

A LEGAL PERSPECTIVE

Evictions Are An Option, Too

Almost all states have a Self-Storage statute that gives an operator the right to claim a lien against the stored property and, if the operator follows all of the steps, eventually get the space back and sell the stored property to help defray the outstanding rent and expenses of selling. However, sometimes a lien sale on a delinquent tenant is not your best option.

No matter which state you are in, you have some type of eviction (sometimes called a forcible entry and detainer) statute that permits landlords to evict their tenants for various reasons, including non-payment of rent. Sometimes, Self-Storage operators lose sight of the fact that, no matter how many times we remind you, that you are a landlord. Operators do not provide the service of storage-- operators rent space to be used for storage. At the end of the day, whether or not you have a Self-Storage statute, in every state an eviction is an option available to you in a non-payment of rent or other lease default-type situation.

Why would you want to consider an eviction over a lien sale? There are five scenarios when I recommend to my clients that they consider an eviction over a lien sale: 1) If you believe your tenant is particularly cantankerous or litigious and will sue you for selling their property, even if you were in the right to do so. This is particularly true if you are renting to, as an example, a lawyer or politician, as your tenant; 2) If you have concerns about, or have had past failures of, service of other notices to the last known address for the tenant and you have been unsuccessful in finding a new address for the tenant. This is less of an issue in states where the Self-Storage statute requires you to only serve at the last known address, implying that even if it is a bad address, the effort of serving notice is all that is required; however, other state statutes are not as clear; 3) If you have a tenant in default for a reason other than non-payment of rent, especially if your state statute is not clear about whether or not you have lien rights for any type of default or only for non-payment of rent; 4) If you find yourself storing a vehicle, particularly if the vehicle has a lien or liens on the title, especially in states that do not provide a remedy to a Self-Storage operator for disposal of a vehicle; and 5) If your state statute requires that the tenant be in default for a long, continuous period of time. For example, Indiana requires ninety days continuous default before you can exercise your lien rights.

While every state has a different eviction procedure, there are certain general principles that hold true in every eviction action. There is generally some sort of preliminary notice to commence an eviction. Second, the court or clerk of courts handles service of the eviction complaint on your tenant. We will discuss why this can be advantageous below. Third, there is actually some sort of trial or adjudication on your right to remove the tenant from the premises, thus giving some legitimacy to the eventual removal of the property from your Self-Storage facility. Fourth, the court often supervises or has some sort of procedure whereby court-appointed persons supervise the removal of the property. Fifth, in many states, you can file either as a supplement to the eviction complaint, or immediately after the eviction is granted, a complaint for money damages. Therefore, if you find something of real value in the Self-Storage unit, you can often lay claim to that asset, even though you have evicted instead of exercising the lien rights and conducting a sale.

Let me try to put my list of reasons to consider an eviction from above into context for you. First, if you have a tenant likely to sue you even if he/she defaulted ten different ways, rather than conducting a lien sale and worrying about whether you have dotted every “i” and crossed every “t,” you can avoid most or all of this problem because the eviction route will cause a court to conduct a hearing to determine your right to remove the property. It is then difficult, if not barred by statute (depending on your state), for the tenant to come back later and sue the operator over the action taken to evict the tenant from the space. Thus, the eviction eliminates a potential claim that you did not follow every requirement in the Self-Storage statute in your state (if you have one), and potentially bars any claim for wrongful dispossession of the space and wrongful disposal of the property, because the tenant will, by the time the hearing occurs, have been properly served with a summons (by the court, not an operator), a court will have held a hearing to determine your right to remove the property, and the court will give the operator an order allowing you to remove the tenant’s property from your rented space, and thus the tenant is barred from claiming wrongful disposal. Over the years, I have seen too many cases where a tenant has sued an operator after the lien sale, and the operator has made one small mistake. This mistake gives the court some reason to look at awarding damages to the tenant. However, with an eviction, the court has heard the case and granted the order to give you the space back. Instead of performing a lien sale, the court will send out a bailiff, constable, or other court official to supervise your removal of the property from the Self-Storage

unit. In some states, this is accomplished by a prepaid, approved moving and storage company, and in some cases, the property is simply removed to the street or removed to another place for storage. However, at the end of the day, you are greatly reducing the risk of the tenant claiming that you mishandled the property or improperly disposed of the property, because the court has a procedure for disposal of the property, and as long as you follow it, you are working under court authority and supervision, and the tenant will find him/herself in a position where it is difficult to make those type of allegations because you have disposed of the property in accordance with court procedures.

The second reason is if the tenant is difficult to serve, or you know you do not have a good address. Many of the Self-Storage statutes are ambiguous about what to do if the certified mail is returned as undeliverable. The advantage in filing an eviction is that every state has what are called Civil Rules, or Rules of Civil Procedure, or something like that, which set forth legal methods of obtaining service against a party in litigation which are often much more broad than the service of the notice via certified mail contained in many states' Self-Storage statutes. In an eviction action, depending on your state, a tenant can be served by certified mail, ordinary mail, posting, bailiff, a process server, or even by such legal fictions such as publication in a newspaper of general circulation, by what is called a warning order attorney in some states, or other methods by which the court attempts to warn the tenant of a pending lawsuit. Even if these efforts fail, in many states, the rules are written to say that by trying these methods of service, the service of the complaint is deemed to have occurred, and the court will proceed with the eviction action. This is much different than your sending out a certified notice, getting it back as undeliverable, and then proceeding with your lien sale hoping the tenant does not come back later and allege that you failed to follow the statute by serving the tenant with the required certified mail notice. This is particularly important because there have been many cases where the tenant claims that they provided an updated address to the facility, the facility claims it knew nothing about it, and the litigation begins. The additional advantage to eviction is that the clerk of the court is handling issues of service and maintains that record for court review. You have much less to prove if the tenant wants to come back and claim they did not get notice, and you have a third party who was responsible to accomplish and verify service.

Third, some Self-Storage statutes are ambiguous about “other defaults,” and there are times where you just want to get rid of a tenant even though the tenant pays rent, for example, if the tenant leaves a lot of garbage around the facility, or you suspect the tenant is causing damage or manufacturing drugs in his or her space. You notify the tenant you do not want to renew the lease next month, and the tenant does not leave and tenders rent. What do you do? Can you overlock, lien the property, and sell it? Maybe yes, maybe no, but you can always evict for holding over after the expiration of the term.

Fourth, you need not give up hope that by performing an eviction, you have relinquished all rights to make claim against the property stored in the premises. Many times operators file for a money judgment, either with the eviction or as soon after the eviction as possible. If you go to perform the set out and find property of value in the storage unit, you can file for what is called an “Execution Against Property” or a “Live Execution”, asking the court to seize certain property that it finds and sell it on your behalf in order to satisfy or partially satisfy your judgment. While this may sound like a bit of a strange concept, let me particularly focus on a motor vehicle. Except for a few states that have some provision about how to get a vehicle re-titled in a Self-Storage default situation, the rest of the states are pretty much left with a patchwork of other laws arising from garage, storage, towing company liens, parking lot liens, and liens belonging to mechanics or artisans to try to fashion a remedy to get the vehicle out of the name of the tenant and into the name of the Self-Storage facility operator in order to sell the vehicle. I contend that one of the best ways to actually remove a vehicle is to evict the vehicle and include a claim or file a subsequent claim for money at the same time, or as soon as the eviction is done. The eviction may be able to be arranged so you know where the vehicle is located (another part of your property or to an impound lot), then you obtain a judgment on your money claim. You can then ask the court constable or bailiff to attach (execute) the vehicle and sell it at a sheriff’s or constable’s sale to try to satisfy some or all of your judgment. The advantage here is that rather than your trying to patch together the various laws in trying to comply with your state’s title requirements and Bureau of Motor Vehicles or Department of Motor Vehicle’s rules and regulations, a sheriff or constable of the court is responsible for getting the vehicle re-titled and sold. In my opinion, the sheriff or constable may be liable, not you, for any mistakes they make in the re-titling of the vehicle, taking a great strain and great amount of potential

liability off the Self-Storage operator who does not have the time or interest in becoming a professional vehicle title expert.

Fifth, in states that have delays in allowing an operator to exercise the lien rights (such as Indiana cited above) an eviction action may actually be quicker than a lien sale. Every jurisdiction that has evictions varies in the amount of time it takes to get an eviction, and therefore this may not be true in your home jurisdiction. Check with your local legal counsel.

However, when you weigh the exposure to potential liability for not selling the property correctly; not getting proper notice to your tenant of your lien sale; facing a claim for wrongful disposal; missing a deadline in the statute; not giving enough time under a statute; and when you compare the effort and time in tracking down vehicle titles and getting vehicles re-titled, no matter what the delay, if you have a feeling that there is something of value in the unit, or that your tenant is particularly litigious, an eviction may not be just an answer to your problem--it may be your best possible solution to the problem tenant.

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