



Cooperative Housing Law Journal

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MISTAKES IN INSURANCE PROGRAMS MAY NOT BE COVERED UNDER DIRECTORS AND OFFICERS LIABILITY POLICIES

By Michael Hale, J.D. CPCU, AAI

Many board members of cooperative associations automatically think that if a Directors & Officers (D&O) liability insurance policy is in place, they are covered for any lawsuits involving management decisions. Like any insurance policy, D & O policies differ widely among the many insurance carriers who offer them and one thing to look for is whether there is an exclusion for insurance decisions.

One of the common issues we see as insurance brokers, expert witnesses and insurance coverage lawyers is the existence of an exclusion in D&O policies for decisions of the board members related to insurance coverages. Such an exclusion could mean disaster if there is a claim that is not covered or is underinsured.

While it is often the management company which purchases the insurance coverages for the cooperative, it is usually subject to board approval. In our experience, many such boards look at costs of the competing proposals more than anything, setting themselves up for potential uncovered liability if the insurance program is inadequate.

For example, if the association purchases coverage for the commonly owned property such as a large building structure, what is the correct amount of insurance that should be secured for the building? This is a real problem because insurance agents are not valuation experts and often pick the limits without the input of an appraiser. We have seen cases where the amount of insurance purchased is millions of dollars short after taking into account rebuilding under applicable ordinances and building codes.

The same is true for liability insurance. How large of an umbrella should be purchased? \$1,000,000? \$5,000,000? \$10,000,000?

Management companies and cooperative boards of directors are well advised to spend quality time every year looking carefully at the commercial insurance program and not assume that all policies are the same. It is useful to obtain the services of an expert in insurance to help evaluate the proposals and advise the board. Since it may not be the case that the D&O policy of the cooperative covers insurance decisions, this might be a particularly important process.

Mr. Hale works with Pentiuk, Couvreur & Kobiljak, P.C. to bring his insurance expertise to our clients to assist in reviewing coverages and protecting boards from liability.



Michael S. Hale, J.D., CPCU, AAI, is an insurance coverage attorney & broker who specializes in advising businesses in many states on purchasing the correct coverages. His portfolio of clients includes cooperatives, condominium associations, and management companies.

DRONES IN MICHIGAN

This spring, that giant flying bug you see in the sky may actually be a drone. The Michigan Legislature passed, and Governor Rick Snyder signed the “Unmanned Aircraft Systems Act,” which is effective April 4, 2017. Currently, the Federal Aviation Administration (FAA) has two separate rules for drones: recreational and commercial, and Michigan’s “Unmanned Aircraft Systems Act” does not preempt any federal ruling in place.

Does this mean that anyone can fly a drone? Not quite. Federal guidelines require that a person be authorized by the FAA to operate unmanned aircraft either recreationally or commercially, and Michigan must follow these federal guidelines.

This technology is sure to have tremendous implications for Cooperatives. Drones could be used by Management to examine roofs or other hard to reach structures. There may be surveillance opportunities for enforcing rules or developing evidence to support court cases. Members may use drones to spy on others. There are a myriad of possibilities.

All of these potential applications need to be examined by Cooperative Boards. Occupancy agreements, and your rules and regulations may need to change to reflect use of drones for the Cooperative and its Members. A key consideration is balancing the desire of the Cooperative and its Members to use this technology but also protecting the privacy of its Members at the same time.

We at Pentiuk, Couvreur and Kobiljak, P.C. welcome the opportunity to discuss the effects of this emerging technology and this new legislation.

THE COST OF A MISSING COMMA: \$10 MILLION

Do you ever send an email or a text and later realize you accidentally sent a typo? Maybe it’s a misspelled word or a grammar mistake, perhaps one that people make every day. Luckily, in most situations you can simply laugh it off without any consequences. But in the world of legal contracts, tiny, even seemingly insignificant grammar issues can have profound monetary consequences.

A recent case, *O’Connor v. Oakhurst Dairy*, No. 16-1901 (1st Cir. Mar. 13, 2017), is a perfect example of the power of a simple missing comma. Truck drivers filed a class action against their employer, a Maine dairy company, arguing they were owed overtime back pay for over four years. The drivers had been working well above the 40-hour wage base, but Maine law provides exemptions wherein overtime is legally not provided. The argument was centered around the following:

“The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of:

- (1) Agricultural produce;
- (2) Meat and fish products; and
- (3) Perishable foods.”

Note the lack of a comma after “packing for shipment...” Because this comma did not create a separate clause that clearly identified distribution as an overtime-exempt activity, the truck drivers were able to successfully argue that, because they did not do any packing, they were able to receive overtime for their distribution. Since they did not pack the dairy supplies, the rest of the clause regarding distribution was null and void. The decision is likely going to lead to a payout of around \$10 million in overtime back pay to the truck drivers.

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Typos and grammatical errors in your Cooperative legal documents can have costly and damaging outcomes; Cooperative Boards should be aware of these dangers and the potential hazards they can create. Using your Cooperative Attorney, a professional with the education and experience in drafting important documents with a seasoned eye is essential for a Cooperative to safeguard itself from careless—yet damaging—mistakes.

So the next time you find yourself laughing at a typo you or a friend made, be thankful it is not being argued about in court with serious consequences on the line. And, when it comes to serious legal documents, do not take any chances: make sure your Cooperative Attorney has had the chance to fully look them over.

News You Can Use



- The IRS will never contact you by phone or email. They will send you written correspondence that will be sent through the U.S. Postal System.
- The latest issue of the MAHC Messenger is now out and available at the MAHC website. Read about the organization's accomplishments throughout the past year, how one cooperative benefitted from MAHC's certification training, and what the latest ruling by HUD on the Violence Against Women Reauthorization Act of 2013 means for Cooperatives. Read all about it at www.mahc.coop.

• When disasters strike, Cooperatives face another “disaster”—this one man-made. The Federal Emergency Management Agency (FEMA) classifies Cooperatives and other homeowner associations as businesses, which means that Cooperatives bear the burden of cleaning debris from their community. Cleanup can cost millions of dollars, and almost no homeowners association can bear that kind of financial burden. Federal lawmakers have taken notice. Legislators first introduced a bill after Hurricane Sandy to change the classification of community associations as businesses, thereby allowing associations to become eligible to receive federal recovery assistance but it died in the last session of Congress. Last week, Congressman Jerold Nadler (NY-10) introduced the Disaster Assistance Support for Communities and Homeowners Act of 2017, H.R. 1684. This bill would allow cooperatives to become eligible to receive disaster relief. Congressman Nadler and Congressman Mark Sanford have also sponsored the Disaster Assistance Equity Act to provide relief to cooperative associations and their residents. Please contact your Congressional representative in support of these Congressional bills. Cooperative residents support disaster response and recovery assistance through taxes, yet we are denied help when needed most.

Resources for You

Midwestern Association of Housing Cooperatives (MAHC)

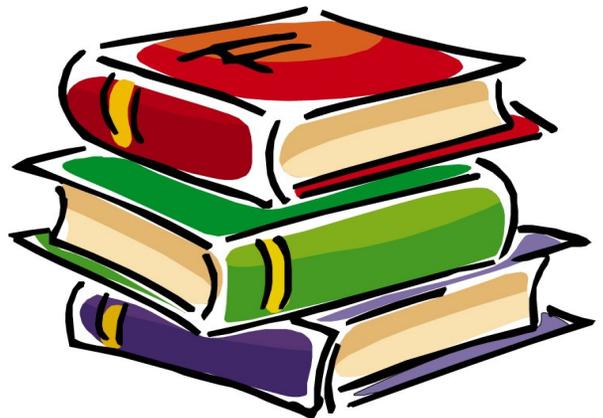
www.mahc.coop
(734) 955-9516

National Association of Housing Cooperatives (NAHC)

www.coophousing.org
(202) 737-0797

National Housing Cooperative Law Center

nationalcooperativelawcenter.com



A complimentary services provided to our friends and clients of Pentiuik, Couvreur & Kobiljak, P.C., a law firm serving housing cooperative boards throughout the nation. (www.NationalHousingCooperativeLawCenter.com).

The material contained herein is not intended to constitute legal advice, or to create an attorney-client relationship where none previously exists. The reader is encouraged to consult with competent legal counsel that is experienced in housing cooperative law. For additional information, please email rpentiuk@pck-law.com or call our offices: (734) 281-7100 (Michigan) or (773) 435-6503 (Illinois). For more information on Pentiuik, Couvreur & Kobiljak, P.C., check out our website at www.pck-coop.com. Please Like us on Facebook: PCK Law.

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The People of PCK

- Attorneys Pentiuk, Gallup and Knock are preparing to teach classes at the MAHC Conference in May. One class is the “Coop Law Update” that will bring cutting edge and vital information essential for Boards and Management to have in order to stay out of hot water. The other class will share insights on how Cooperatives get ripped off by embezzlement, scams and schemes, and how to prevent, detect and deal with theft.
- Randall Pentiuk co-authored an article appearing in the Winter issue of the NAHC Cooperative Housing Quarterly with Herbert H. Fisher, Esq. (retired) on the new HUD ruling concerning the Violence Against Women Reauthorization Act of 2013 (VAWA). This new ruling seeks to protect victims from being denied assistance or evicted due to their being a victim of a VAWA crime. Why is this important for cooperatives? Because Cooperatives might not have a successful forcible entry and detainer or a summary disposition proceeding unless they serve notice as outlined in the VAWA HUD ruling To read the article check out
- Randall Pentiuk has been reappointed to serve on the Board of Directors at NAHC. He has been appointed to serve on numerous committees:
 - Bylaws Subcommittee
 - Government Relations
 - Governance
 - International Cooperative Alliance & Cooperative Housing International—Chairman
 - Executive
 - Communications
 - Development & Preservation
 - Roger Wilcox Library Committee
- Attorneys Pentiuk and Kerry L. Morgan have co-authored an article on the topic of credit checks for the Spring NAHC Cooperative Housing Quarterly issue. The article focuses upon the risks associated with modifying language in the authorization for performing the check, based upon a court ruling out of the 9th Circuit Court of Appeals.

Calendar of Events

- MAHC Annual Conference will take place right outside of Washington, D.C. on May 21-24, 2017. Attorneys from Pentiuk, Couvreur & Kobiljak, P.C. will be teaching two classes. For details call the MAHC office at 734-955-9516 or visit the MAHC website at www.mahc.coop.
- On May 20-21, you may also take the Certified Cooperative Director (CCD) and Certified Cooperative Manager (CCM) courses. The CCD, developed for board of directors, committee members, and/or members, covers the history of cooperatives, corporate law to ethics in the board room. Additional topics include budgets, audits, financial components, marketing and managing of the cooperative. The CCM, designed for managers and assistant managers of cooperative housing, comprises fair housing, ethics, legal structure of cooperatives, policy making, decision making, financial integrity and battling renter mentality in today's cooperatives.
- MAHC will hold a CCD class at Georgetown Townhouses Cooperative in Taylor, Michigan on August 12 & 13, 2017. For details, check out MAHC's website or contact the office.
- NAHC's Registered Cooperative Manager (RCM) training will take place on May 3-4, 2017 at the NAHC office in Washington, D.C. Go to www.coophousing.org for more details.
- NAHC will hold its annual conference in San Antonio, Texas October 25-28, 2017 at the Riverbank Westin Hotel. In conjunction with the conference, RCM training will take place there on October 23 and 24.
- The Council of New York Cooperatives and Condominiums (CNYS) will hold its 37th Annual Housing Cooperatives and Condominiums Housing Conference at Baruch College's Newman Vertical Campus; Manhattan, New York on November 12, 2017. For more details go to www.cnycc.com



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