

Housing Cooperative Law Journal

Volume I, Issue 2

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SPECIAL POINTS OF INTEREST

- Affordable Care Act
- REAC
- Picture Liability

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How the Affordable Care Act May Affect Your Cooperative

APRIL KNOCH, ESQ.

Every day in America, we are used to making purchases and depending on the product, paying a sales tax on the total cost of goods at a varying percentage. We pay sales tax on paper products, prepared foods, vehicles and now we pay sales tax on digital downloads. We have never been required to pay a sales tax on the sale of our homes. It was the one investment that remained untouched by the sales tax and is instead taxed on a yearly basis according to market value. In less than a year however, this will all change.

For the first time, beginning January 1, 2013, the federal government will apply a 3.8 percent tax on the unearned income arising out of the proceeds from the sale of single family homes, townhouses, cooperatives, condominiums, and even rental income, depending on the seller's individual circumstances and any capital gains tax exclusions. This tax is one of many scheduled taxes itemized in the Patient Protection and Affordable Care Act (PPACA) budget in order to raise \$210 billion to pay for PPACA.

According to the Tax Foundation, Tax Policy Blog on September 24, 2010: "there is no "sales" tax on home sales in the health care bill" passed by President Obama in his inaugural year. "The bill would impose essentially a capital gains tax on *some* home sales made by a *limited number* of taxpayers. (The health care law contains a new 3.8 percent tax on "unearned income" for high-income taxpayers. Unearned income includes capital gains.) To be hit by the 3.8 percent capital gains tax, you first have to be a married couple making more than \$250,000 in adjusted gross income or \$200,000 if you are single. The capital gain on the home sale must also exceed \$500,000 if this is a primary home and you are a married couple (\$250,000 for singles). So, for example, even if you and your spouse make \$300,000 in wages and you bought a home that you lived in for \$600,000 and you sell it for \$1 million, your capital gains tax on that home sale would be zero. Even if the home sold for \$1.2 million, thereby resulting in a capital gain of \$600,000, only \$100,000 of that capital gain would be subject to the new tax (because of the \$500,000 exclusion)."

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NEWS YOU CAN USE:

Real Estate Assessment Center & the National Association of Housing Cooperatives Join Forces

In a cooperative REAC inspection, the cooperative board would be advised as to any deficiencies in any unit, but with no penalty to the coop as a whole.

On Wednesday, May 2, 2012, July Sullivan and Greg Carlson visited the Real Estate Assessment Center (REAC) on behalf of the National Association of Housing Cooperatives (NAHC). Specifically, they went to visit Mr. Delton Nichols, who is the Deputy Director of REAC. Ms. Sullivan and Mr. Carlson went to REAC on behalf of NAHC to propose a change in protocol involving cooperatives. According to the cooperative documents, in most cases the member is responsible for everything within the dwelling unit. Previously in other similar situations, various local government requirements have been set. For instance, in New York City local ordinances require that window guards be installed on units when there is a child under seven years of age residing in the home. This created problems as there would be a REAC deficiency when the building had a REAC inspection and the member did not comply with the local government requirements, resulting in a penalty to the housing cooperative.

With the change that Ms. Sullivan and Mr. Carlson proposed, the REAC inspector would make a note of any deficiency but not take any points away. Similarly, in a cooperative REAC inspection, the cooperative board would be advised as to any deficiencies in any unit, but with no penalty to the cooperative as a whole. Mr. Nichols was very receptive to the idea. Further meetings are in the works with HUD Asset Management for multifamily units, and ultimately HUD Asset Management for Multifamily will issue what rules and regulations the REAC program must implement.

Other options for housing cooperatives to consider when balancing member obligations with housing cooperative liability is submitting a portion of the proprietary lease or occupancy agreement that would pertain to the member's responsibility of the unit. Points would be given back and the property would be flagged so that future inspections would be taken care of in REAC'S final review.

Think Twice Before Taking Pictures of Your Residents

RANDALL PENTIUK

If you are thinking about using pictures of your cooperative residents in a photography contest or any sort of fundraiser, think twice. While it is unlikely that a court would allow a suit alleging misappropriation of a resident's name and likeness in order to promote products or services, or make money from the commercial use of their identity, your cooperative could be subject to a lawsuit.

Michigan is the only Sixth Circuit State without a "right of publicity" statute, and the only one that does not provide post-mortem right of publicity protection. In most states, you can be sued for using someone else's name, likeness or other personal attributes without permission for an exploitive purpose. *As a general rule, you should never use someone's name or photograph in advertising or promotion of your website or blog without permission.*

There are two kinds of claims. The first involves an invasion of privacy through misappropriation of name or likeness, and the second involves the violation of the right of publicity (the right of a person to control and make money from the commercial use of his or her identity).

Elements of Misappropriation & Violation of the Right of Publicity:

1. Use of a protected attribute
 - a. "Likeness" refers to a visual image of the Plaintiff, whether in a photograph, drawing, caricature, or other visual presentation.
 - b. For an exploitative purpose
 - c. Misappropriation: P must show D used name/likeness in advertising or promoting products or services. Can also be held liable for non-commercial use if D exploits the P's identity for D's benefit.
 - d. Right of publicity: right of a person to control and make money from the commercial use of his or her identity. Plaintiff must show Defendant used their name/likeness for **a commercial purpose** such as **advertising, promoting goods or services, placing name/likeness on/in products/services you sell to the public.**
 - e. No consent

CONT'D on pg 4

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CONT'D: Pictures

f. Consent is a complete defense to legal claim for misappropriation or violation of the right of publicity.

Children cannot consent on their own behalf. When using the name or likeness of a minor, you should seek consent from the minor's parent.

Children cannot consent on their own behalf. When using the name or likeness of a minor, you should seek consent from the minor's parent. People can revoke consent anytime before the use of name/photograph takes place.

Exceptions

News and Commentary generally cannot be held liable for using someone's name, likeness, or other personal attributes in connection with reporting or commenting on matters of public interest. (Courts generally take broad view of "news" and "commentary", which encompasses both print and online sources such as **internet bulletin boards, unauthorized biographies, magazine/TV reports, fundraising letter, magazine article, and books**)

Limitation: Use of P's name/likeness **must bear a reasonable relationship** to content of news/commentary presented, or may be liable for creating an "advertisement in disguise".

Michigan Case Law History:

Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (Mich. Ct. App. 1983).

The right of publicity has developed to protect the commercial interest of celebrities in their identities. The theory of the right is that a celebrity's identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity.

Janda v. Riley-Meggs Industries, Inc., 764 F. Supp. 1223 (1991).

Where an orthopedic surgeon gained a significant reputation because of his research on prevention of softball injuries by use of a detachable base; and subsequently his research was cited by a softball base manufacturer and brought suit. The Court held in favor of the surgeon and extended the right of publicity by using those research results to increase sales of the softball bases.

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Helpful Housing Cooperative Resources

National Cooperative Law Center: www.nationalcooperativelawcenter.com

A website and resource filled with the most up-to-date news, articles, and legal publications as well as a national coop locator.

Pentiuk, Couvreur & Kobiljak P.C.: www.PCK-CoopLaw.com

A premier law firm with offices in Chicago and Detroit serving Cooperative Boards throughout the United States in all aspects of housing cooperative matters.

National Association of Housing Cooperatives: www.coophousing.org

A nonprofit national federation of housing cooperatives, housing associations, professionals, and individuals interested in promoting the interests of cooperative housing communities.

Midwest Association of Housing Cooperatives: www.mahc.coop

A regional association of housing cooperatives committed to supporting and championing the cause of quality housing through education, legislative actions, partnership, and advocacy for housing cooperatives.

CONTACT US:



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Pentiuk, Couvreur & Kobiljak is the premier law firm with offices in Chicago and Detroit serving Cooperative Boards throughout the United States in all aspects of housing cooperative matters, including dealings with HUD, refinancings, civil lawsuits, corporate law, bylaw and governing document revisions, evictions, and board policy drafting and enforcement.

Please visit our national website at www.nationalcooperativelawcenter.com and see if your housing cooperative is on the map!

If your cooperative is not on the map, send your website link and housing cooperative contact information to RPentiuk@pck-law.com and we will post your coop on the map and help drive new members your way!

Coop Calendar:

**MAHC Annual
Conference:**

Las Vegas, NV

Spring 2013

For more information
please visit:

www.mahc.coop

**NAHC Annual
Conference:
Reno, NV**

- Oct. 10-13, 2012

For reservations please
visit:

coophousing.org

CONT'D: Affordable Care Act

Once you wade through all the political rhetoric, legalese and the brain fog created by trying to decipher the meaning of this tax and how it applies to you as a member of a cooperative, you are still left with question marks.

Upon a first reading by the Tax Foundation, it would appear that the tax will not apply to cooperatives and any taxpayer making less than \$250,000.00 combined income. The problem with the above explanation however is that it glosses over the fact that the Medicare tax in the health care bill is not indexed for inflation. This means that over time, if the health care bill and the tax code were never changed, i.e., if deductions and exemptions continually decrease over time for those making \$250,000 combined or \$200,000 single and less, short and long term capital gains eventually more and more homeowners, including cooperative members, will qualify for the 3.8% income tax on his and her federal income tax returns.

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Essentially, limited equity cooperatives will not really need to worry about the tax due to restrictions on transfer value, however, market rate cooperatives on the other hand, would be subject to the tax depending on the value of the membership and whether the amount the membership is sold for increases the seller's adjusted gross income above the yearly limits. Unfortunately, for this very controversial tax on home sales, there will be no examples of how this tax actually works or what its impact will be until after January 1, 2013.

Housing Coop Law Journal Is Going **GREEM!**

(at least we're going to try)

But we need **YOUR** help to do this. If you currently receive the **Housing Coop Law Journal** and you have an e-mail address, please **email** Randall Pentiuik at RPentiuik@pck-law.com and include the following information:

First & Last Name

Business Name

Address, City, State & Zip

Email Address

Thank you for your help in our endeavor to make the world a little **greener!**



CONT'D: Pictures

Ruffin-Steinback v. dePasse, 267 F.3d 457 (2001)

Miniseries depicted the lives of the Temptations' original members, and none of the plaintiffs were compensated or consented to the use of their likeness. This case also addressed the question of whether depicting a story where some of the events are fictionalized constituted a violation of the right of publicity. The court held for the Defendant; and said that the right of publicity does not prohibit depictions of a person's life story.

Parks v. LaFace Records, 329 F.3d 437 (2001).

Rosa Parks brought suit against hip hop group "Outkast" for using her name as the title of a song. Court used balancing test to analyze publicity appropriation v. free expression. The district court held that "a title that uses a celebrity's name will be protected by the First Amendment unless the title is 'wholly unrelated' to the content or was 'simply a disguised advertisement'". The court of appeals found that the evidence presented a question of fact, that "upon consideration of all the evidence, a reasonable finder of fact could find the title to be a disguised commercial advertisement".

The common law of most states creates an exception to liability for news reporting and commentary on matters of public interest, and many state statutes explicitly exempt news reporting and other expressive activities from liability. If your cooperative has a newsletter that you use pictures in, then you may be exempt from liability. In addition, hosting advertisements on your cooperative's website does not deprive you of the news and commentary exception. Courts recognize that for-profit news organizations that sell advertising space are entitled to protection.

If you have taken pictures of your housing cooperative members and are planning on using them for any purpose, the safest route is to have any subjects sign a disclosure and release form allowing you to use their likeness for any housing cooperative purpose. Protect your housing cooperative through preventative measures, and always make sure to discuss these policies with your housing cooperative's legal counsel.

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URGENT NATIONAL UPDATE FOR COOPERATIVES

Unless Congress miraculously acts in a bi-partisan manner, the federal government will be forced to have automatic 8.4% across the board spending cuts beginning January 1, 2013.

All government assisted cooperatives should start to plan for the likely event that these cuts become a reality. What HUD will do and how HUD will handle the cuts is not known at the moment. If the cooperative has a project based section 8 contract, there is a possibility that individual members' participation to rent (carrying charges) will rise from 30% to 35%. This possibility and the possible short funding, which we experienced a few years ago, would require Boards with a HUD subsidized or a HUD insured cooperative, to make difficult decisions. It is important for these Boards to begin to plan NOW.

Please note that the 8.4% cut equals 1/12 or one month of annual subsidies. What will your cooperative do if it loses one month's worth of subsidies? Members should start planning now for the worst case scenario and hope to not to have to use it.

Some ideas your cooperative may want to consider are: Drafting an alternative budget; start assessing your members now to cover the difference and build a nest egg fund; look for non-essential services that may be reduced or eliminated; research alternative funding possibilities; or a combination of the above.

Please note that the above are a few key suggestions. It is strongly recommended that you work with your cooperative's professionals, regional associations or a competent attorney, to draft your own plan.

You should also reach out to your Senators and Representatives (especially since this is an election year!). Tell them what traumatic harm these cuts will have on your cooperative. To find out who represents you, please use the link to "Contacting the Congress"

<http://www.contactingthecongress.org/>

Please quickly e-mail your Senators and Representatives and tell them to protect HUD from severe budget cuts to the specific programs that currently help your cooperative (e.g., Project based Section 8, 236, 202, etc.)



Leaders in Housing Cooperative Law for over 30 years.

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