

A LEGAL PERSPECTIVE

Watch Your Words

In my first article of 2005 for the *Inside Self-Storage Magazine*, I wrote about hot topics for the year. One of those hot topics was watching out for the issue of reliance by your tenants as a defense to the language in your lease that releases the operator from liability. The theory goes something along these lines. Your lease provides all the normal language that would protect the owner from being liable to the tenant for losses, damage to property, theft, disappearance, etc., but then there is something that the operator says or does beyond the lease that gives the tenant a legal argument that the tenant had the right to assume that the operator provided more tenant rights, protection, or coverage than stated in the lease. If the tenant alleges that they relied on the operator's action or inaction, the tenant will try to argue that the term of the lease was superseded by the action or inaction of the operator. The most common example I give is using the words "safety", "security" or similar words in your facility name. You can, as an operator, go to great lengths to disclaim your liability to guard and protect the tenant's property, but occasionally, tenants argue that despite the lease provisions disclaiming an operator's liability for security of the stored property, the word "safety" or "security" in the name of the facility led the tenant to believe that the property was more safe or secure than another facility down the street, and that is the theory upon which they try to hold the operator liable for a loss, such as from a theft.

In these highly-competitive days in the Self-Storage industry, operators are looking for ways to differentiate themselves from other facilities. Differentiating yourself from the facility down the street is even more difficult when it comes to discussing outdoor or semi-enclosed vehicle storage, which for the purpose of this article includes boats and RVs. Let's face it - a parcel of gravel or paved lot is a parcel of gravel or paved lot. You must do something to differentiate yourself from the facility down the street that is providing the same gravel or paved lot. The experts tell you that you need a selling point - something to differentiate yourself from Brand "X", or to create a sense of urgency to get the tenant to come right in.

Many operators, in order to "sell" their facilities to prospective tenants for vehicle storage, are turning to the security aspects of their property as a selling point. Please do not misunderstand me - if you have security features, I do not advocate in this article that you ignore

these features. However, let me point out two words that I see more often than not when dealing with security. I see these two words in advertisements, brochures, websites, signage on the property, and other lease documents. I see the term “surveillance” normally in the context of video surveillance, and “monitored” or “monitoring” in the context of video monitoring, alarm monitoring, or manager-monitored access. A major dictionary defines “surveillance” as “close watch kept over someone or something (as by a detective)”. To “monitor” is defined as “to watch, keep track of, or check, usually for a special purpose”.

Do you see the problem? When you use a term such as “surveillance” or “monitoring”, you are, by your words, indicating that someone is closely keeping track of or watching whatever it is that you promise is surveyed or monitored. Thus, video surveillance means that you are keeping close watch over your video system. As examples: if you have cameras that are live but do not record (or drone cameras), and you are not, as the operator, sitting and staring at a monitor all day and night, you do not have video “surveillance”. If you are videotaping or digitally recording ten cameras at once and are not reviewing the tape or digital recording on a regular basis, you do not have video surveillance. If you claim you have video surveillance at the gate and are not watching those who are going in and out of the gate to determine their legitimate right for access, you do not have video “surveillance” at the gate. Likewise, if you promise video monitoring, it implies that someone is watching the video camera’s results at all times. If you have monitored alarms, you are implying that there is someone at a station somewhere, be it police or private monitoring company, watching the results of the alarm systems closely, 24 hours a day, 7 days a week. If the gate alarm is monitored, this also means someone is watching for gate alarms and reacting to them by dispatching the manager or police if the gate alarm sounded, not just a loud bell or horn going off, which the manager may or may not hear, because the manager could be off-site.

Likewise, if you say that your manager lives on site and therefore “monitors” the facility, this, by definition, means your manager is on-site 24 hours a day, 7 days a week, and there are probably a few flaws with that claim. First, unless your manager is super-human, I doubt your manager can watch the entire facility all at once. Second, I doubt your manager is awake and watching the facility only, all day and night, every day and night (and if they are, you may have an overtime issue we have to discuss), and third, your manager is probably not actually on-site all

the time. Your manager may go to the grocery store, go to visit family and friends, or take vacations.

Understanding the definitions of words such as “surveillance” and “monitoring”, lets look at a hypothetical problem. An expensive RV stored at your facility is broken into, vandalized, or property such as the TV is stolen from inside. If you claim that you have video monitoring or video surveillance, a tenant might presume from the definitions of those words that someone would have noticed almost immediately the thief lurking about the premises, breaking into the RV and leaving with property, and should have had ample time to contact the authorities while the theft offense was occurring, because someone is watching the video camera output at all times. This may not be the case at your Self-Storage facility. Further, if vehicle storage units are alarmed or the gate is alarmed, and you claim alarm monitoring and all that really happens is the alarm goes off, and if the manager is present and hears it, he or she calls the police, or perhaps checks the alarm when the manager returns to his or her office the next morning, then you do not have alarm monitoring. Further, if you claim things such as “manager on site monitors the premises”, then a tenant might presume from the term “monitoring” that a manager might be walking the premises or looking through the cameras at the premises at the time the theft occurred, or at the very least notice the theft as the manager “monitors the premises” by walking it first thing in the morning when he or she comes on duty. This term “manager monitoring” gives rise to a whole new level of manager responsibility, which may include detecting and notifying the tenants of problems with their stored vehicles, and the term “monitoring” seems to imply almost immediately as soon as the problem would become evident as opposed to as soon as the manager would happen to notice it. This is a very different standard. That is, the manager may not closely inspect every stored vehicle daily, maybe only once a week. If you are claiming monitoring, the tenant could contend the manager has a duty to closely inspect for damage, theft, leakage, etc., each vehicle at least once a day, perhaps even more than that.

This hypothetical does not even begin to consider how a manager is to know whether a vehicle has been properly removed by a tenant to be taken on a trip or has been stolen, and whether or not the manager has a duty to check gate codes every day to make sure the gate code used was the gate code of the person who would have had the right to take the vehicle off the property. That is another separate problem.

Nevertheless, if you use a term such as “surveillance” or “monitoring” and have a problem with a vehicle stored at your facility, you could find yourself having a tenant argue that even though your lease absolves the operator from most liability for loss, damage, theft, etc., and says that you are not responsible for those things, that by using terms like “monitoring” or “surveillance” in your marketing materials you changed the contractual relationship and increased your duty to watch, monitor, and take care of the stored vehicles.

Again, I am not opposed ever to putting your best foot forward and marketing your product as aggressively as you can. However, when you use words like “surveillance” and “monitoring” you are, in fact, taking on a potentially higher duty of care that you may not intend. Watch your words carefully.

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