OF FIN., BILL ANALYSIS OF SB 897, at 1 (May 17, 2011) (explaining that this language will require the DSS to take on the following responsibilities: “[P]erform mandatory complaint visits initiated by the Ombudsman, initiate administrative actions against licensees of RCFEs in specific instances of financial distress, and assess and collect civil penalties.”).

67. See supra notes 60–61 and accompanying text (describing the differences between the two bills).

68. See SENATE FLOOR, COMMITTEE ANALYSIS OF SB 897, at 5 (May 24, 2011) (“CANHR believes that the notification provided for in the bill will ensure that residents will be better able to plan for a possible move and avoid dangerous last-minute evictions.”).


70. HEALTH & SAFETY § 1569.686(c) (enacted by Chapter 376) (emphasis added).

71. Id.; see also Paltrow, supra note 54 (describing the “robo-signing” controversy). But see CAL. DEP’T OF FIN., BILL ANALYSIS OF SB 897, at 1 (May 17, 2011) (arguing the DSS should not be required to take on additional responsibilities in a time of fiscal difficulty).


73. See Udesky, supra note 1 (quoting one of the sheriff deputies as saying: “I can’t believe [this foreclosure situation] has gone this far”).

74. HEALTH & SAFETY § 1569.686(a) (enacted by Chapter 376).
order to preserve rental income from their residents. It also attempts to prevent the serious problems associated with transfer trauma by implementing a standard procedure to protect residents of a financially distressed RCFE.

Despite Senator Leno’s desire to protect elderly RCFE residents, Chapter 376 is not a perfect solution. The language of Chapter 376 may lead to unintended consequences that might cause some residents to unnecessarily switch facilities. In addition, Chapter 376 imposes new costs and responsibilities on DSS, which may lead to less-effective enforcement, especially in difficult fiscal times. Finally, because Chapter 376 does not require mandatory civil punishment, an unscrupulous RCFE administrator who does not notify their residents of a facility’s financial distress could potentially keep operating without consequences.

75. See Udesky, supra note 1 (reporting that the Ombudsman of San Mateo “handled eight foreclosures of elder-care homes in the last two years, and few owners gave warning to residents or their families . . . . [The RCFE owners] themselves are going through hell. They’re losing their homes and their businesses.”).

76. See id. (describing transfer trauma).

77. See supra Part IV.C–D (describing the additional costs and enforcement issues).

78. See supra text accompanying note 57 (describing the stress a family might experience when addressing an RCFE’s financial state).

79. See supra Part IV.D (describing the discretionary nature of Chapter 376’s penalties).

80. Id.