Proactive Tools to Prevent Lawsuits

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Self storage is a “relatively” risk free business; relative to say, residential apartments, whose tenants use the leased property on a daily basis. However, our industry has unique attributes and typical “Achilles heels” that are often involved in any litigation that is filed against a facility. Typically, litigation against a self-storage facility falls into the category of (1) suit for wrongful foreclosure or (2) liability (e.g. “slip and fall,” or a tenant claims you are responsible for damage to his goods).

Wrongful Foreclosure
Check your insurance coverage. The first thing to address in avoiding this type of liability is straightforward, but often overlooked – make sure you have the proper insurance coverage. The standard commercial liability policies often do not provide coverage for “wrongful foreclosure,” which in the insurance world is called “sale and disposal legal liability.” If you are unsure whether or not you have this specific coverage, contact your agent to confirm.

Check for alternate contact information. Many, if not most, wrongful foreclosure suits involve some sort of allegation of failure to send notice to the proper address. Per Texas law, you have the obligation to send all foreclosure notices to the tenant “at the last known address for the tenant according to the rental agreement or in a written notice furnished from the tenant after the execution of the rental agreement.” The statute does not define “written notice,” but the TSSA lease makes it clear that a change of address from a tenant must be a complete address, in writing and signed and dated by the tenant and actually received by the facility. The lease (Paragraph 2) expressly provides that return addresses on envelopes, forwarding orders, or addresses on checks, are insufficient. However, it is recommended that regardless of legal requirements, you send notice to every potential address you have for the tenant. In nearly all instances, the goal is not to foreclose, but to get the word to the tenant about the delinquency so they will come in and pay. Plus, sending the notice to all known addresses “covers your bases” and is a good “insurance policy” against any accusation that you didn’t send the notice to the correct address. Don’t just look in your software program for the tenant’s contact information—if you have a paper file, pull that file and look through it for notes or other communication from the tenant. Check and double check. In addition to its comprehensive “step-by-step” foreclosure legal articles and the foreclosure timelines in the TSSA Goldbook®, TSSA publishes other forms that can provide a valuable double check and help prevent

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If your current leases are TSSA leases, this is a relatively easy process. I would suggest updating your leases at least every two years. At the very minimum, lease versions change every two years (with each legislative session), but more often than not, they change yearly. For example, over the past 10 years, important changes have been made to the lease regarding a definition of climate control, holding the tenant responsible for collection agency charges, wording about late fees, and numerous other significant changes. It is in both your and your tenant's best interest to have the most up-to-date lease, to ensure maximum protections for you and your tenant, and to ensure compliance with the law.

As far as how to go about doing it, if you are on a TSSA lease, Paragraph 30 of the lease check your provision, but this provision has been in the TSSA lease for at least 10 years) allows you to make any changes to a lease, including changing dollar amounts, by giving the tenant at least 30 days advance notice of the change. TSSA has a form for just this purpose, titled “Notice of Rental Increase: Filing and Update to the Most Recent TSSA Lease”.

Is there a military customer that rented in September 2005 and she said she was in the Army, but failed to pay any rent until December 2007. It has now been two years and I have not heard from her. Her mail from Hawaii is being returned unread. Is there a way to get her to return to us, and has contacted us to “repo” it.

Q: When we need to foreclose on a vehicle, the actual vehicle being stored. Can providing extra security, extra screening or anything out of the ordinary to ensure that they do not enter and tow the vehicle away. However, you are not legally authorized to assist them in removing the vehicle.

Q: We need to foreclose on a vehicle. However, the information we have on the lease for the vehicle, including the VIN number, does not match the actual vehicle being stored. Can we still proceed with the foreclosure?

A: In my opinion, you can. Chapter 59 of the Texas Property Code states that a lessee has a lien on “all property” in a self-service storage facility. Just as you would have a lien on a dishwasher stored in an indoor unit even though the tenant may not have possession of that unit, the information sheet that he was going to store a TV, but it would be very unusual if that court ordered you to do something otherwise. Normally a court order would only be against the tenant.

A: As far as how the Texas Property Code states that the tenant is not liable for the payment of the rent.

Q: If this form is signed by an active military tenant, you need not receive a service member’s Civil Relief Act (SCRA) to avoid the tenant’s delinquency. However, when a military tenant has not paid the rent, do you need to receive a service member’s Civil Relief Act form?

A: It is TSSA’s long-standing position to encourage members to be understanding of sudden circumstances. However, inevitably there will be a select few military tenants who use a military person’s identification in order to shirk their legal obligations under the lease. If you have a military customer that rented a unit in 2005 and she said she was in the Army, but failed to pay any rent until December 2007. It now has been two years and I have not heard from her. Her mail from Hawaii is being returned unread. Is there a way to get her to return to us, and has contacted us to “repo” it.
In the 2010-2011 Goldbook©
For the complete, detailed reference and step-by-step foreclosure procedure for motor vehicles, trailers or boats, consult the TSSA Goldbook©, pages 36-64.

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Special Foreclosure Update
A Senate Bill in the 2009 legislature affected the “special” foreclosure process. Now, facilities no longer must “retain possession” of the vehicle/boat, etc. for 30 days before sending the Notice of Intent to Sell. Instead, new you send the Notice of Intent to Sell anytime you want, as long as it’s within 30 days of seizure of the vehicle/boat.

1. Make sure the rental agreement is signed and contains proper statutory lien language, as TSSA leases do.

2. Seize the unit containing the vehicle/boat (or wheelboot/chain) and get owner and lienholder names for vehicles or trailers from TDMV or TPWD or your local tax assessor-collector.

3. For vehicles, wait no longer than 5 days after seizure before sending a Notice of Claim. (Boat seizures have no 5-day requirement.) For boats, mail the notice to the tenant via certified mail. For vehicles, mail it via certified mail, return receipt requested, to both the tenant and all registered owners and lienholders of record.

4. Within 30 days after seizure, mail a Notice of Intent to Sell to owners and lienholders of the vehicle or boat via certified mail, return receipt requested, and allow them to redeem during the first 31 days after you mailed the intent notice.

5. No earlier than 15 days after Notice of Claim is sent, publish your newspaper ad twice in two consecutive weeks (at least 7 days apart). Optional: Mail Notice of Public Sale form to tenant via regular mail.

6. Wait at least 31 days after mailing Notice of Intent to Sell form (Step 4) before conducting the sale.

7. Conduct public sale BUT allow tenant to redeem any time before the gavel falls. Give buyer Bill of Sale, along with all original mailing receipts or returned mail and TDMV or TPWD affidavit.

8. Collect sales tax ONLY on non-vehicle and non-boat items, for example household goods also in the unit.

TSSA Legal Counsel Says:
- Facilities no longer must “retain possession” of the vehicle/boat, etc. for 30 days before sending the “Notice of Intent to Sell” to lienholders. Facilities can now send the Notice of Intent to Sell “no later than 30 days” after seizure of the vehicle/boat.
- Before: Facility seized the vehicle/boat and sent the Notice of Claim, waited at least 30 days after seizure, and sent the Notice of Intent to Sell.
- Now: Facility no longer must wait 30 days after sending the Notice of Claim before sending the Notice of Intent to Sell to registered owners (sometimes not the tenant) and lienholders.
- When can/must the Notice of Intent to Sell be sent? Now, anytime from the date of seizure up to 30 days after seizure.
- Can the Notice of Intent to Sell be sent at the same time as the Notice of Claim? Yes, it can be sent any time between the date of seizure and 30 days after seizure.

TXDOT, now known as Texas Department of Motor Vehicles (TDMV) form VTR-265-SSF and TPWD form 309B and 309C (the applicable foreclosure forms) have both been updated, with input from TSSA legal counsel, to reflect these new statutory requirements. (Note that on the TDMV form, the Notice of Claim is called the “first notice,” and the Notice of Intent to sell is called the “second notice.” On the TPWD form, the Notice of Claim is called the “first notice,” and the Notice of Intent to sell is called the “second notice.”)
In September of 2009 the U.S. Department of Homeland Security (DHS) issued two papers, which TSSA forwarded to members through an e-mail blast. This article will summarize those papers. In the one-page September 21, 2009 paper titled “Terrorist Use of Self-Storage Facilities,” the DHS noted that working along with the FBI, it encourages local law enforcement to establish contact with self-storage facilities to implement systematic procedures for detecting and reporting signs of suspicious behavior.

The DHS paper included a list of examples of suspicious behavior, as follows:

- Insistence on paying cash, sometimes well in advance
- Seemingly excessive concern about privacy
- Visits to the unit late at night or at unusual times
- Suspicous deliveries to the unit, e.g., from chemical supply companies
- Exhibiting nervousness or evasiveness when approached by employees or security personnel
- Unusual fumes, liquids, residues, or odors emanating from units
- Discarding of chemical containers in facility dumpsters
- Stockpiling of cell phones, timers or similar electronic devices
- Indications of burns or symptoms of exposure to chemical substances
- Attempts to store unusual quantities of fuel, or agricultural/industrial chemicals
- Attempts to store agricultural equipment, such as commercial sprayers
- Attempts to store blasting caps, explosives or fuses

In another recent memo, the DHS provided tips aimed at detecting homemade explosives and explosive manufacturing. Many homemade explosives are utilizing hydrogen peroxide. People using concentrated hydrogen peroxide often have white-colored peroxide burns on their skin. Some other indicators that may point to homemade explosive production or storage are:

- Burn marks on hands, arms, face; stains on clothing
- Foul odors/fumes coming from a unit
- Damage to ceilings and walls, such as corrosion of metal surfaces and paint discoloration from caustic fumes
- Strong chemical odors emanating from sewers or drainage ditches
- Large industrial fans
- Dead vegetation in area surrounding unit
- Presence of metal or plastic drums for storing explosives
- Storage of machinery, such as gas burners or mixers, for processing raw materials
- Discoloration of pavement, soil or structure surrounding the unit
- Refrigerators or coolers used to store volatile chemicals and finished product
- Storage of high quantities of hydrogen peroxide (e.g. more than one gallon)

The standard TSSA Rental Agreement prohibits tenants from using any electricity of storing any flammable, or hazardous materials in a unit, and prohibits storage of fertilizers and other similar items (see lease Paragraph 38). Of course, the fact that a substance is prohibited under the terms of the lease does not mean a tenant will not try to store it in your facility. One of your best defenses is simply to “be nosy.” If possible, walk the grounds when tenants are accessing their units, especially if the tenant has given you a sufficient (see some of the warning signs at left). Also, be mindful of your right under paragraph 18 of the lease to enter the unit, either with advanced written notice to the tenant, or with no notice when criminal activity is reasonably suspected. Report any suspicious activity to law enforcement, the Department of Homeland Security National Operations Center (202-282-9685 or NOC.Fusion@dhs.gov) or the FBI (find the phone number of your regional FBI office online at http://www.fbi.gov/contact/e/o/h.htm). If possible, all reports should include the date, time, location, type of activity, number of people and type of equipment/cause of suspicion, the name of the submitting company/facility, and a designated contact person at the facility.

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First, contact your insurance company. Insurance policies vary, but under many, if you do not put your carrier on notice of a suit in a timely manner (or, depending on the language of the policy, a threatened suit), the carrier can deny coverage. Find out what the notice requirements are under your policy, and make sure you abide by them.

Contact your own attorney. Self storage is a very specialized field. It is normally in your best interest, even if your insurer appoints a lawyer to represent you, to have your own counsel advising you and potentially working with the insurance company’s attorney. You would obviously be responsible for the fees for your own (non-insurance appointed) attorney, but this relatively minimal investment may well pay great dividends in the long run.

Organize the tenant’s file. Documents have a habit of disappearing when suits are threatened, especially if there has been a claimed employee error. Ideally, before anyone else in the company knows about the suit or threatened suit, make sure you have compiled, in a safe place, a copy of all documentation (including informal notes, etc.) in the tenant’s file. Also, take photos of any relevant areas (the alleged pothole, for example) at the time the lawsuit is filed or threatened, and make note of who took the photos, and date the photos.

Take witness statements. As time goes on, facts are forgotten, whether legitimately or “conveniently.” Get witness statements as soon as possible after any accident or threatened or filed litigation. TSSA publishes two forms for these purposes, appendix CD form BUS-7, the “Onsite Property Inspection Checklist.” This is certainly not required by law to be filled out, whether once or on a regular basis, but a valuable tool in rebutting any claim of negligence. If you can prove that you checked the facility on day Y and discovered it, and checked it Y and discovered it and promptly fixed it, then this can help rebut any claim of negligence. Employee error cases are another frequent scenario. Human error is simply going to happen. Certain employee errors are likely to be covered under a standard liability policy (e.g. the employee accidentally closes the access gate on a customer’s car). Other employee error is not as likely to be covered (the employee misreads the lease or misunderstands the law, and cuts the unit’s lock for someone who was not legally entitled to access). Good employee education and training is the best way to prevent lawsuits of this nature.
The Servicemembers Civil Relief Act (SCRA) was adopted in 2003 and amended in 2004 and 2008. There is a comprehensive legal article regarding this act in the TSSA Goldbook©. Here are some answers to frequently asked questions, to supplement the article in the Goldbook©.

**Question:** Do the SCRA protections expire when the tenant is discharged from the military or is there a grace period?

**Answer:** The SCRA states that a person holding a lien on the property of a service member (a self-storage facility, for example) may not, during any period of “military service” of the service member, and for nine months thereafter (the grace period) foreclose on a lien without a court order. “Period of military service” means the time that the person is on active duty, or in the case of a member of the National Guard, called to active service for more than 30 consecutive days.

So in summary, during any period where your tenant is on active duty, and for nine months following the end of his active duty status, you may not foreclose without a court order. (There is an exception if the tenant has signed a lawful waiver of his SCRA rights.) There is no exception for dishonorable discharges—the nine-month grace period still applies. The grace period was formerly 90 days. On July 30, 2008, the protection was extended from 90 days to nine months. Effective January 1, 2011, a “sunset” provision in the law will automatically roll the nine months back to 90 days.

**Question:** What does “active duty” mean?

**Answer:** “Active duty” means full-time duty in the active military service of the United States. It includes full-time training duty, annual training duty, and someone in attendance at a school designated as a service school by law (while in the active military service). Such term does not include full-time National Guard Duty. Also, there are reserve components of the Army, Navy, Air Force, and Marine Corps, so just because someone says they are in a certain branch of the military does not mean that they are on active duty. It is always important to ask (and get the answer in writing).

**Question:** What if the military person is on the lease with his non-military spouse? They are both tenants.

**Answer:** You are on foreclosure “freeze” during the period of active duty service (and the grace period thereafter) unless you get a court order allowing the foreclosure.

**Question:** What if the spouse who is not in the military is my tenant, but I know that her husband is in the military on active duty? The husband is not my tenant and is not on the lease.

**Answer:** This is a gray area, and I would recommend that you try to avoid foreclosure without a court order, if possible, during the period where her husband is on active duty military service. The statute says: “A person holding a lien on the property or effects of a service member may not, during any period of military service of the service member and for [the grace period] foreclose or enforce the lien without a court order.” It states that a person who knowingly violates this section is subject to significant penalties. So, since you know that the husband is active duty military, then I would suggest that you hold off on foreclosure or obtain a court order.

In general, you have no duty to ask every tenant who says they are not in the military whether his or her spouse is in the military. But if you know the answer is “yes,” then I would recommend exercising caution. Remember, you can request a judge to give you permission to foreclose. If it is a situation of someone abusing the SCRA to get free rent when the at-home spouse is perfectly capable of paying the bills, a judge is not likely to look kindly on that situation. You may also try contacting the community affairs officer of the soldier’s unit for assistance in having the military person (or his spouse) meet his or her contractual obligations.

The SCRA gives “dependents” (the non-military spouse in this case) the right to petition the court for the same protection that the military spouse receives under the SCRA. However, this protection is not automatically afforded to non-military spouses; it must be applied by a court at the request of the non-military spouse. The Act only specifies penalties for “knowing” violations. However, I don’t know of any cases where someone has foreclosed in good faith on a tenant and later found out that he was active duty military. So the ramifications of that, and any potential consequences, are unknown.

**Question:** In general, what information do I need from the tenant in order to be able to determine whether he or she is in the military on active duty?

**Answer:** Ideally you should obtain at least the full name, date of birth, address, and SSN of your tenant. Additionally, you should confirm at the time of leasing, if a tenant is in the military, whether he is on active duty; and if so in what branch. There are several websites that can (often for a fee) assist you in performing a search to determine whether a tenant is in the military on active duty, and for most of them you need a date of birth and SSN, plus it helps to have the branch of the military so you don’t have to search the information for each branch.

One such website is www.ServicemembersCivilReliefAct.com. This site’s home page states: “Although providing a Social Security number is the most assured and fastest method of researching a name, this site may enable searches with alternate identifying data (e.g. birthdate, address).” The Department of Defense has its own website. A search of this website normally ends in a result, but with a caveat that without a SSN or DOB, the person’s identity cannot be conclusively determined. The Department of Defense’s military search website is: https://www.dmdc.osd.mil/app/scra/scraHome.do

**Question:** If I have leased to a tenant who is active-duty military, and have not required this tenant to sign a waiver of the tenant’s rights under the Servicemember’s Civil Relief Act (SCRA), may I raise the tenant’s rent during the lease term utilizing the TSSA lease provision allowing me to do this upon 30 days notice to tenants?

**Answer:** No, the SCRA provides that unless a waiver is signed, you may not modify a contract or lease (without the tenant’s written consent). This would apply to any lease modification, be it a rule change, rent increase, updating the tenant to a new TSSA lease version, etc. Quite simply, you may not make any changes at all to an active-duty servicemember’s lease without the servicemember’s written consent, unless the servicemember has signed a waiver that complies with the SCRAs waiver requirements.

**Question:** Is there a cap on late fees or other amounts for military tenants?

**Answer:** Yes, the statute imposes an “interest rate limitation,” which applies to all fees (including late fees) but the limitation applies only in situations where a tenant signs a lease BEFORE entering the military. The SCRA does not limit interest, late fees, etc. if a tenant signs the lease at the time he is in the military. (Texas law limits interest to a maximum of 18%, and common law places certain restrictions on late fees, including that they be a reasonable estimate of damages.)

If a tenant enters the military after signing a lease, interest is thus capped, and “interest” is broadly defined under the SCRA to include “service charges…fees, or any other charge…” Section 207 of the SCRA requires that interest accruing on any obligation or liability against a military servicemember under a document signed before he entered military service must be reduced to 6% per year during the period of military service. If a contract or lease was executed by a servicemember after the servicemember entered military service, the interest rate in the contract (or late fee for delinquent payment, or other fees) is not affected by SCRA.

In summary, if someone signs a self-storage lease and at the time of signing they are in the military, interest, late fees and other fees are not capped by the SCRA. If he signs a self-storage lease and then subsequently enters the military, interest (including any late fees or other fees) is capped at 6% per year. This is 6% of the delinquent obligation. So, if someone is delinquent $500 in rent, and enters the military after signing his self-storage lease, all fees (late fees, etc.) are capped at 6% of $500, or $30 per year.