October 5, 2013

The Honorable Craig L. Griffin, Presiding Judge
Deborah C. Servino, Judge
Peter J. Wilson, Judge
Appellate Division, Orange County Superior Court
West Justice Center, 751 West Santa Ana Blvd
Santa Ana, California 92701

RE: Request for Publication of ***Huntington Continental Town House Association v The JM Trust dated Jan 1 2005, Joseph A. Miner Trustee and Joseph A. Miner, individually*** Case Number 2013 – 00623099 Filed Sept 26, 2013

Dear Judges Griffin, Servino, and Wilson:

Pursuant to California Rules of Court Rule 8.1105, the Center for California Homeowner Association Law ("CCHAL"), is submitting an *amicus curiae* letter to the Orange County Appellate Division to ask that ***Huntington Continental Town House Association v JM Trust*** ("*Huntington*") be certified for publication.

The Court's opinion in *Huntington* merits publication because it satisfies the standards for publication set forth in the Rules of the Court 8.1105, specifically it

- Modifies, explains, or criticizes, with reasons given, an existing rule of law
- Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;
- Involves a legal issue of continuing public interest
- Provides guidance to the lower courts hearing homeowner association assessment collection/foreclosure cases

NATURE OF THE *AMICUS CURIAE'S* INTEREST IN *HUNTINGTON*

The Center for California Homeowner Association Law (www.calhomelaw.org) is a statewide 501(c)(3), tax-exempt non-profit entity whose mission is to protect the legal rights of the estimated 9 million persons, who live in California's 50,000 common interest developments [aka CIDs and/or "homeowner associations."] [1]

Assessment collection and foreclosure by associations – the subject of *Huntington* -- is the primary policy focus of the Center. To advance our mission, we initiate and monitor state legislation impacting the legal rights of association homeowners. We also sponsor

[1] In 2011, associations comprised an estimated 4.9 million units or 25% of California's housing stock. See Assembly Housing Committee analysis of AB805, pp 3-4, April 6, 2011.

legislation that will create new consumer protections for homeowners. We were, for example, sponsors of SB137/Ducheny (2006 Statutes) establishing the debt thresholds that must be reached before an association can use nonjudicial foreclosure to force payment of assessments. These thresholds are referenced in *Huntington.*

HUNTINGTON EXPLAINS, WITH REASONS GIVEN, AN EXISTING RULE OF LAW

The statute at issue in *Huntington* is Civil Code §1367.4(b) created through consumer protection legislation authored by Congresswoman Jackie Speier, when she was in the California Legislature (AB1317, 1997 Statutes.)[2]

Huntington makes clear that

> *"Civil Code §1367.4(b) allows for partial payments and delineates to what debts, and which order, payments are to be applied. The plain language of subdivision (b) contemplates partial payments, and not just payments in full satisfaction of the amounts owed. There would be no need to explain how payments are to be applied to the various charges if the Legislature contemplated only payments in full," says the Huntington ruling.*

The opinion is critical, because associations routinely reject partial payments of assessment debt. What are the legal strategies for accomplishing this? Unbeknownst to property owners, association boards strike private contracts with assessment debt collectors that intentionally subvert Civil Code 1367.4(b). The contracts void the duties of associations under this statute and simultaneously void the rights of homeowners (1) to make partial payments and (2) to have those payments applied according to the prescriptions of Civil Code 1367.4(b), i.e. to assessments first until they are paid down in full and only after they are paid in full to the discharging of collection costs.

The Center, in the course of its legislative work, has collected dozens of sample contracts between associations and the debt collection firms specializing in assessment collection.[3] The contracts state clearly that the two parties to the contract – association and debt collector – are devising private agreements for the application of homeowner payments: arrangements that negate the statute and circumvent its consumer protections.

The most prominent feature of these contracts is that the debt collector alone will decide how payments are to be applied to the homeowner account. The contracts state that the debt collector will pay himself first instead of last, as required by Civil Code §1367.4(b)[4]

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[2] Her bill was triggered by a Sea Ranch foreclosure in which the home was auctioned for $2400 in order to recover $567 in homeowner assessments. The auction winners then offered to sell it back to the homeowner for $180,000. The homeowner later sued Sea Ranch and recovered his home (*Mahaffey v Sea Ranch*, Sonoma County Sup Court.) His attorney Michael G. Miller testified in support of her bill: see http://leginfo.ca.gov/pub/95-96/bill/asm/ab_1301-1350/ab_1317_cfa_960828_224816_sen_floor.html. See also Santa Rosa Press Democrat, "Taken by Surprise: Sea Ranch Home Sold for $2400," December 17, 1994.

[3] See for example, Association Lien Services (ALS) and Heather Farms Association; and the Angius & Terry Collections Agreement and the Feldsott & Lee contract for Assessment Collection Service.

[4] A sample contract devised by Sunrise Assessment Collection Services, an association debt collector, and sent to a Sacramento County homeowner is posted on the Center's website at http://www.calhomelaw.org/PDF/Anon%20D%202010%20april%2017.pdf

The collections contract between Feldsott & Lee and Huntington Town Homes exemplifies this practice. Says page 1 of its contract: *"Monies collected from (homeowner) member shall be first applied to payment of attorneys fees to ATTORNEY, then costs and the remainder to assessments."*

This provision of the contract generated by the law firm of Feldsott & Lee and executed by Huntington Town Homes is in clear contravention of California Civil Code 1367.4(b).

After such a contract is executed with the association, debt collectors routinely send a contract to the homeowner reflecting the terms of its contract with the association, namely: that the debt collector alone will determine the application of payments. Most contracts include the exact language of Civil Code 1367.4(b) but demand that the homeowner waive his consumer protection rights under it. If the homeowner refuses to sign the contract waiving his rights, the debt collector won't give him a payment plan, i.e. allow him to make partial payments. If the homeowner attempts to make partial payments to the association, the board rejects them under color of the agreement that it has executed with the debt collector.

Because the association and the debt collector both reject partial payments, the home often goes into foreclosure.[5]

Huntington rightly clarifies another issue: that improper application of payments means that the homeowner association *"did not adjust its interest accrued calculations for the unapplied payment, causing the damages awarded to be excessive and not supported by the evidence."*

Again: this is a critical point, because the assessment debt is the foundation for calculating most of the collection costs, e.g. late charges and interest, for example. Keeping the assessment debt balance high is the key strategy for calculating additional collection charges and for extending the debt into the 12-month territory, allowing the debt collector to foreclose. *Huntington* clarifies that the improper application of payments is prohibited under existing law for yet another reason: because it expands the debt instead of diminishing it.

ASSESSMENT COLLECTION AND PARTIAL PAYMENTS ARE LEGAL ISSUES OF CONTINUING PUBLIC INTEREST

Assessment collection and foreclosure have been issues of continuing public interest in the State Legislature. Since the Speier bill (AB1317, 1997 Statutes), legislation has been routinely introduced in the Legislature to rein in specific business practices by associations and firms specializing in assessment collection and foreclosure.[6]

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[5] The number of trustee foreclosure sales resulting from these practices was documented by Sentinel Fair Housing (Alameda County) via research it did on association foreclosures in five Bay Area counties over a 12-month period. Sentinel presented its research at public hearings in Sacramento convened by State Senator Denise Ducheny.

[6] AB2289/Kehoe (Due Process in Nonjudicial Foreclosure – signed into law); AB1836/Harman (Internal Dispute Resolution Procedures – signed into law); SB 1682/Ducheny and AB2598/Steinberg (both set thresholds to be reached before an association could use foreclosure as a collections tool; vetoed by Governor); SB137/Ducheny (established thresholds to be met; signed into law); AB1098/Jones (Homeowner right to access financial records – signed into law); AB2624/Houston (trustee supervision of post-foreclosure redemption);

Individual lawmakers, like Assembly Member Julia Brownley,[7] State Senators Denise Ducheny, Ellen Corbett, and Darrell Steinberg and other lawmakers have taken up the issue. When she was chair of the Senate Housing Committee, State Senator Denise Ducheny convened public hearings on assessment collection after a Calaveras County association foreclosed on the $275,000 home of a disabled owner, who owed a $120. (sic) annual assessment.[8] The home was auctioned for $70,000. After the hearings Ducheny introduced SB1682 to establish thresholds that must be met before an association could use foreclosure as a collections tool. This bill was vetoed by the Governor but her second bill, SB137, with similar threshold provisions, was signed into law.[9]

The Center for California Homeowner Association Law (CCHAL) sponsored several of the bills listed in the footnotes. With the California Alliance for Retired Americans (CARA), we also sponsored two bills (AB2502/Brownley) and SB561/Corbett[10] that dealt specifically with the partial payment issue addressed in *Huntington*.[11] Both bills dealt with the contract issue, i.e. that contracts between associations and debt collectors whose purpose was to negate Civil Code §1367.4(b) were null and void. They also clarified that homeowners have the statutory right, under the Speier statute, to make partial payments.

However, both bills were defeated by the association industry and its debt collectors. The key argument used by debt collectors is that Civil Code 1367.1 and 1367.4 does not apply to them; they assert that it applies only to associations, when associations are collecting assessments. Despite clear evidence to the contrary, debt collectors also deny "coercing" homeowners into signing payment plans requiring them to waive their consumer protection rights under Civil Code 1367.4(b). These arguments are exemplified by a six-page letter of opposition from Association Lien Services (ALS) to Senator Corbett's legislation SB561.[12] ALS, a subdivision of the law firm of Swedelson & Gottlieb, has a huge share of the assessment collection market in California.[13]

Huntington is a critical decision because, through it, the Orange County Appellate Court has accomplished through its opinion what the California Legislature has not been able to accomplish, i.e. to clarify that (1) homeowners may make partial payments (2) at any point during the collection process; that (3) payments shall not be rejected by either the association or its debt collector and (4) payments shall be correctly applied to the homeowner's account per the prescriptions of state statute Civil Code §1367.4(b)

AB2846/Feuer (Paying Disputed Sums Under Protest); AB2502/Brownley and SB561/Corbett (Partial Payments issue.)

[7] Now in Congress and representing the 26th District.

[8] "Does the Punishment Fit the Offense?" February 17, 2004, Senate Housing Hearings on association foreclosures. Background paper by Senate Housing Chief Consultant Mark Stivers; Mark.Stivers@sen.ca.gov. See Sacramento Bee, "Couple Lose Their Home Over a $120 Debt," January 24, 2004.

[9] The thresholds are reflected in the Huntington decision: (1) either the debt comprises $1800 in assessments only (collection costs are excluded) OR (2) the assessment debt has been owed 12 months or more. See 2006 statutes.

[10] In the 2010 and the 2011 Legislative sessions.

[11] Congresswomen Jackie Speier submitted two-page letters of support for both AB2502 and SB561. These are posted on the CCHAL website.

[12] Posted on the CCHAL website.

[13] In its letter of opposition to SB561, ALS states that it has open at any one time 4000 homeowner accounts alleged to be delinquent.

HUNTINGTON ADVANCES CLARIFICATION OF A STATUTE AND PROVIDES GUIDANCE FOR LOWER COURTS.

As explained in the preceding sections, the homeowner association industry and assessment debt collectors are operating under an interpretation of portions of section Civil Code §1367.4 that the *Huntington* decision finds to be erroneous. So far as the Center is aware, *Huntington* is the first written decision to correct this erroneous interpretation of the state statutes governing partial payments and the correct application of those payments.

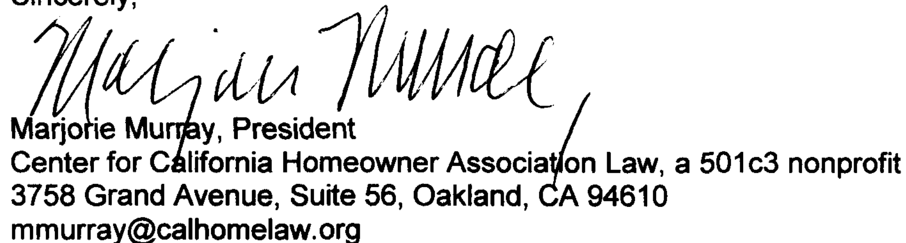
At a minimum, publication of this decision will provide guidance to trial courts throughout the state as they contemplate the assessment collection cases brought before them. The *Huntington* ruling will be particularly crucial for guiding the officers of small claims courts where many of assessment collection cases originate.[14] The Center is aware that the problem of limited time and resources is particularly acute when the judicial officer is a volunteer *pro tem* judge.

The statutes governing assessment collection and foreclosure are complex and not susceptible to quick study. They involve not only Davis-Stirling, the body of statutes governing common interest developments, but also involve the identical foreclosure statutes used by lending institutions.[15] Therefore the guidance provided by publication of *Huntington* will be very helpful to all California courts hearing cases involving assessment collection and the issue of partial payments.

We also want to emphasize the scope of the assessment collection issue throughout the entire state. When Congresswoman Speier introduced her legislation, AB1317, California had 30,000 associations; now it has 50,000. One in four Californians – 25% of the state's population --lives in them. Associations collect about $200 million annually in assessments and control now about $10 billion in cash.[16] As *Huntington* illustrates – and as CCHAL, Sentinel Fair Housing, and the State Legislature have documented – assessment collection practices do not always comply with existing state statutes.

For the reasons stated in our letter, we respectfully request that *Huntington* be certified for publication.

Sincerely,



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[14] AB2846/Feuer (2008 Statutes) lets the homeowner pay disputed assessments and charges under protest and then file in small claims to recover sums not exceeding the small claims court limit. The measure was supported by the California Judicial Council.
[15] Civil Code §§1350 et seq and Civil Code §§2924 et seq
[16] See Community Association Statistics, Levy & Company, San Francisco, CA, 2011.

HUNTINGTON V MINER IMPACTS ASSESSMENT COLLECTION

An Orange County Appeals Court affirmed Monday (Jan 13) that state law "compels" California's 50,000 homeowner associations to accept the partial payments that homeowners try to make in order to pay down assessment debt. "Compel" is the court's word indicating that associations don't have a choice – and that association debt collectors can't interfere in the process.

The opinion declared that homeowners can make payments (1) directly to the association and not the HOA's debt collector (2) at any point during the collection process and (3) payments do not have to include collection costs.

The court acknowledged that it was breaking new legal ground with the ruling.

The partial payments issued has boiled ever since Congresswoman Jackie Speier authored legislation, when she was in the State Assembly, prescribing how homeowner payments are to be applied: FIRST to assessments owed until they are paid in FULL and only afterwards to collection costs.

However, association lawyers and debt collectors have argued, since the 1997 law went into effect, that the law applied only to associations and not to third parties like themselves who collect homeowner dues on behalf of associations.

Mondays' ruling – 17 years later -- clarifies that not only are associations "compelled" to accept partial payments from homeowners but that those payments do not have to include collection costs.

The ruling will have a huge impact on association debt collectors, most of whom are lawyers or subdivisions of law firms. They market their collection services to associations as "no cost" services, meaning that the costs of collection will be borne by the homeowner. The debt collector then uses the association's lien authority to secure not only assessments owed but all the collection costs claimed by the debt collector whether or not the costs are legitimate. California law puts no caps on the collection costs that the company can charge.

The standard contract between the debt collector and the association bars all communication between the homeowner and the association once the account has been turned over to the collection firm. Homeowners who send assessment payments to the association are turned away, their payments rejected, and told to deal only with the collection company.

Paying down the assessment debt is critical to the homeowner, because state law lets the association foreclose on the home if the debt reaches $1800 or if it has been owed for more than 12 months. The minimum bid at the foreclosure auction is the amount owed the association and the debt collector, typically between $3500 and $5000, i.e. the bid bears no relation to the market value of the home.

The Court broke new ground with the ruling, stating that "***This case presents an issue on which this court has found little published authority: whether a homeowner's association must accept and apply partial payments that reduce delinquent assessments owed but not any other amounts due, such as late fees, interest, and attorney's fees and costs. We conclude the Davis-Stirling Common Interest Development Act (the Act) compels a homeowner's association to do so."***

The Orange County Appeals Court issued its first ruling on ***Huntington v Miner*** in September 2013, finding in favor of Orange County homeowner Joseph Miner The association's law firm and debt collector, Feldsott & Lee, also of Orange County, challenged the ruling and asked for a second review by the three-judge panel.

CCHAL petitioned the Court with a five-page *amicus* letter asking it to let its opinion stand and to certify it for publication. The letter comprised the legislative history of the assessment collection and foreclosure issue.

On Monday, Jan 13, the Court issued its new – and even stronger – ruling clarifying that state law compels associations to accept homeowner partial payments and that those payments do not have to include collection costs.

The Court's Minute Order also states that it was certifying the opinion for publication "at the request of the Center for California Homeowner Association Law."

CCHAL is able to monitor court rulings like Huntington and to write petitions, because of the support of our generous Contributors, which is why we are notifying them first of this critical court ruling.

For technical reasons (having to do with our server), we have not been able to post Huntington v Miner on the CCHAL website. However, if you are a CCHAL Contributing Member in good standing, send an email to info@calhomelaw.org and we will email the complete ruling to you along with appendices and Minute Order.

Not sure of your membership status? Please go to Manage Your Membership at http://www.calhomelaw.org/memberedit.asp

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