

# Cooperative Housing Law Journal

Pentiuk, Couvreur & Kobiljak, P.C.

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## *The Use of Probation and Conditional Occupancy Agreements in Resolving Litigation*

### The pros and cons

When a cooperative elects to initiate eviction proceedings against a member whose conduct has violated the governing documents – for whatever the reason may be, not every case in a court of law is guaranteed win. Sometimes key witnesses' testimony will change, sometimes witnesses will refuse to testify (even after issued a subpoena), or unfavorable facts may be unearthed during discovery. Even if the cooperative has dotted every "i" dotted and crossed every "t," sometimes judges and juries will side with the resident member in an eviction case despite what the law and facts may show. This is why most civil lawsuits settle.

Most civil lawsuits settle before ever reaching a judge or jury. A settlement should never be considered a bad outcome, even if it appears that the Member is "winning" by allowing them to have continued occupancy. However, there are certain ways to settle cases using Probation or Conditional Occupancy Agreements that can actually place the cooperative in a more advantageous position, despite allowing the defendant to retain possession. Although each case is inherently different, there are several pros and cons to Probationary or Conditional Occupancy as a means to settle an eviction or nonpayment case.

Of course, the most obvious con of a probationary or conditional occupancy agreement is that the defaulting member would remain in their unit, perhaps indefinitely or until a subsequent violation. In severe cases of material violations, settlement is not an option at all. Additionally, the cooperative's attorneys may have spent considerable time and costs preparing the eviction case as though it was going to proceed to trial. Furthermore, if a probation period is granted, the cooperative will have to wait and see if the member/defendant commits a violation, and if so, will likely have to file notice with the court and attend another hearing. Moreover, a violating member may also discuss the contents of a probationary or settlement agreement with other members. However, this concern can easily be protected by the use of a confidentiality clause, prohibiting the offending member from discussing any term of a settlement with other persons.

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Despite these cons or concessions, settling an uncertain case by use of a Probation or Conditional Occupancy Agreement benefit the cooperative in the event that any further conduct of the member that violates a Settlement, may result in the ability for the cooperative to regain possession of the unit in an easier fashion. There are several pros to a well-crafted probationary or conditional occupancy agreement:

- The length and term is negotiable. It can be for months, a year or even more.
- Their scope can be as broad. It can account for and prohibit more than what the initial eviction action is based on. For example, if the eviction was based on repeated violations for loud music at night, a well-crafted agreement can also require the member refrain from *any other violation* of the cooperative's Occupancy Agreement or Rules and Regulations.
- If the member violates the agreement, the cooperative may be able to get an eviction order, and at times, the order can often be obtained immediately or the same day of the hearing.
- It can limit the issues for the judge if there is a violation. If the member violates the probation or conditional occupancy agreement, that can be the only issue for the judge to decide.
- It can include a waiver of a jury trial or of defenses if violated by the member. Enforcement and be similar to strict liability.
- If the case was never about money or payment of carrying charges, a clause requiring the member to continue making timely payments can be included. Thus, even if the case is about unbecoming behavior, and the member corrects their behavior, the conditional agreement can be enforced if carrying charges are unpaid.
- It can incorporate all of the cooperative's governing documents, not only the one that the defendant or member violated.
- Probation agreements have a certain degree of deterrent effect, so it may be all the cooperative needs to stop the unwanted behavior.
- If problems occur after the probationary period expires, and the member commits a violation warranting eviction, the cooperative will have already attempted to resolve the issues with the member. This may result in getting a judgment of possession quicker than the initial case.
- Repayment of some or all of the fines and/or attorney fees can be a condition to the defaulting member's conditional occupancy.

Either way, there are numerous ways to place the cooperative in as advantageous position as possible when negotiating terms of a settlement with a probationary or conditional occupancy agreement. By no means is this a suggestion that they should be used whenever there is some degree of uncertainty on going to trial or if the member and their attorney gives considerable legal resistance to the action. However, when appropriate, a well-crafted conditional occupancy agreement can place the cooperative in an advantageous position. After all, what is the goal? It is to put the defaulting member in compliance, and if they are unwilling or incapable of doing so, they need to find another place to live.

## Alterations to Exterior of Dwelling Units

### What you need to know

As the long and cold winter months descends upon the Midwest, the fleeting memories of hot and sunny summer days flood our thoughts. For many, having a shady outdoor patio to relax beneath is

crucial for survival of those sweaty summer months. One may wish to install an awning, screened in porch, or a shade canopy to achieve the perfect shaded patio for your living space. But Members beware! Before taking steps for such an installation, Members must consult their governing documents. These may restrict various alterations that involve making changes to the dwelling structure, either externally or internally i.e. the same shaded patio you are looking to install. Members must adhere to their governing documents before modifying any general or common element of the Cooperative as most Cooperatives restrict the use of these types of sun-shade mechanisms in the above mentioned governing documents.

Many may wonder why something as ordinary as a covered patio is against Cooperative guidelines. Well, as simple as a covered patio may seem the exterior alteration not only changes the appearance of the dwelling unit, but could compromise the structural integrity to not only the dwelling unit but entire building, as well. Allowing Members to install awnings, screened in porches, shade canopies, etc., can alleviate sun exposure issues, but could result in more pressing matters. Among these issues are: roof malfunctions, foundation issues, basement wall cracks, internal and external wall cracks, plumbing problems, electrical concerns, gutters, etc. These are just a few examples of what could happen to the dwelling's structure once a heavy fixture is attached. Other issues that may arise pertain to complying with city codes, pulling proper permits, acquiring proper insurance for such alteration, and whether the hired contractors are fully insured and licensed within the specific state.

Allowing Members to install these and other various types fixtures on the exterior of a dwelling unit may bring many challenges for your Cooperative. The Cooperative must protect the Members, but it also must protect and preserve the structural integrity of all dwelling property. Members who wish to alter the exterior or interior of their dwelling units must precisely comply with the restrictions as stated in their Cooperative's governing documents and the first step in doing so is an educational process so Members understand their obligations and the processes involved.

Bottom line: As you plan ahead for next summer, and you are looking for shade on a sunny day; remember to check with your governing documents or contact your Cooperative's management company before putting down a deposit on an expensive new awning.

## News You Can Use

- Does your cooperative have a compliant employment eligibility verification program? A recent court case, DLS Precision Fab LLC v. US Immigration & Customs Enforcement has stated that employers cannot simply blame Form I-9 (the Employment Eligibility Verification) violations on the HR Director. The court found that because the HR Director was not a separate entity but the company's agent, the company was liable for the violation as her or her supervisor.

Also related, in accordance with President Trump's 'Buy American, Hire American' Executive order, a newly revised I-9 form has been issued and is required to be in use by September 18, 2017

- The multifamily housing Policy is to be revised and HUD is looking for feedback. This effort to make the guidance up-to-date through Housing Notices, Mortgagee Letters, Policy Memorandum, along with regulatory and statutory directives. Individual chapters on Multifamily Drafting Table will be made available. HUD is asking all stakeholders to review this draft and give feedback on the subject by November 3, 2017. Submit all feedback to [MFHDraftingTable@hud.gov](mailto:MFHDraftingTable@hud.gov)
- The New York Supreme Court dismissed a lawsuit initiated by members of the Seward Park Housing Corporation. The board of directors changed the member parking from self park to valet parking and in turn the members challenged this.  
Although the case was dismissed it opens up an interesting conversation about decisions made by “the board” in regards to the business and bylaws. These decisions can be made as long as the outcome fits the certain requirements, and said decision is made in good faith and within the scope of authority. Link to the full articles [here](#).
- Effective June 6, 2017 the U.S. Department of Labor withdrew a previous informal guidance on joint employment and independent contractors. This decision makes it a bit easier for administration to work with joint employers and independent contractors without worrying about joint liability for employee’s actions. Although this decision does not change the legal responsibilities of employers under the Fair Labor Standards Act. This should help the board decide what employees to hire, keep, and fire. If the board seems unclear on conduct for such actions they should seek clarification from management and the cooperative’s legal counsel. Link to the full articles [here](#).
- The Violence Against Women Reauthorization Act of 2013 was signed into law on March 7, 2013 and HUD issued a final rule on December 16, 2016 in order to meet the law’s new provisions. This ruling will apply multifamily assisted housing properties, including those with project based Section 8, Section 202 and 811 supportive housing for the elderly and people with disabilities; Section 236 and 221(d)(3) below market and reduced interest rate programs; and the Section 811 Project Rental Assistance grant program. For more information refer to HUD’s [website](#) for details and the press release relating to this ruling.

## Calendar of Events



- The 2018 Annual MAHC conference is set for May 21-23, 2018 at Green Valley Ranch Resort & Spa in Las Vegas, Nevada visit <https://www.mahc.coop/> for more registration information.
- The National Association of Housing Cooperatives' 58<sup>th</sup> Annual Conference will be October 24-27, 2018 in Phoenix, Arizona visit <https://coophousing.org/annual-conference/> for more information.

## The People of PCK

### On Online Banking

We are excited to announce that our very own Kerry L. Morgan was a keynote speaker at Community Choice Credit Union's Fraud Information Seminar. Unfortunately, fraud has become an all-too-familiar phenomenon in recent years as we have grown more reliant on using credit and debit cards, online purchases and online banking.

As many people wish to learn more about the dangers of fraud, as well as ways to avoid it and what to do if you are a victim, Mr. Morgan was able to use his knowledge of the legal world to assist. His speaking concentrated on the legal aspects of fraud: liabilities and the rights we have as consumers.

Keeping yourself secure is the best front-line way of avoiding fraud entirely, and easy solutions include: maintaining complex passwords for your phone and online accounts, knowing and being wary of common potential scams, avoiding using public wi-fi for secure transactions such as banking, and training yourself to look for damaged or suspicious card readers that may be indicative that a skimmer (a device placed by a thief which reads your card information) has been installed.

### On Super Lawyers

Randall A. Pentiuk and Kerry L. Morgan have received the honor of being added to the rank "Super Lawyer". This rating and title is for outstanding lawyers who have achieved a high-degree of peer recognition and professional accomplishment. A four step selection process with a nomination by peers, a 12 point research criteria on the lawyers professional achievements, peer evaluation, and the final selection is only 5% of those attorneys selected will gain the title Super Lawyers. Mr. Pentiuk and Mr. Morgan are a shining examples of Super Lawyers, congratulations!

Want to know more about the attorneys at Pentiuk, Couvreur & Kobiljak, P.C.?

Check out our website  
[www.pck-law.com](http://www.pck-law.com)

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our specialized site [www.pck-cooplaw.com](http://www.pck-cooplaw.com)

Read our blog and provide us with your feedback. We look at ways to improve our service to you.

## On Federation of 213 Housing Cooperative

April E. Knoch attended the Federation of 213 Housing cooperatives annual fall meeting on September 30, 2017. She presented the Federation members with some legal pointers on how to remain a Cooperative and thwart efforts by developers which aggressively attempt to convert the Coop to Condos. PCK has developed tools to be placed in the Coop's governing documents and its chain of title to help preserve its status as a Coop. The Federation is comprised of Section 213 Cooperatives in the Metro Detroit area that gather periodically to network with one another and to gain greater knowledge and experience in areas of common interest.

## National Association of Housing Cooperative 57<sup>th</sup> Annual Conference

Our attorneys Randall A. Pentiuk, Creighton D. Gallup and April E. Knoch taught four classes at the Annual Conference for NAHC in San Antonio last month. The interactive and informative courses left members enlightened, entertained, and inspired. The attorneys at Pentiuk, Couvreur & Kobiljak, P.C. have taken their years of experience in Cooperative Housing legal work and created classes that teach cooperatives to thrive and flourish. Attendees of the four classes enjoyed the material taught and their time with Mr. Pentiuk, Mr. Gallup and Ms. Knoch. Our firm is proud of another job well done by our attorneys, and positive feedback from the 57<sup>th</sup> annual conference.

## Resources for you

Midwestern Association of Housing Cooperatives (MAHC) <http://www.mahc.coop/>  
(734) 955-9516

National Association of Housing Cooperatives (NAHC) <http://www.coophousing.org/>  
(202) 737-0797

National Housing Cooperative Law Center <http://www.nationalcooperativelawcenter.com/>

*A complimentary services provided to our friends and clients of Pentiuk, Couvreur & Kobiljak, P.C., a law firm serving housing cooperative boards throughout the nation. (<http://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.*

*In an effort to make this newsletter digital and efficient any subscribers receiving the print edition can send in an email and be changed over to electronic copies.*

*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](mailto:rpentiuk@pck-law.com) or call our offices: (734) 281-7100 (Michigan) or (773) 435-6503 (Illinois). For more information on Pentiuk, Couvreur & Kobiljak, P.C., check out our website at [www.pck-coop.com](http://www.pck-coop.com). Please Like us on Facebook: PCK Law.*