THEFT, VANDALISM, AND CASUALTY: ARE YOU POTENTIALLY LIABLE?

By Connie N. Heyer, TSSA Legal Counsel

In the vast majority of instances, tenants lease storage units from facilities, everything goes according to plan, and there are no "glitches" in the process. However, many of the questions that TSSA receives from its members relate to theft of goods, goods damaged by casualty, or other such incidents, and members want to know what, if any, potential liability they may have. No lease can, as a matter of law, protect a facility from all liability, especially liability caused by a facility owner's negligence. Also, no amount of lease language can prevent a tenant from filing a frivolous lawsuit and forcing you to use your funds or insurance to defend yourself. However, the TSSA lease language provides strong protection to self-storage facilities for theft, casualties and other such matters. This article will summarize the lease provisions designed to protect our members in this regard.

First and most importantly is the "Notice to Tenant and Release" section of the TSSA lease. This is the language on the bottom left hand corner of the first page of the TSSA standard lease. It is in bold, a good part of the language is capitalized, and tenants are required to separately initial this language, adding additional weight to its importance. A tenant would be very hard-pressed to say that he had no idea that the facility would not be responsible for leaks, etc. when he initialed the very paragraph expressly releasing the facility from liability. It is not legally necessary for the tenant to initial a certain paragraph in order for the paragraph to be binding against him, but we have found that if a tenant initials a certain paragraph, it usually nips arguments in the bud regarding claims of liability against you – he initialed this very prominent paragraph with his own initials.

This "Notice to Tenant and Release" reads as follows: "Rent is due in advance on the due date specified in ¶4. Rent paid after the late charge date(s) in ¶4 will result in late charges. Tenant will furnish own lock. NO REPRESENTATIONS OF SAFETY OR SECURITY HAVE BEEN MADE TO TENANT BY LESSOR OR LESSOR'S AGENTS. TENANT HEREBY RELEASES LESSOR AND LESSOR'S AGENTS FROM LIABILITY FOR ALL LOSS, DAMAGE OR CAUSE OF ACTION OF ANY NATURE, INCLUDING BODILY INJURY AND DAMAGE TO PROPERTY STORED IN OR TRANSPORTED TO OR FROM TENANT'S SPACE — REGARDLESS WHO OWNS SUCH PROPERTY AND REGARDLESS WHETHER THE LOSS OR DAMAGE IS CAUSED IN WHOLE OR PART BY FIRE, SMOKE, DUST, WATER, WEATHER, INSECTS, VERMIN, EXPLOSION, UTILITY INTERRUPTION, EQUIPMENT MALFUNCTION, UNEXPLAINED DISAPPEARANCE, NEGLIGENCE OF LESSOR OR LESSOR'S AGENTS, THEFT BY OTHERS, OR ANY OTHER CAUSE. Tenant will self-insure or obtain insurance for all losses and damages as required by paragraph 20."

The lease further addresses liability in paragraph 20. This paragraph makes clear (again, most of the paragraph is in all-capital and underlined language) that the lessor is not liable for damage to property stored in the tenant's space, regardless of who owns the property and regardless of the cause of damage.

Paragraph 20 also provides that the tenant will not store property of over $5,000 in value, or that may cause emotional distress or consequential damages if it were missing, stolen or damaged. Further, it requires the tenant to purchase fire, theft and casualty insurance on all of the tenant's property if its value exceeds $1,000, and provides that the tenant self-insure all contents not covered by the tenant's insurance.

Regardless of whether a tenant wants to store more than $5,000 in his unit (for example, the tenant has exceptionally expensive furniture, etc.), this is a contractual provision to which the tenant agrees when he signs this lease. This is obviously to keep tenants from suffering damages in the event that a leak, theft or other casualty occurs, and claiming that the value of their goods was in the multi-thousands of dollars and they will sue you, etc. For example, in response to a claim from a tenant that a leak, casualty, etc. has damaged $40,000 worth of goods in his unit and he is going to sue you, it is helpful to be able to point out that not only is the facility not liable, but the tenant himself is in violation of the lease as he agreed not to store items of more than $5,000 in value.

Another thing that can be helpful in protecting you against potential liability, including the hassles associated with a frivolous lawsuit, is to offer tenant content insurance for sale on-site (you can, with minimal effort, obtain a "specialty license" to sell tenant insurance on-site), and have the tenant sign a separate agreement saying that they either accept or reject the ability to buy tenant insurance.

If you do sell tenant insurance on-site, we recommend that you use Appendix CD Form ADD-7, the Insurance Acknowledgement. It is an acknowledgement by the tenant that the tenant has received your insurance brochure and either chooses to purchase the coverage you offer, or declines to purchase insurance (there are two checkboxes). It really takes the wind out of a tenant's sail if he comes into your property outraged that a leak or casualty damaged his goods and saying he's going to sue you, if you pull out the Insurance Acknowledgement that the tenant separately signed, declining to buy your insurance and expressly choosing to self-insure.

Even if you do not sell tenant insurance on-site because you do not have a specialty license, you could draw up a form similar to the Appendix CD form noted above, where the tenant simply acknowledges the language of paragraph 20 – namely, acknowledges that the tenant won't store anything valued at more than $5,000, that the tenant agrees to purchase his own insurance, and that he self-insures for all contents not covered by the tenant insurance. It is legally unnecessary, but our members who use such a form report to us that it is helpful in lessening the chance that a tenant will file a frivolous lawsuit in the wake of damage to or theft of his stored items.

If you receive a demand letter from an angry tenant, saying that his goods have been damaged in a leak, flood, theft, etc., probably the best thing to do initially is to write back, or have your attorney write back, specifically outlining the lease provisions (summarized above) that absolve you of liability, telling him that you have no liability, and suggesting that he contact his own insurance company.[1]

[1] This article represents the opinion of TSSA legal counsel. Other lawyers may have different opinions.

WHY USE THE TSSA EMPLOYMENT APPLICATION FORMS?

By Larry Niemann, TSSA Senior Legal Counsel

The Texas Self Storage Association has prepared a TSSA Employment Application for the free, exclusive use of its members because the exposure of storage facility owners and managers to employment-related lawsuits is increasing significantly, especially because of federal laws. The form is EM-1 in the Appendix CD. (A supplemental employment application form that may be used by certain small Texas employers is available in the Appendix CD as form EM-2.) The application has been designed to reflect requirements of federal, state, and local statutes and regulations governing the employment relationship. Violation of these laws can result in significant penalties and damages.

1. **National and state laws.** For many years, federal employment discrimination laws (Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967) have prohibited *employers with 15 or more employees* from discriminating against qualified applicants for employment because of their *race, color, religion/creed, sex, age, or national origin*. Also, for a number of years, the Texas Commission on Human Rights Act (TCHRA) has prohibited employment discrimination by *employers with 15 or more employees* based on physical or mental disabilities of the applicant. Additionally, in some Texas cities (e.g. Austin), *employers with 15 or more employees* are prohibited by city ordinance from discriminating against qualified applicants because of HIV/AIDS or sexual preference. Another federal law, the Uniformed Services Employment and Reemployment Rights Act (USSERA), prohibits *any employer* from denying applicants employment because of continuing military service obligations, such as reserves or National Guard. USSERA also requires reinstatement of almost all employees who enter the Armed Forces of the United States and whose employment is interrupted by military duty.

2. **The ADA.** This law prohibits covered employers from discriminating on account of an applicant's *disability*. The ADA also requires covered employers to "reasonably accommodate" such disability conditions and it restricts health and medical inquiries by covered employers. The phrase "covered employer" in this case means an employer who is subject to the particular law being discussed.

3. **Which employers are covered**? Generally, employers are covered by employment-discrimination laws if they have 15 or more employees. The number of employees for purposes of determining whether an employer is covered by these laws is calculated by combining individuals employed in all of the employer's facilities or in companies under common ownership or management control.

4. **What questions cannot be asked?** The questions on the TSSA Employment Application form are designed to minimize the risk of discrimination lawsuits or other employment-related lawsuits. On the TSSA Supplemental Employment Application, more questions can be asked, but this supplemental application can only be used by employers of less than 15 employees.

5. **Can you ask about or test for drugs?** The application will ask whether the applicant currently uses illegal drugs and whether he or she would be willing to be tested for such substances. Under the ADA and TCHRA, an employer may inquire about and test for current use of illegal drugs, either before or after making a job offer. However, when an applicant has ceased using them and has completed or is presently engaged in a rehabilitation program, the applicant will be regarded as having a disability under both ADA and TCHRA. Therefore, covered employers should not ask about *past* (as opposed to *current*) drug use. Employers are not required to conduct drug testing. Current federal and state employment laws do not prohibit drug testing by private employers or require specific drug testing procedures. However, legal requirements in this area may change and employers should keep abreast of any changes regarding limitations and procedures for drug testing in the future. Further, while federal law and Texas state law generally permit employers to test applicants and/or employees for illegal drug and alcohol use, many other states are much more restrictive. Employers doing business in states other than Texas should become familiar with the laws in all states in which they operate. Drug testing should never be performed by employers without first adopting a "drug-free workplace" policy, distributing it to all employees, giving a copy of it to the job applicant you want tested, and obtaining the written consent of the applicant or employee. See the legal article titled "Drug Abuse Policy (sample)" in this section.