

## **PROACTIVE PLANNING TO AVOID LAWSUIT AND WHAT TO DO IF YOU ARE SUED**

In our litigious society, it is almost certain, that at some point in time you will be sued. Lawsuits come in many different varieties in our industry, but there are several types that we see all the time. The first and most obvious is the lawsuit over wrongful sale, (the wrongful disposal of property.) The second type is the breach of contract/failure to perform, (the refund cases.) The third type is employment law-related lawsuits, such as wrongful discharge/sexual harassment and wage and hour claims. The fourth type is the class-action lawsuit which we have discussed so often in this column involving as an example, late fees.

Anyone who has ever spoken with me knows that I always quip “Anyone with \$200.00 can file a lawsuit”. That doesn’t mean that the complaining party is correct; unfortunately there is no person in the Clerk of Court’s office that reviews cases to see if they are valid before allowing them to be filed.

There are some steps you can take which will help you ward off some, but of course not all, of these potential lawsuits.

### 1. Wrongful Sale/Disposal of Property

First and foremost, insure that your lease is well-written, clear and unambiguous, especially on the issues of when rent is due and what happens if it is not paid on time. 47 out of the 50 states have lien sale statutes which also give you guidance. (See the Legal Perspectives article in the February 2002 issue of ISS discussing lien sale procedures in greater depth). It is important that you have reviewed the lien sale statute in your state, preferable with your attorney, to make certain that your lease and your lien sale procedures are in compliance with your state’s statute. Under your state’s statute, if you have complied with the terms of the statute, including minimum waiting periods, the inventory, the advertisements, the mail notices, the conspicuous language in your notices, etc., your liability to your tenant for a wrongful sale is minimized or completely eliminated. Thus,

these types of lawsuits are easy to avoid or at least easy to win by following your state's statute.

## 2. Breach of Contract

Most of us have run into a tenant who turns out to be simply dissatisfied with their experience. More often than not, the dissatisfaction arises from a breakin, a leak, damage to their property, theft of their property, gate failure, etc. These are the people who, regardless of how well written your lease is, think you are a babysitter for their property and that you are somehow responsible for their damages and losses, no matter how they occur (or even if they occur at all).

While you have insurance to cover these types of claims, and while your insurance will almost always defend you and, if necessary, pay a judgment, many operators maintain policies with deductibles which might very well exceed the amount of the claim. Further, turning too many claims over to your insurance company will result in rate increases or the insurance company dropping your coverage. Thus, there is a certain class of claims which lawyer's refer to as "nuisance claims". These claims may or may not be valid, and they have demands that are not worth turning over to an insurance company for defense. However, you and your facility can not afford a reputation of simply paying money every time a tenant deems they are entitled to some type of compensation.

The universal factor we find in these type of lawsuits is that the claim when first learned of, has some value associated with it for \_\_\_\_\_. By the time the lawsuit is filed the amount of the claim has often doubled or tripled. These cases have a way of multiplying as the tenant becomes more angry and when their demands are not met. We also find that often the plaintiff tells us if only they would have received an

apology or some recognition of their claim they never would have filed suit. Sometimes resolution is as simple as an apology, an agreement to transfer, or a small concession that not only keeps the tenant, but keeps them out of court. For a reasonable fee, most communities have a business mediation service through either the court system or the Chamber of Commerce. Mediation is not Court. It is an opportunity for both sides to meet with an impartial person - the "mediator" - who is trained to assist with the resolution of disputes by exploring resolution options. While you may not be able to negotiate with an irate tenant and settle a case for an apology and a couple of months of discounted rent, an impartial mediator, after allowing the tenant to vent for a while, and helping them understand the potential weaknesses of their case as well as explaining to you the strength of the tenant's case, may be able to achieve the same result. That result may cost you, the owner, a few hundred dollars - the same few hundred dollars you would pay your attorney to simply begin defending the lawsuit, not to mention the potential judgment that could be rendered against your facility by a sympathetic judge who has a bad opinion of Self-Storage from some previous experience or misconception.

In any event, if you resolve the dispute through settlement with the tenant or through mediation, make certain that you have and present to the tenant a release releasing all claims accruing up and through the date of the settlement, including any issue raised in the complaint. Without a release, the tenant can theoretically go back to court and sue you later for the same circumstances. With a release, which should be prepared by your counsel, you can block the tenant from ever bringing up the problems or issues that they had with you in any type of cause of action. A well-drafted release can even prevent the tenant from agreeing to testify on behalf of any other tenants of your facility. The most common mistake we encounter with self-storage operators who do settle their own cases, is that they base their release on a handshake rather than a written release. Sometimes it works;

sometimes it has come back to burn the owner. It is simply a waste to agree to resolve any dispute without a written release.

### 3. Employment Law Issues

States vary in their laws regarding your ability to discharge employees. If you have even one maintenance person or manager, other than yourself as owner, you should strongly consider having an employee handbook outlining the company's policies regarding everything from absenteeism to the vacation and everything in between. An employee handbook must be drafted by your attorney. There are too many state-specific issues which must be included for this to be purchased from a stationery store. Almost all employee handbooks, however, have some common threads such as statements about sexual harassment, protection of employment to certain protected classes, outlines of payment of wages or salaries, outline of vacation policies, outline of termination policies, outlines of expected behavior including any uniform requirements, attendance issues. An employee handbook should be given to every new-hire, and a signed receipt should be retained by ownership. If you are instituting an employee handbook with current employees, make certain that you ask your attorney about the appropriate consideration to give the employee in order to make the policies binding on the existing employees. The employee handbook buys you, for a small price, excellent protection if you follow the rules you set out for yourself as an owner for your employees. For an example, if an employee is habitually late, and you do not have an employee handbook, and you discharge the employee they may find other alleged reasons for the termination. However, if they received and have signed an employee handbook which states that excessive tardiness or absenteeism is grounds for discharge, you are in a far better position to show a judge or a jury that the employee knew what was expected of them and that they failed to act in accordance with the requirements set forth in the handbook.

An interesting development which has been around for a long time, but which is really coming home to roost in the Self-Storage industry is fair wage and hour claims by managers. This is a Federal law. The wage and hour rules are Federal laws. As you may know, people who are actually in management can be salaried and are not subject to the provisions of the wage and hour act which require payment of overtime for more than 40 hours worked in a week. There have, however, for quite some time, been cases involving the apartment industry where people who have the title of manager of the apartment complex are really not management by the Act's definitions. Generally speaking in order for a manager to be an exempt employee they must be an executive, professional or administrative employee. They must receive a fixed salary even if they do not work a 40 hour week. An executive generally must manage at least 2 other employees and exercise a significant amount of discretion and independent in doing his/her job. The administrative exemption is more like a project manager instead of a manager of employees. Still this manager must exercise a substantial amount of \_\_\_\_\_ in their position, be included in decisions which directly relate to the company's management policies and operate with only general supervision. Either position must significantly relate to the success in favor of the business. If these employees do not have this sort of authority, they are not actually management, and even though you have them on salary, they would be entitled to overtime for working in excess of 40 hours a week. Often we see Self-Storage facility managers working more than 40 hours a week because of the staff shortage or \_\_\_\_\_ when rent is being received, or bills are being issued, there is generally more than 40 hours of work to be performed. The penalties for wage and hour violations are reasonably substantial, and the look-back period is \_\_\_\_ years. You should consult with your attorney or a labor law attorney as quickly as possible to see if changes in your policies need to be made before a lawsuit is filed.

#### 4. Class Action Lawsuits

While these suits are rare, they have certainly garnered a lot of attention in our industry, especially over late fees. Please make sure that your late fees are either in compliance with your state statute if your state has one, or if not that they are not punitive. If you have questions about the status of late fees, please see the ISS Legal Perspectives article from \_\_\_\_\_ . More Self-Storage Associations are trying to lobby for statutes that provide guidance for the types of late fees you should be allowed to charge without it being considered punitive and therefore actionable by a class of tenants. Most recently, Missouri and Arizona have passed such bills with more on the way. However, until your state has a Late Fee Bill, it would behoove you to make sure that your late fees are not unreasonably high and/or find other creative ways to avoid charging late fees. For example, some operators have begun requiring all tenants give them a credit card with authorization to charge the card in the event rent is not paid. If the tenant does not want their card charged, they must pay their rent by a certain date (the first or third) of the month. In the event the rent is not received by the operator on that day, the card is authorized and the rent is paid through the card. Thus, these operators have little or not late rent, and the few that have done things such as maxed out their card such that the charge will not authorize are no longer being charged late charges, the operators are simply working to remove those people from the facility via lien sale, statutes, etc. or other termination of the lease as quickly as possible so that they do not face claims for excessive late fees. This is just one example of what operators are doing to get around the problem.

All of this being said, there is still a good chance that, at some point, you could be sued. There are several things that you should do right away as soon as you receive word that you are being sued by being served with a summons from a court. They are:

1. Notify your insurance company
2. Prepare and organize the file pertaining to that tenant; and
3. Conduct your own investigation and review policies.

1. Notifying your Insurance Company

Most insurance policies have a provision that puts you on notice, whether you read it or not, that if you do not let them know that you are being threatened with a lawsuit and/or being sued within a certain number of days after receiving that notice that their obligation to cover you is waived. That is why, even if you are not sure you want to invoke your insurance coverage, or even if insurance will cover the claim, you must let them know that there is a potential claim out there as soon as you know. If there is any question as to whether or not the insurance company will cover the claim, they may issue what is called a “reservation of rights letter”. This type of letter means that the insurance company will assume the obligations of defending you in a lawsuit, but reserves the right to later determine whether or not the claim is actually covered and whether or not they would actually have to pay any judgment rendered against you.

The insurance company will assign an attorney to handle the lawsuit. This attorney, while employed by the insurance company, works for you. You make decisions about the case, etc. The insurance company only authorizes potential payments of settlements or pays judgments. That being said, it is never a bad idea to keep your own company attorney involved in the case to always insure that your best interests are being represented by the insurance company’s attorney. Often, the attorney hired by the insurance company to represent you may not have the working knowledge of the industry that your attorney may

have. You would obviously be responsible for your own attorney's fees, but that minimal investment may pay great dividends later on in the case.

## 2. Preparing and Organizing the File that Pertains to the Tenant

As the owner of the facility, you want to make certain that you have the full, complete, and accurate file regarding the situation. Documents have a habit, especially if your employee has done something wrong, of disappearing. Thus, before anyone else within the company knows about the lawsuit, you should ensure that you have compiled a full and complete copy, if not the original, of the tenant or tenants' files, including computer printouts and all written documentation. If the lawsuit is a claim against you for something such as a personal injury or theft, make sure you have obtained copies of all police, fire, and/or ambulance reports and witness statements. You should also take photographs of the scene of the injury, accident or theft.

It is also very important to gather the names, addresses and phone numbers of anyone who may have seen or learned any information about the case who may be able to act as witnesses. As time passes between the filing of the lawsuit and the trial (this can be several years), you may forget or lose track of the people who could be witnesses in the case. Gathering this information early will make it easier for you and/or your attorneys to find these pertinent people later.

## 3. Conduct Your Own Investigation and Review Policies

If this is a claim by a tenant for some type of wrongful action, before preparing a large and expensive defense, make certain that you have not done the wrong which they claim, or if you have done the wrong, that it was justified for some reason. If not, it might be in your best interest and less expensive to get out of the lawsuit early through settlement. Also, if

you have done something wrong, this would be an appropriate time to review your policies and procedures to ensure that you have properly instructed your employees to avoid a reoccurrence of the same problem and resultant lawsuits.

Once all of this has happened, please be aware that there is a time limit by which you must file an answer and certain other pleadings with the court. If you miss these deadlines, you may not only lose by default, but you may waive the right to assert counterclaims or join other parties in the lawsuit. This is not the time to be frugal with your money and avoid hiring a lawyer. If you have not reported this claim to your insurance company and/or they have not appointed an attorney, obtain one on your own. Defending a lawsuit is not the time to handle matters yourself.

Assuming complaints and answers are all properly filed, there will be period of time for what is known as discovery. During discovery, each party is entitled to obtain information from the other party, including asking questions about the nature of the case, determining valuations, reviewing medical records, incident reports, and all other documents that may be used at trial. Some of the forms of discovery may be familiar to you, such as Interrogatories, Requests for Production of Documents and depositions. Others, such as requests for admissions and requests for physical examinations may not be as familiar to you, but their intention is to result in the same goal - that being, there should be no surprises at trial. A properly-prepared case should allow you and your attorney to know exactly what the other side intends on claiming and the basis for their claims, the evidence, reports and all other documents they intend to produce at trial. The proliferation of discovery has led to greater use of settlement and negotiation tactics.

If, through discovery, you find that the plaintiff has a good claim against you, or the plaintiff may find that their claim is baseless. There are opportunities, both informally and through court intervention, to try to cause the party to reach a settlement or a negotiated resolution of this matter. Sometimes, cases may even be sent to binding or non-binding arbitration, where one or several third, independent parties listen to the case and render an evaluation/judgment on the claim. Other cases are sent to mediation for the same type of back and forth negotiation which is described earlier in the article.

If all else fails, the case eventually will have its day in court. A larger, complex class-action litigation has its weeks in court, while a simple property loss claim may have its 15 minutes in court. At the end of the day, if all else fails, both sides will have had the opportunity to have a trier of fact, either judge or jury, determine who is responsible for the alleged loss, and how much the alleged loss is worth to the injured party. There will either be a judgment for the plaintiff or the defendant, and if there is a judgment for the plaintiff, an amount would be awarded which would have to be paid by you or your insurance company, depending on the nature of the claim and your coverage limitations.

As you can see from this brief description, for a self-storage owner/operator, there is absolutely nothing fun about litigation. Litigation is not only distracting, costly and time-consuming, but also emotionally difficult because someone is accusing you, rightfully or wrongfully of having done something wrong. It is never easy to be told that you are wrong, or that you may have done something wrong and/or that a jury or judge may perceive that you have done something wrong. That is why, to the best extent possible, good documents, preparedness, and a willingness to listen and resolve the situation early is more important than ever.

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