

## **A LEGAL PERSPECTIVE**

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### **PROPER LIEN SALES**

This month's column is inspired by the question I get most from our readers via mail and e-mail. The most frequently asked question, is "How do I know if I am performing my lien sales correctly?" My response is, if you live in a state with a Self-Storage statute (in forty-seven of the fifty states), the statute lays out the exact requirements that you must follow in order to perform a lien sale. Unless I remember to give them a statutory citation, the follow up question is always "Where do I find my states' Self-Storage statute?"

It frightens me to think that there are operators in our business who may never have learned what their states' Self-Storage statute requires or even know whether or not they are complying with the lien sale requirements in their state.

Most of the case law that you read either in this column, in the SSA's Self Storage Legal Review, or elsewhere is case law that we apply to Self-Storage by analogy. For example, recently a court upheld a subrogation provision in a construction contract in Virginia. While the case had absolutely nothing to do with Self-Storage we can look at that kind of case and say "If they would uphold a waiver of subrogation clause in a construction contract we would expect the court to uphold a waiver of subrogation clause in a Self-Storage contract." However, the one place where Self-Storage makes its own law, all the time, is in lawsuits involving improper lien sales.

An example, which you may have read about is the case involving Rome Hilliard Self-Storage in my home state of Ohio. Rome Hilliard was sued for wrongfully disposing of a tenant's property. In this particular case, the tenant had moved and not provided the facility with a forwarding address. The Self-Storage facility sent a letter via certified mail to the last known address advising the tenant of the time and date they intended to sell the property if the tenant did not pay. In the Ohio statute, as the court reviewed quite carefully, there is a requirement that the demand for payment must be conspicuous and must demand payment not less than ten days after the delivery of the

notice. The court examined the notice used and found that the facility had used the same size and face of type and thus the demand for payment was not conspicuous. In this particular case the court also found that the sale did not occur more than fifteen days after the advertisement ran, also a violation of the Ohio Statute. The court awarded and an appeals court upheld, actual damages, compensatory damages and punitive or punishment damages against Rome Hilliard in excess of \$5,500.00 plus costs and attorney fees. It sounds like a bunch of technical violations, but the statute is clear as to what the owner had to do to sell the property and frankly, the owner did not follow the statute and paid the price.

The Rome Hilliard case is not news to the Self-Storage industry. It does however point out the importance of following your state's statute, if you have one, in performing a lien sale.

Forty-seven of fifty states now have a Self-Service Storage or Self-Storage statutes. In the chart below I have given you the starting point to locate your State's Statute in your state code. You can get a full copy of your state's Self-Storage statute from numerous sources including your state's Self-Storage Association, the SSA's website (if you are a member) or elsewhere on the internet. One particularly easy source to use for looking at a copy of a statute on the internet is the Cornell Law Library website which is [www.law.cornell.edu](http://www.law.cornell.edu). We also have a link to that website on our law firm's website [www.kgnlaw.com](http://www.kgnlaw.com).

I encourage you to discuss the requirements of your states' statute with your counsel and insure that you have a complete understanding of what is required. While you may be able to learn much from the statute your attorney can supplement your understanding greatly. All of the forty-seven self-storage statutes give some if not exact direction how to lead up to and perform a lien sale. The owners who think they are doing it "close enough" for the statute or without having read the statute at all or, those who decide to ignore a portion or requirement under the statute because it is difficult or inconvenient, are going to continue to be the facilities highlighted in case law updates involving judgments for the tenants.

It is not possible in one column to discuss the requirements of each and every state's statute. Suffice to say every statute provides some if not all of the following requirements.

1. The tenant must be in default. In some states, default is defined for you in your statute as some number of days after rent is past due. Other states require that default be defined in your lease agreement. Again in most of these circumstances a well drafted lease agreement with a properly defined "Event of Default", (that rent is due on a certain date and if not paid by a certain date the tenant is in default) will carry the day in all situations.

2. You must send out some sort of warning or initial contact late fee notice letter.

3. You must send some type of certified mail notice to the tenant advising them of their default; your intent to sell; a firm date that you intend to sell the property; a location where you intend to sell the property; and some indication of the balance due in order to avoid the property being sold. There is always some sort of time parameter that must pass between the sending of the notice and the sale.

4. There is often an advertising or posting requirement.

5. Some states have other requirements such as checking for other liens and putting those lien holders on notice. As an example: If you open the unit and find a whole bunch of furniture in the unit and then check UCC filings as may be required by some Self-Storage statutes and find out that X Finance Company has a lien on all household goods and furnishings, you may be required to put X Finance on notice that they may come and pay the amount due and remove their possessions in lieu of your selling them. Specifically Alabama, Colorado, Connecticut, Michigan, New Hampshire, Ohio and Utah requires this kind of lien check and notice to lien holders. If you sell the property in these states giving appropriate notice to the lien holders and they do not pay, their lien is extinguished or inferior to your lien. If you do not give this notice then you are potentially liable to the lien holders for the amount of money you have earned from the sale of the property, up to the amount of their lien. (Some other states where it

is arguable that liens should be checked are Arizona, Florida, North Carolina and South Carolina.) I cannot tell you how many times I find that Self-Storage operators in states with a lien check requirements are not checking liens with either their local or state authority before proceeding to sale, and thus not properly notifying lien holders. This creates the kind of exposure that makes us nervous.

The cases we see reported in Ohio and around the country in the forty-seven states that have self storage statutes involve for the most part owners failure to properly follow the requirements of their statute by not giving the prescribed notices in the style prescribed and in the manner prescribed by a statute, by not providing advertising, by not holding an appropriate public sale, by declaring default too early, or by not giving enough time from the date of the letter or the advertisement until the date of sale.

Selling a tenant's property is obviously a last resort. No owner should cherish the opportunity to perform a lien sale. Most of our clients prefer to do anything else available to avoid selling, including giving the people access to the property to get their stuff out to avoid facing the potential liability. We even have clients who go so far as to declare a monthly (unofficial) "amnesty day" where they notify the people that are about to be subject to the start of the lien sale process that on one day they have the ability to enter the property, without any sort of hassle, get their stuff, take off their lock and let the client have their space back. This concept does not get you paid, but you at least have the space back to re-rent sooner. In the event the tenant is just completely non responsive, you believe you have gotten notice to the tenant and your only option is to sell the property, please carefully follow the requirements of your lien sale procedure.

We have, by most accounts, a relatively straightforward industry. We rent space. In forty-seven states when we rent space and the tenant does not pay operators have specific rights allowing them to remove tenant's property and sell it. You might be surprised to learn that your Self-Storage statute, in its entirety, is only four to six pages long. It is not light reading but it is not *War and Peace* either. If you read the statute, (and you should consult an attorney to help you clarify some of the issues in your statute), you will learn in at least forty seven states the procedure to follow to properly perform the lien sale. All of the dates, deadlines, times, type face requirements and advertising requirements are all contained right there. By taking the time to read and

understand the statute and by making a conscience decision not to ignore the “difficult stuff” in the statute you will not only be helping yourself avoid potential liability for a wrongful sale which might result in damages and attorney fees against your facility and you personally, but you will also be helping the industry maintain its image. Too many operators improperly performing lien sales leads to the legislature getting involved. When the legislature gets involved it is never to make laws more beneficial for the operators, it is always in response to some horror story about a lien sale. Then state and national associations have to get involved and fight like the dickens to avoid a change in the law that is disadvantageous to the other operators. Please help preserve the simplicity and straightforward nature of your industry by observing the requirements of the lien sale in your statute.

If you need any help with the interpretation of your state’s statute please contact us or your state’s Self-Storage association, or your own attorney. We would all rather help you avoid this kind of liability which can be so simply avoided by following the requirements of your state’s statute.

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](mailto: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) 7215151.



<b>STATE</b>	<b>SECTION</b>
Alabama	8-15-30
Arizona	33-1701
Arkansas	18-16-401
California	21700
Colorado	38-21.5-101
Connecticut	42-159
Delaware	4901
Florida	83.801
Georgia	10-4-210
Hawaii	507-61
Idaho	55-2301
Illinois	770 ILCS 95/1
Indiana	IC26-3-8
Iowa	578A.1
Kansas	58-813
Kentucky	359.200
Louisiana	9:4756
Maine	10:1371
Maryland	18-501
Massachusetts	105A
Michigan	570.520
Minnesota	514.970
Mississippi	85-7-121
Missouri	415.400
Montana	70-6-411
Nevada	108.4733
New Hampshire	451-C
New Jersey	2A:44-187
New Mexico	48-11-1
New York	33-8-180
North Carolina	44A-40
North Dakota	35-33-01
Ohio	5322.01
Oklahoma	42-191
Oregon	87.685
Pennsylvania	73-PS-1901
Rhode Island	34-42-1
South Carolina	39-20-10
South Dakota	44-14-1
Tennessee	66-31-101
Texas	59.001
Utah	38-8-3
Virginia	55-416
Washington	19.150
West Virginia	3814-7
Wisconsin	704.90
Wyoming	29-7-101

