

A LEGAL PERSPECTIVE

Annual Overview of Self-Storage Law

Where the Industry Stands and Jeff Greenberger's Fearless Predictions for Legal Issues in 2005.

By now, all of you have read dozens of articles recapping or reminiscing about 2004. New Year's resolutions may have come and gone. Nonetheless, I would be remiss if I did not recap some of the current big legal issues in Self-Storage and look forward to possible legal issues in 2005.

While looking back on 2004, I will always think of 2004 as the year this industry may have finally risen above the "low-fly" zone and ended up on many legislators' and regulators' radars, and I fear that more government interference is on the way in the industry.

Let's start by looking back at where the industry stands. Forty-six states now have some sort of statute that at least, in part, discusses the lien rights of a Self-Storage operator. Some states have full chapters devoted only to Self-Storage, while in some states Self-Storage is still lumped in with other lien rights. Only Alaska, Montana, Nebraska, and Vermont do not have some sort of Self-Storage statute. However, many of the above-referenced states' statutes are in need of a good overhauling and modernizing. These statutes are, in some cases, more than thirty years old, and do not effectively reflect what the industry has grown into since written. Eight states now have some type of late fee law that governs the amount of a late fee that can be charged in a Self-Storage relationship. These states are Arizona, California, Maine, Missouri, North Carolina, Ohio, West Virginia, and Maryland (which states lump Self-Storage into their other lien laws for governing of late fees). Most of these Bills are favorable to the industry, and many other state Self-Storage Associations have recognized the value of putting forth proposed legislation to set a reasonable late fee in a Self-Storage relationship so that their operators are protected from potential class action litigation. If you have any questions about late fee issues, you can review my column in *Inside Self-Storage Magazine* from April 2001.

Several states have introduced legislation to impose some sort of sales tax on rents charged by Self-Storage operators. A few states, including Ohio, have even been successful in passing on this new sales tax to Self-Storage consumers.

Self-Storage operators have continued to receive, in 2004, non-specific warnings from the Department of Homeland Security that their facilities may be used for the purposes of either storage of materials that could be used in a terrorist attack or storage of property that has been stolen until it can be fenced in order to raise money to fund terrorist organizations and/or terrorist opportunities. Therefore, many Self-Storage individual operators and large operators have begun to use some sort of employee and tenant screening, sometimes of credit reports, but more often criminal histories before making rental decisions. In late 2004, the Self-Storage Association introduced its first attempt at a criminal screening package known as "Counter Measures". Several vendors are also making available to you screening tools to instantly check criminal and credit backgrounds. Many hardware and software providers are now working to meet the demand by integrating their programs to allow this screening to occur as part of an entry of data into their software before a rental can be consummated. I sincerely applaud those who have heeded the warnings of the experts in this industry and of the Department of Homeland Security to screen, not only because it is smart from a business perspective, but also because it is their patriotic duty to make sure that the operator knows who is renting space in their facilities.

Also in 2004, the government has revised its overtime regulations. Many states have regulations that are more strict than the Federal regulations, and therefore the new regulations do not apply. Further, this new law does not really answer many questions about whether a Self-Storage manager is an exempt or non-exempt employee, nor are the definitions of these two terms generally clarified by the new law. We at least know that any full-time employee earning less than \$455.00 per week can not be an exempt employee and would be entitled to overtime. There are still very few days that go by in my office and at the ISS Expo where I am not approached by some operator who is concerned that they have been treating their manager as an exempt employee, and after learning more about the definitions of an exempt employee think that they may be facing a potential overtime claim. We have seen a small number of class action suits by Self-Storage managers against medium-sized operators claiming back overtime and other damages. A great summary from the U.S. Department of Labor is available on the web at:

http://www.dol.gov/esa/regs/compliance/whd/fairpay/side-by-side_PF.htm.

Zoning also continues to be a difficult issue for new and expanding facilities around the country. Now that zoning boards tend to lump mobile storage facilities in with Self-Storage facilities, it is becoming increasingly difficult to get zoning approval for new Self-Storage facilities. Part of the problem is that as the industry started, it gravitated toward high visibility areas such as near expressway exits or large intersections. I think we can all say we know of one Self-Storage facility that each of us has seen that is not as well-maintained as your own, that is painted gaudy colors or has outdoor storage of vehicles and looks more like a junkyard than any other type of business. Unfortunately, perception is hard to change. We are also seeing cases where Self-Storage facilities are being challenged through eminent domain to be taken and redeveloped by the government or private developers for a “higher and better use”. Eminent domain is also taking part of the yards, driveways, or corners of Self-Storage facilities for the widening of a road or to add a new expressway ramp.

Finally, as the industry has proliferated, and perhaps become more competitive and, as I said before, risen above the radar, I am seeing more negative newspaper articles about Self-Storage facilities as they pertain to theft, property damage, and drugs. Specifically, as examples, I see more articles than ever about the use of a Self-Storage facility to house methamphetamine labs, to house/hide stolen property, and more people seem to be renting a Self-Storage unit in order to have access to break into the other units in the facility to steal property. Recently, around Cincinnati, Ohio, a theft ring was broken up whereby one person would rent the smallest unit possible in a Self-Storage facility and use legitimate access to the facility to break into other units. While the police have caught the thieves, police and Self-Storage operators have not yet calculated the number of units that may have been broken into, where property has been stolen by getting into the units above the partitions. It is expected that these arrests will solve what is expected to be at least 100 thefts in the last year in this area. On a depressing note, I am also seeing more articles about people who are trying to live in what are often unheated, unventilated Self-Storage units. Finally, it would also not be appropriate to leave this section of the article without mentioning the winner of the most bizarre use of Self-Storage in 2004. In November of last year, Dallas, Texas, authorities discovered a man operating an OB/GYN clinic out of a Self-Storage unit.

With that in mind, let’s look forward to 2005 and what are the potential hot topics.

First, we expect in June the Do-Not-Fax regulations, similar to the Do-Not-Call list, to be reinstated. These regulations were placed on hold earlier in 2004. If you do not have a provision in your lease agreement now, insert language right away that allows the operator to fax and e-mail your current tenants for the period of time from the date that the tenant signs the lease until final move-out including full payment of all amounts due. If you do not do this, you will miss opportunities, both for marketing and lease enforcement/collection that you are probably already using. For those existing leases, particularly those with month-to-month leases, do as the banks, insurance companies, and other providers have been doing - send out a notice amending your lease to include this language effective 30 days after the next rent payment is due. I fearlessly predict that some time in the next several years, one of the facilities that does not make these changes will end up charged with a Do-Not-Fax violation. Enforcement of e-mail SPAM will be tightened too, so include e-mail language in your new permission clause. Do-Not-Call issues generally do not apply and therefore do not need a permission clause with existing customers because of the definition of a “business relationship” contained in the Do-Not-Call regulations.

One trend I can predict with some certainty is the continuing and spreading of litigation which began in 2004 about the size of the space rented. Particularly in California and Maryland, class action lawsuits have already been filed against several operators by tenants who claimed that while they thought they were renting a certain size unit, in actuality the units are less rentable square feet than are advertised, stated in the lease, or shown on a floor plan, and therefore the attorney for the class is looking to get back a certain amount of money, per month, per tenant for multiple past years, plus other fees, costs and attorney expenses. While these may be small amounts of money per month, per unit, when the amount is multiplied by several years, and the volume of units, the number becomes quite a bit more significant. Further, attorney’s fees are often awarded a part of a judgment or settlement in a class-action lawsuit, so while the claim may settle some day for little or no actual money back to your former tenants, there may be a large payment of attorney’s fees to the class action law firm. There are several obvious ways to fix your potential exposure on an ongoing basis, including, but not exclusively, making certain that all information, including leases, brochures, and floor plans disclose that the amount of space is approximate and that the tenant is not entitled to an adjustment in rent if the leased space contains more or less square footage than stated in the lease.

You may also want to stop referring to your units by size (i.e., “10x10”), and call it a one-room unit, two-room unit, small house unit, etc. - a bizarre concept, one that will not go over well with the marketing folks, but one that protects against this ridiculous litigation. Adding language about approximate size is another change you must consider making to your lease immediately, if you do not already have similar language in your materials. I predict we will find a lot more of these space size lawsuits before they run their course.

I also predict more lawsuits over two topics which I will lump together in this article - advertising and reliance. The first aspect of this topic is advertising. Many of you use statements in your advertising that, if you were sued, you could not support. In looking through the Yellow Pages in my travels, I have seen such statements as “Manager on site - 24 hour monitoring of the premises”. While you may have a manager on site now, you really do not have the manager watching out his or her window 24/7, and you may be without a manager for six or eight weeks if he or she quits or is fired, and you can no longer back up that claim. Over the years, we have also discussed in this column and others the use of the words “safe”, “security” and “secure”, or other words that imply that your facility is more safe, more secure, or better protected than the competition. Unless you can back these claims up, the words may come back to haunt you. Also, I continue to see questionable advertising, particularly in offering specials. If your special is too good to be true, and there is a catch to it, or you are not really offering exactly what the public may believe you to be offering, you may well find yourself in a lawsuit or charged by the Attorney General of your state for a deceptive sales practice. I have seen many offers of “first month free” with no footnotes or restrictions stated, and it turns out that the first month is free only with the signing of a six-month lease. Now that this industry is above the radar, “advertising tactics” such as this are going to become more difficult to get away with, and entities such as the Attorney General of your state will start looking at this industry and its advertising practices with greater scrutiny. That dovetails into the discussion of reliance. Reliance is an argument we are seeing made more and more in lawsuits against Self-Storage operators. The basic argument goes something like this: because of something said, done, or implied by the agent at the facility, or the advertising of the facility or the marketing materials of the facility, I relied on the facility to (fill in the blank here - such as have more security, provide a climate that would prevent mold, to have no crime or no

chance of being broken into, that I would not be assaulted or injured on the property). This subject has multiple components, but two big ones. First, your advertising - implying or stating through advertising materials that the facility is safe - will lead to a reliance argument that your facility was safer than the one down the street and therefore the tenant rented from you, and when their unit is broken into, the lawsuit could allege that you have more liability for the loss because of the reliance on representations made by the manager, etc., of safety and security. There is also the reliance argument to be made on the implied activities. If you have, for example, dummy or non-functioning video cameras in your property, you could find yourself facing a reliance argument. It goes something like this: I relied on the fact that I saw all the video cameras all around the premises that (a) my property would be safe; and (b) if it was stolen, there would be plenty of video tape to help the police find the people, and therefore I want to hold you liable for the loss, even though your lease says you are not otherwise liable. I have seen and heard of facilities that even go as far as to not only have fake cameras, but signs around the property saying such things as “Smile, you are being videotaped”, or “Your actions are being videotaped. A copy of any video showing criminal activities will be turned over to the police for prosecution at the highest level allowed by law”. Looking at this type of sign, in retrospect, if in fact the cameras are not real, and if in fact you can not turn the tapes over to the police for prosecution, and if you have a theft problem, eventually you will face the reliance argument against you in a lawsuit.

I also predict you will see more states and the Federal Government imposing higher restrictions on the disposal of your business records that contain personally identifiable information about the tenant, such as leases, applications, and credit card information. Eventually, shredding will be required for disposal of almost all records.

You will be seeing more and more action by state insurance licensing departments to impose requirements on pay-with-rent insurance and even mail order Self-Storage insurance that many facilities offer at their rental offices. Some Self-Storage insurance companies have stopped writing new policies and are even withdrawing from some states their pay-with-rent insurance policies where it is not clear in the state whether or not an insurance license is required to collect premiums for Self-Storage insurance. Several states, including California, have provided guidance or begun issuing a limited-type license for the purposes of allowing a Self-Storage operator to offer pay-with-rent

insurance. We expect to see more of this type of licensing in states which have not yet dealt with this issue.

My final fearless prediction for 2005 is that we will begin seeing more advocacy by the State Associations. We have already seen a good bit of advocacy fighting off sales tax in a few states and getting the industry-sponsored late fee bills passed in several states, where the actions were sponsored more by the State Association and its local operators than by the SSA. I believe we will see more recommendations over the next several years that State Associations get active in lobbying and political action, as well as updating, in whole or part, their state's Self-Storage statutes, that more states will come into the fold with late fee bills, and that we will start to see more State Associations trying to modernize the notice requirement to a tenant prior to a lien sale. You will start to see Associations advocating, where appropriate, that the certified mail notice to a tenant is not only expensive, but rarely is accepted by the tenant prior to a lien sale. Several State Associations are already thinking about advocating for a change in their state statute to provide for a post-office-issued certificate and proof of mailing, rather than the traditional return of the green card. This would save money would more likely result in the notice being served on the tenant rather than having the tenant refuse the certified mail, and in many states leave you wondering what the statute requires, if you have tried to serve notice, but failed, via certified mail. State Associations will offer more local training and certification classes to managers and employees. I also expect to see State Associations issue advertising standards of practice.

Remember, of course, if I did have a working crystal ball, I would be playing the lottery from a beach in the Caribbean. However, one fact remains true. This is a relatively straightforward industry that can do a lot to self-regulate itself to keep its operations simple and resolve tenant situations fairly. If you operate in a clean, careful, and honest manner, and support your State Association in its endeavors to educate the other owners, members of your state legislatures, and the public, then 2005 should be a year of continued progress and growth for the industry. Over the next twelve months, I will endeavor to make several of my columns expansions on issues discussed in this article if there is interest. Please keep the notes and e-mails coming, and I will continue to write about that which interests the majority.

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