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**JOINT EDITORIAL BOARD**  
*for*  
**UNIFORM REAL PROPERTY ACTS**

August 22, 2013

**DISTRIBUTION OF JEB REPORT ON COMMON INTEREST  
ASSESSMENT LIEN PRIORITY**

**REQUEST FOR PUBLIC COMMENT REGARDING AMENDMENT  
TO SECTION 3-116 OF THE UNIFORM COMMON INTEREST  
OWNERSHIP ACT**

*The Joint Editorial Board for Uniform Real Property Acts (the "Board") provides guidance to the Uniform Law Commission (ULC) and others regarding potential subjects for uniform laws relating to real estate, as well as advice regarding potential amendments to existing uniform laws relating to real estate. The Board is comprised of representatives of the ULC, the American Bar Association Real Property, Trust and Estate Law Section, and the American College of Real Estate Lawyers, as well as liaisons from the American College of Mortgage Attorneys, the American Land Title Association, and the Community Associations Institute.*

This letter accompanies the attached Report ("JEB Report") entitled "The Six-Month 'Limited Priority Lien' for Association Fees Under the Uniform Common Interest Ownership Act." Uniform Common Interest Ownership Act (UCIOA) § 3-116 (and comparable provisions of its predecessor acts, the Uniform Condominium Act, the Model Real Estate Cooperative Act, and the Uniform Planned Community Act) provides that a common interest community association's lien for unpaid assessments has a priority over the lien of an otherwise first-lien mortgage lender to the extent of six months' worth of regularly-budgeted but unpaid assessments at the time of a foreclosure (either by the association foreclosing its assessment lien, or by the mortgage lender foreclosing its mortgage lien). Section 3-116's limited priority lien marked a substantial departure from prior law and struck what the drafting committee characterized as an "equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders." UCIOA § 3-116, comment 1. UCIOA § 3-116 (or nonuniform legislation comparable in substance) has been enacted in more than 20 jurisdictions.

The drafters of UCIOA § 3-116 believed that the six-month association lien priority struck a functional balance between the need to protect the financial integrity of community associations and the legitimate expectations of first mortgage lenders. This belief was premised on the assumption that a first mortgage lender holding a defaulted mortgage would take prompt action to enforce that mortgage via foreclosure, and that in most states such a foreclosure could be completed within six months or a reasonable period of time thereafter, minimizing the period during which unpaid assessments would accrue for

which the association would not have first lien priority. This belief was further premised on the assumption that a common interest unit would typically have a value sufficient to allow the recovery of both the first mortgage balance and six months of unpaid assessments.

The real estate market facing common interest communities today does not reflect these basic assumptions. Many common interest units are “underwater,” with values below the outstanding first mortgage balance. Furthermore, and particularly in states with judicial foreclosure, there are long delays in the completion of foreclosures. During these delays, neither the defaulting unit owners nor the first mortgagee typically pay the assessments on the unit. [Under existing law, the mortgagee does not become legally liable to pay assessments on the unit unless and until the mortgagee acquires title to the unit via a foreclosure sale or a deed in lieu of foreclosure.] Many lenders have chosen to delay instituting foreclosure proceedings on common interest units, thereby delaying the lender’s potential acquisition of title and the lender’s potential liability for future assessments. The consequences of such delay are devastating to a common interest community and its remaining residents. To account for the unpaid assessments, the association must either increase the assessment burden upon the remaining unit/parcel owners or reduce the services the association provides (e.g., by deferring maintenance on common amenities). If the other community residents have to pay the burden of increased assessments to preserve community services/amenities, the delaying lender receives a benefit — the value of its collateral is preserved while the lender waits to foreclose. Yet this preservation of the mortgage lender’s collateral value comes through the community’s imposition of assessments that the lender does not have to pay or reimburse.

**The JEB Report.** The Board has prepared and issued the JEB Report for two reasons. First, the current economic climate facing community associations has produced an increasing volume of litigation regarding the interpretation of the existing six-month limited priority lien provision reflected in UCIOA § 3-116. This litigation has addressed not only the effect of foreclosure proceedings by the association and/or the first mortgage lender, but also whether an association can assert its six-month lien priority only on a one-time basis or on a recurring basis (i.e., each time it brings an action to enforce its lien for unpaid assessments). To protect the integrity of § 3-116 and to provide guidance to courts, the Board has prepared the JEB Report to clarify the intended application of § 3-116(c)’s limited priority lien in a variety of scenarios in which priority disputes might arise.

Second, the Board believes that recent experience has demonstrated that existing law governing the relative priority of association liens and first mortgage liens is not satisfactory. For this reason, in June 2013, the Board submitted an earlier draft of the JEB Report to the ULC, along with a recommendation that the ULC appoint a drafting committee to prepare an amendment to § 3-116 that would strike a more appropriate balance between the interests of first mortgage lenders and common interest community associations and their residents. At its 2013 Annual Meeting in Boston, MA, the ULC Executive Committee agreed that amendment of § 3-116 is appropriate, and directed the Board to draft an amendment in consultation with the appropriate representatives of stakeholder groups.

**Preparation of Amendment and Request for Comments.** Consistent with the instructions of the ULC Executive Committee, the Board is undertaking to prepare a proposed amendment to § 3-116. The Board will begin by soliciting written comments from any interested persons or stakeholder groups. Following this comment period, the Board expects to conduct a public meeting in December

Distribution of JEB Report  
Request for Public Comments  
August 22, 2013  
Page 3

2013 (date and time to be announced) in Washington, DC, to consider the appropriate scope of the priority to be accorded to common interest assessment liens. At this meeting, all interested persons or stakeholder groups are welcome to attend and express their opinions to the Board. The Board will then prepare a proposed amendment to § 3-116 and submit the amendment to the ULC for its consideration at the ULC's 2014 Annual Meeting in Seattle, WA.

As noted above, all interested persons or stakeholder groups are welcome to express their views as to the appropriate scope of the priority to be accorded to common interest assessment liens. Comments should be submitted to the Board in writing by October 31, 2013, and may be submitted by mail or by e-mail as follows:

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Commenters are welcome to express their views in general terms, with specific proposed statutory language, or both. Comments will be catalogued and made available for public viewing on the websites of the ULC and the Board.

COMMENT DEADLINE: October 31, 2013.