

How can this happen in Texas?

By Beanie Adolph¹

Many Texas homeowners who face loss of their home or fines from an HOA ask:

How can this happen in Texas?

How can this happen in America?

The short answer is that, since the early 1980s, commercial interests – primarily HOA attorneys and HOA management companies (the “HOA Industry”)² – have worked to change Texas laws to allow the HOA Industry to make yet more money from Texas homeowners. Every legislative session, these commercial interests have lobbyists trying to convince Texas legislators to grant more power to the HOA Industry. Since at least the early 1980s, Texas homeowners have lost significant rights of privacy and control, and have become subject to fines, other money judgments, injunctions which control their lives and homes, and foreclosure. This assault, authorized largely in secret, reflects power given to HOAs without voter approval or even voter knowledge. For too many homeowners it is the devastating loss of home and savings.

Some of the major legal events that allow a Texas HOA to exercise its power over homeowners:

1983 – A new HOA weapon – attorney fees

In 1980, a lawsuit between an HOA and a Texas homeowner was on an even playing field with respect to attorney fees – *i.e.*, each party paid its own attorney fees. **Today, and in fact, since 1983**, a new law³ granted to a Texas HOA a powerful weapon against a homeowner – the right to recover the HOA’s attorney fees while the homeowner has no complementary right.⁴

From the first time an attorney is involved, the stakes for the homeowner change. The HOA attorney fees add up quickly, usually exceeding the original dispute cost. The longer the suit continues, the bigger the financial risk for the Texas homeowner, but not for the HOA. This one change has forced thousands of Texas homeowners to capitulate in disputes with HOAs because a dispute over an oil spill or a basketball goal just is not worth the risk of thousands of dollars in attorneys’ fees.

1987 – Loss of the homestead protection against HOA foreclosure

In 1980, the Texas Constitutional homestead protection prevented an HOA from foreclosing on a home. **Today, and in fact, since a Texas Supreme Court decision in 1987**,⁵ the Constitutional homestead protection is ignored for all HOA liens for assessments. There was no statewide election on an amendment to the Texas Constitution on whether to eliminate the

homestead protection. There was no legislative vote on a new law to eliminate the homestead protection, with the accompanying committee hearings and ultimate governor signature. There was not even a court hearing where Texas homeowners in general or even one Texas homeowner presented arguments against the loss of the homestead protection. Texas homeowners lost their homestead protection in a Texas Supreme Court 3-2 decision, that reversed “judgments upholding the homestead protection by the trial court and the court of appeals”, where only the HOA had an attorney and only the HOA presented arguments. No one argued for the Texas homeowners.

Now, Texas HOAs file thousands of foreclosure actions every year, causing many Texas homeowners either to abandon their homes or to lose their homes at foreclosure sale. HOA attorneys and HOA management companies reap untold profits every year from these foreclosure actions – all taken from Texas homeowners.

1995 – The HOA industry’s special focus on Houston

In 1980, without the consent of the homeowner, a Texas home could never be subjected to an HOA. **Today, and in fact, since 1995**, a 1995 law⁶ allows an HOA in Harris, Galveston, Brazoria, and Montgomery Counties to be forced on a nearby Texas homeowner without the homeowner’s consent. A Texas homeowner can own a home outright for forty years, and then, suddenly, without the homeowner’s consent, the homeowner can be subject to mandatory HOA dues, HOA rules that control the use and appearance of the home, and the risk of HOA fines and foreclosure.

In 1980, a Texas home could never be subjected to new deed restrictions without the homeowner’s consent. **Today, and in fact, since 1995**, in that same Houston area, that same 1995 law allows an unlimited number of new HOA deed restrictions to be added without a homeowner’s consent.

In 1980, a Texas HOA had only the powers expressly listed in a formation document – powers agreed upon by every homeowner in the HOA. **Today, and in fact, since 1995**, that same 1995 law grants to a Texas HOA in the four Houston area counties not only its expressly listed powers but also many unidentified additional powers that the HOA may think “necessary and proper” or implied.⁷

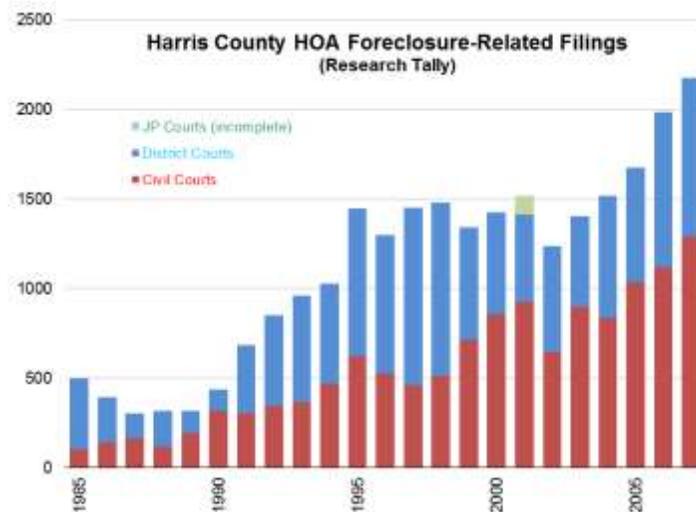
In 1980, Texas HOAs generally did not charge homeowners any fees, and in fact, many HOA dues were not mandatory. **Today, and in fact, since 1995**, that same 1995 law and other more recent laws allow an HOA to charge resale certificate fees, document copy fees, collection fees, inspection fees, violation enforcement fees, transfer fees, and many other fees that an HOA or management company or HOA attorney can dream up. The potential list of fees has no end. HOA attorneys and management companies now earn millions of dollars in revenue from fines and fees charged to homeowners.⁸

The HOA industry won all these new powers by enactment in 1995 of Texas Property Code Chapter 204. The Legislature passed this new law at the 11th hour on the last day of the session,⁹ on a voice vote, rules suspended twice,¹⁰ absent public knowledge or media attention. The HOA industry wrote the 1995 bill as a “bracket bill”, *i.e.*, a bill bracketed to a particular, but unnamed geographic area defined only by population (in 1995, just Harris and Galveston Counties). When a bill applies only to a limited geographic area, legislators who are not from that area often pay no attention to the bill or give deference to lawmakers from the specified area. Obviously, the effects of this bill have continued and expanded across the state.

The effects of these many legal changes across the state

The result of this thirty-plus year assault on homeowner rights has been catastrophic for many Texas homeowners. Most Texas home buyers have little choice but to buy a home subject to an HOA. HOA foreclosures have exploded. HOA fines and fees have multiplied.

After 1995, foreclosure filings in Harris County rose from below 500 in 1990 to about 2200 in 2007.¹¹ In Harris County from 1985 to 2007, HOA foreclosure filings totaled 25,726.



HOA foreclosures in Harris County adversely affect poorer homeowners.¹² The vast majority of HOA foreclosure filings are against lower income homeowners as shown by the table below for 1985-2001 (with 2001 home values).



Many homeowners threatened with foreclosure have little chance to pay off the thousands of dollars in attorney fees that are demanded early in these cases. This has led many homeowners just to abandon their homes.

¹ Beanie Adolph is associated with hoadata.org and a director of HOA Reform Coalition of Texas

² Developers on occasion also align with the HOA Industry.

³ Texas Property Code Section 5.006.

⁴ The statute generally allows only the first party to file the suit to recover attorney fees.

⁵ In the 1987 Texas Supreme Court *Inwood* decision, three majority justices (against two dissenting justices -- Justices Mauzy and Gonzalez) held that the Texas Constitutional homestead protection did not protect a homeowner from foreclosure by an HOA for delinquent assessments, reversing judgments upholding the homestead protection by the trial court and the court of appeals. Justice Mauzy recommended in his dissent in *Inwood*:

If the Constitution is to be amended to destroy or weaken an individual's homestead exemption, it should be done as prescribed by the Constitution in article XVII, section 1. What is required is passage of a proposed amendment by at least 100 affirmative votes of the members of the House of Representatives and at least twenty-one affirmative votes of the members of the Senate, and a majority vote of all the people of this State who choose to vote at a public election held for that purpose. TEX. CONST. Art. XVII, § 1 (1845, amended 1972). A strict construction of our Constitution requires this result. I would require no less.

⁶ Texas Property Code Chapter 204.

⁷ Texas Property Code Section 204.01

⁸ In a typical arrangement, a management company contracts with an HOA at below-market rates and makes its profit through fines and fees charged to homeowners. The HOA and the management company benefit at the expense of the homeowner.

⁹ <http://www.lrl.state.tx.us/legis/billsearch/actions.cfm?legSession=74-0&billtypeDetail=HB&billNumberDetail=2152&billSuffixDetail=&startRow=1&IDlist=&unClicklist=&number=100#>

¹⁰ House Bill 2152 passed on the third reading May 27, 1995. The bill was then sent to the Senate. Senator Gallegos moved that Senate Rule 7.18 and the Constitutional Rule requiring bills to be read on three several days be suspended and that H.B. 2152 be placed on its third reading and final passage. The motion prevailed by the following vote: Yeas 31, Nays 0. The bill was read third time and was passed by a viva voce vote. The Senate passed the bill May 27, 1995. The bill was enrolled May 28, 1995, and sent to the Governor May 29, 1995. Texas

1995 Session from January 10 to May 29.

http://www.lrl.state.tx.us/scanned/Senatejournals/74/05271995_81_3500.pdf

¹¹ The graphic is based on information from HOADATA.ORG.

¹² This graphic is also from HOADATA.