
A LEGAL PERSPECTIVE

LIMITATIONS ON THE TYPE AND VALUE OF PROPERTY STORED

One lease clause that I consistently urge my clients, and anyone else who will listen, to include in their lease is a limitation on the type and value of property stored in a Self-Storage unit. There are two different, distinct concepts in this type of clause. One is a dollar value on the property that the tenant agrees to store in the storage unit; the second is a disclaimer or prohibition against certain types of property that are stored.

There are three advantages to the operator in adding this type of provision. The first is to act as a deterrent to the tenant instituting litigation, as you have essentially made the deep pocket shallow. Second, you will encourage more tenants to purchase insurance on their goods. Third, you may reduce your property insurance premiums. An example of this type of provision is:

Lessee agrees not to store property with a total value in excess of \$5,000.00 without the prior written permission of the Lessor. If such written permission is not obtained, the value of property shall be deemed not to exceed \$5,000.00. By this Agreement, Lessor is generally not liable for the loss of Lessee's property. In the event any competent court of law adjudicates Lessor liable for any loss, for any reason, Lessee agrees that Lessor's liability shall not exceed \$5,000.00. This provision shall not constitute an admission that Lessee's property has any value whatsoever. The Premises is not appropriate for storage of irreplaceable property such as books, writings, objects which have an unknown immediate resale market value, or objects which have a special or emotional value to Lessee and Lessee agrees not to store such types of property in the leased premises. Lessee agrees, at his/her sole expense, to maintain insurance on all property stored in the space with actual cash value coverage against all perils, without exception. Lessee's failure to maintain such insurance shall be a Default under this Agreement and Lessee shall assume all risk of loss or damage that would have been covered by such insurance.

What kind of protection does this provision provide? First and foremost, operators should limit the dollar value of the stored property. How many times have you conducted a lien sale and had difficulty collecting \$50.00 for the entire contents of the unit? That is because a lot of what is stored in Self-Storage facilities may have been expensive to buy, but once the stored property is used or old, these items are not worth much any more (we will discuss actual cash

value below). In your customers' minds, the stored property is a priceless heirloom. I could spend the rest of the column quoting from newspaper stories and lawsuits over the last few years vilifying Self-Storage operators for expensive, if not priceless items, stored in a Self-Storage facility that were lost damaged or stolen, normally through no fault of the Self-Storage operator, and the Self-Storage operator refuses to pay the tenant the cost of the lost property, and the matter is tried in the court of public opinion.

I am a staunch advocate of keeping the dollar value in your leases as low as possible, sometimes as low as \$2,500.00. Anyone who would store more than \$5,000 or \$10,000 (actual cash value) worth of property in a ten-by-ten space should be questioned whether or not Self-Storage is the right option at the outset. Additionally, you will note that the above provision contains language prohibiting storage of irreplaceable items that have an unknown immediate resale market value, or objects which have a special or emotional value. The operator should stop anyone who wants to store irreplaceable property in a Self-Storage unit. Again, there are many stories in newspapers about the Self-Storage facilities that sold off or damaged in a fire, flood, mold, etc., wedding presents, grandma's wedding dress, baby books, photo albums, and the like, all of which do not belong in a Self-Storage facility, or at least should be properly stored in a Self-Storage facility. The most notable example of this issue arose more than a year ago when a national Self-Storage facility properly conducted a lien sale, but ended up selling the personal papers of Malcolm X. While the sale was justified and proper, the publicity was all bad.

One legal/insurance concept that an operator needs to understand is that of replacement cost versus actual cash value. If a facility is liable for damage, or if a tenant sues a facility you own for damage, loss, or destruction of property in their Self-Storage unit, please know from a negotiating position what the highest value is that you will have to pay. Your maximum exposure is actual cash value; the actual value today, which is the depreciated cost over the years of usage and the average depreciation of items such as beds, refrigerators, couches, papers, etc., which are normally stored in a Self-Storage unit. Conversely, your customer will think he or she should start with replacement cost. For example, they purchased a bed two years ago for \$1,500.00; it would cost them \$1,600.00 to replace it now. The only people who offer replacement cost coverage are insurance companies. Self-Storage operators are not insurance

companies, and you have no duty to pay a tenant, even if you are liable for the damage, the cost to replace the item, only the actual cash value of the item. Therefore, when a tenant presents you with a list of items destroyed, lost, or damaged in their unit, you must always begin by explaining to them that, generally, you are not liable, but even if you were, the amount for which you would be responsible would be the depreciated value of the item, not replacement cost. Determining actual cash value can be tricky. Most states allow the owner of a property to testify as to its value, but would require you to bring in an expert witness, such as an insurance adjuster. However, it is not that hard to come up with a round figure based on, as an example, garage sale rates, of what the property stored in the storage unit, as itemized by the tenant, would be worth. It is certainly appropriate to ask for copies of receipts and if they are not available, to ask the age and condition of the items stored. Obviously, if someone is upset because a couch became moldy or a stereo was ruined by a roof leak, and the item is ten years old, no matter what they paid for it, unless it is some sort of antique, it has decreased substantially in value, having depreciated over ten years. Often, when you can explain this to the tenant, they will back off the damage claim. However, you can not always avoid the folks who will claim that the item does not have money value, but has emotional value, an irreplaceable object, an item of sentimental value, family photographs, notes, papers of relatives, love letters from grandpa during the war to grandma, etc. Hopefully, the provision suggested above, or one similar to it, will also help you diffuse the argument that you are somehow liable for loss to these types of items because you have entered into a contract that prohibits the storage of those types of items. Imagine the type of deposition your attorney can take on your behalf if this matter ends up in litigation. Question by question, asking the tenant whether or not they understood the lease, whether they signed these provision, whether they understood these provisions, and whether or not they in fact violated these lease provisions in storing grandma's old love letters, grandma's wedding dress, etc.

Any of you who have ever heard me speak at an ISS Expo know that I preach the theory of creating barriers of entry to litigation or what I prefer to call "hurdles". The more hurdles you throw between yourself and a tenant, the harder it is going to be for that tenant to bring litigation or bad publicity against you and your facility. The above-suggested provision does exactly that.

A limitation on liability of value and a limitation on the types of items stored is one of the first and best hurdles to litigation.

Actually, there will be times when you are liable for a tenant's loss. For example, there will be times when a manager or employee backs a truck into a building, causing damage to stored contents, or where the wrong unit is sold at lien sale, operators will be liable, but they shall not be liable for an unlimited amount of money. Most of the time, the operator should not be liable for losses due to circumstances outside the operator's control, such as fire, flood, earthquake, generally theft, etc. However, if the tenant views you as a bottomless pocket of money, what does the tenant have to lose by suing you hoping to at least get a nuisance settlement out of you? The answer, if you have limited your exposure to, for example, \$2,500.00, is that the suit is a lot less attractive to both the tenant and any attorney who might take the suit on a contingency fee. Additionally, a dollar value limitation discourages what I like to call the "puffery" in a property damage or loss claim. Without a provision protecting you, such as the one suggested above, when there is loss or damage, the tenant can often "invent" items stored or conveniently restate their value. One of my favorite cases involved a wood-carved type mask. It was set on its side, on top of a couch in a storage unit, and somehow fell from its precarious perch and was broken. The original claim, as described to our client's manager, was damage to a piece of art, value approximately \$500.00, not fixable. Another one would have to be purchased. When the claim was denied and the lawsuit filed, it became a priceless original woodcarving and if it could be replaced, it would probably be \$10,000.00. In the discovery phase of the case, we determined that the woodcarving, which had most likely been made in China and was purchased on E-bay for \$55.00. Had our client had the provision in their lease similar to the one above, imagine the deposition we would have been able to take, asking questions about why an irreplaceable art object with a value practically impossible to determine was stored in a Self-Storage facility when this type of storage was prohibited, and why she was storing something with value of approximately \$10,000.00 when the value limitation on the premises could have been \$2,500.00? This is why I call this type of lease clause a barrier or hurdle to litigation.

The second consideration for having a value limitation such as the one above is to help convince your tenants to purchase Self-Storage insurance. There are those of you who are in states that may allow a forced placed type insurance policy, and there are those of you who require insurance and add it to the rent. However, I understand that to be the minority position among the operators in the country; most operators hope their tenants buy insurance on their own. When you are explaining the lease and explain the damage limitation to the tenant, and if the tenant requests that you raise the limit because they will be storing more valuable property in the space, you can have an addendum standing by to allow the increase in value, but the consideration that will be required in order to vary from your standard limit will be a requirement that they provide either proof of insurance, buy the insurance through the program that you have at your facility, and/or name you as an additional noticed or insured party on their policy. The addendum, a sample of which is at the end of this column, as you will note, provides that, in the event the insurance lapses, the value limitation automatically resets to the limit stated in the lease. This type of addendum allows the operator to easily deal with the objections that you receive from people who want to store things in their unit, such as a boat, car, RV or other valuable property. The tenant may say, "I can not agree that my car is only worth \$2,500.00". Your response would be, "Very well, we have an addendum to deal with these sorts of situations. All that it requires is your signature, we will amend the amount, and you will provide us proof of insurance for the amount of the item being stored". If the tenant objects to the addendum and insurance requirement, you should let the tenant walk out the door. Many of my clients, especially those that set low value limitations in their lease, report that they have much greater participation with voluntary purchase of Self-Storage insurance, apparently for two reasons: (1) With this type of provision, people have a better understanding that the landlord is generally not going to be liable in the event their property is lost, stolen, or damaged in the Self-Storage facility; and (2) many people feel that their stored property is worth more than the value limitations and therefore agree to purchase the insurance.

The third advantage for this type of provision is the operator's own risk management issues. Imagine knowing the exact amount of liability for damage you would suffer in the event of a catastrophic fire, landslide, earthquake, arson, etc., occurring to an entire building. Now that

you have thought about it, imagine how your property liability insurance provider would look at it. Some owners have reported to me that providing this provision to their insurance agent has resulted in a reduction in their property insurance premiums because the insurance underwriters are able to look at the overall risk and set a lower value on it and therefore adjust the premium. Other owners are able to simply reduce their overall coverage because of the limitation of value on items stored in a building, which results in a reduction in the overall premium. Another result is that with fewer claims, your experience rating may improve with your insurance carrier.

I hope this article demonstrates that a short provision in your lease placing a limitation on the value of items stored, and on the type or nature of the items that are appropriate to store in a Self-Storage facility, will hopefully eliminate many frivolous lawsuits by people who think that you are (a) responsible; or (b) that it is worth filing just to hopefully sue the “deep pocket” and extract a satisfactory nuisance settlement on otherwise worthless property. This provision will also help your tenants understand the nature of the Self-Storage relationship between you as the operator and the tenant as the customer and responsible party for insuring against loss, and will hopefully increase your percentages of tenants who opt into their own or your insurance program, and will also help actually decrease your rates of property insurance.

Jeffrey Greenberger is a Partner 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.

