

A LEGAL PERSPECTIVE

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As a new contributor to ISS, this column is intended to focus on legal issues that I see everyday as a practicing attorney representing self storage owners and facilities. Specifically I will focus on issues that are emerging in the industry nationwide, a state or regional trend, and/or the issues that, as a practitioner, my clients bring to me in their day to day operations. I welcome your e-mails, letters or phone calls with questions about this months article and suggestions of other topics that you would like to see covered in this column. My e-mail, snail mail, and phone number are listed at the end of the column.

The first column is devoted to all of you who have “borrowed” your lease or even one or two lease clauses from another operator or facility. The question is how do you know that the person from whom you “borrowed” knew what they were doing when they drafted (or, worse, borrowed) their lease? When lease terms and clauses are borrowed they become like the childhood game, Operator, more confused and misdirected each time they are passed along.

Most of the leases that come to me for review have at least one or two provisions that, upon careful review, make absolutely no sense or at least contain typographical errors which create some kind of ambiguity that hurt or destroy the intent of the Lease. Ambiguity can certainly affect your ability to enforce a lease. If the ambiguity exists in an important paragraph of your lease, such as payment of rent, default, or remedies upon default under the lease, it can cause serious problems. Lets take an example from a provision of a lease that I was given recently.

“ Defaults; Lessor Remedies: If Lessee breaches any term or condition of this Agreement, Lessor in addition to such other rights it may have under this Agreement shall have the right to terminate this Agreement. If Lessee fails to pay any rent or other charges when due Lessee may: (i) remove Lessee's lock and access the space; (ii) overlock the space to prevent Lessee' access until all amounts outstanding are paid in full; (iii) inventory and/or take possession of the property located in the space; (iv) sell the property stored in the space as permitted by law; or (v) pursue any and all remedies available, at law or equity, including a forcible entry and detainer action against Lessee.”

Obviously, the problem with this provision is that somebody mistyped one word *Lessee* instead of *Lessor* in the second sentence (in bold above). Thus, your tenant has the right to remove tenants lock and access the space, overlock the space, inventory and take possession and sell the property stored in the space. The operator, with literal enforcement of this provision, would have none of those rights. While you may think that this is a simple typographical error and that any court would understand that you meant to take these rights for yourself, that is not necessarily the way the court would be inclined to interpret this provision. A common rule of contractual interpretation is that ambiguity in a contract is resolved in the favor of the person who did not draft the contract, in this case, the tenant. Thus, in seeking to enforce your right to overlock and sell the property under this provision, the court could say the provision might be ambiguous, but the ambiguity is resolved in favor of the tenant. In the worst case the court could say the provision is not ambiguous at all; Landlord does not have the right to overlock or sell the property. Either way the result is the same - the Landlord loses! If you make a typographical error like this, it could put your business in serious jeopardy because it emasculates your ability to collect rent by removing the threat of overlock and a Landlord's lien over your tenants. Further, some states' self storage statutes permit the right to overlock and lien the property only if the right is provided in the lease agreement. With this small, one word, typographical error in your lease agreement, you might forfeit your right to overlock and sell the possessions stored in the

premises. A lengthy lease modification process would then have to begin requiring the operator to give month to month tenants thirty (30) days notice of the change and your tenants who are still under a lease could not have this change made until the end of their term. For all tenants, the attempt to make the change would certainly call to their attention to your mistake. This particular lease clause was an expensive mistake for the person who came to see me after an attorney representing a tenant whose property was sold at auction reviewed the rental agreement. This little typographical error loomed as a possible class action lawsuit by all tenants who had their property sold at lien sale at any time during the last ten years by this facility. The settlement was far greater than the legal fees that any owner could ever spend on having their lease reviewed and revised.

The industry experts always encourage operators to make an annual review of occupancy rates, rent rates, competition, etc. to make sure that they are competitive in the market and that you are keeping up with the trends in the market. The same should be done for your rental agreement. Once a year, at a minimum, you should review your lease to insure several things: (1) That the policies that you are enforcing at your facility are clearly stated in your rental agreement so that your tenants know what to expect from you and you from them; (2) Check to make certain that you understand what each and every term of your rental agreement says and means; (3) Review to be certain that there are no ambiguities either in language or terms in your agreement, and (4) Insure that you have not borrowed duplicative provisions that say the same thing in slightly different ways.

I see leases all the time that were prepared from a form book or by an attorney but the landlord liked another default, or other provision so much from someone else's lease that he/she cut and pasted it into their lease. Now the lease has, for example, two default provisions that say two different things providing two inconsistent remedies. Guess in whose favor the ambiguity is resolved? Further, insure that your terms throughout the lease are consistent. If you are referred to at the beginning of the lease as "Landlord" you should not also refer to yourself in other parts of the lease as "Lessor" or "Owner". Also, tenants should

not be referred to as “Tenants,” “Lessee”, and “Renter” inconsistently or interchangeably throughout the agreement. Finally, make certain that both the facility itself and the particular unit being rented are referred to consistently throughout the lease by one identifying term each.

Your best piece of mind will come from a annual review of your lease by a competent attorney. You should especially consider having your lease reviewed if you have modified any of the provisions in your lease since it was written by an attorney or service and/or if you have recently borrowed or substituted a provision in your lease agreement, and/or changed operation policies. The cost of reviewing the lease or modification now will be a fraction of the cost of the first settlement (if the case can even be settled) in the event you have an inconsistency or ambiguity in your lease agreement construed against you.

Remember, if you can't understand what a provision in your lease says, you should not expect a court, who doesn't know anything about the industry or the business, to understand it for you. Further, if you expect a court to make an interpretation of a lease clause you do not understand the court is obligated to make that interpretation in favor on the non-drafting party, in this case your tenant. There is no reason that a self storage rental agreement cannot be written in plain, easy to understand english. If yours is not, or if there are provisions that you are not sure fit appropriately within your lease, make a slightly late New Years resolution to have that lease reviewed and then, if changes are necessary, distribute new leases to your tenants at the beginning of the next month or as soon as the term expires.

I look forward to seeing you at ISS in Las Vegas, January 30 through February 3, 2001. I will be conducting a late fee litigation and legislation seminar and will be at Roundtables and “It's a Wrap”. Please feel free to see me at any of those sessions with any questions or suggestions you may have. I look forward to talking with you again in March.

Jeffrey Greenberger practices with the law firm of Katz Greenberger & Norton LLP in Cincinnati, Ohio and is licensed to practice in the states of Ohio and Kentucky. This column is for the purpose of providing general legal insight into the self storage field and should not be substituted for the advice of your own attorney. Mr. Greenberger's practice focuses primarily on representing the owners and operators of commercial real estate including self storage owners and operators. Mr. Greenberger is the legal counsel for the Ohio Self Storage Owners Society, Inc., and the Kentucky Self Storage Association, Inc., as well as a regular presenter at Inside Self Storage Trade Shows. You can send your questions, comments, or suggestions for future topics to Jeffrey Greenberger at JJG@kgnlaw.com or mail them to Jeffrey Greenberger c/o Katz Greenberger & Norton LLP, 105 E. Fourth Street, Suite 400, Cincinnati, Ohio 45202 or you can reach Mr. Greenberger at (513) 721-5151.