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Wisconsin Upholds Rental Agreement Value Limitation

The Wisconsin Court of Appeals decision in *Low v. Penn Self Storage*, 2010 Wisc. App. LEXIS 1046, would surprise anyone who is familiar with this court's ruling two years ago in *Cook v. Public Storage, Inc.*, 761 N.W. 2d 645 (2008). In Cook the court concluded that a $5,000 limitation on the value of stored property was not enforceable. In the Low case the same court held that a $15,000 rental agreement limitation on the value of stored property was enforceable and while these decisions appear to be in conflict, the court had no trouble distinguishing the two cases.

Ms. Low rented a space from Penn Self Storage and fell behind in her rent. The property was sold at a lien auction for $20. Penn then brought a small claims action to recover the balance owed. Low counterclaimed alleging that the lien sale violated the Wisconsin self storage lien law (Wis. Stat. section 704.90 et seq.). (*Editor's note:* This case was decided under the law prior to the changes that went into effect on June 2, 2010 and the amendments were not considered by the court.) At trial the jury found the following violations of the lien law:

1. Failure to include in the rental agreement a provision allowing Low to specify the name and last known address of a person whom Penn was required to notify, in addition to Low, if Low was in default, as required by § 704.90(2m).
2. Failure to include in the rental agreement a statement in bold-faced type that Penn had a lien on Low's personal property in the leased space and could satisfy the lien if Low defaulted by selling the personal property in accordance with § 704.90(3) (b)
3. Failure to place an advertisement containing Low's name, in violation of § 704.90(6) (a) (4).
4. Selling Low's property sooner than fifteen days after the first newspaper advertisement of the sale, in violation of § 704.90(6) (a) (6).

The jury awarded Low $22,000 in damages for the value of the property. Penn Self Storage request that the award be reduced to $15,000 based upon the following rental agreement clause:

> *"Use of Premises and Prohibited Storage. ... Lessee agrees not to store property with a total value in excess of $15,000.00 without the prior written permission of the Lessor. If such written permission is not obtained, the value of the property shall be deemed not to exceed $15,000.00."*

The trial court reduced plaintiff's recovery to $15,000 based upon this rental agreement language. Plaintiff appealed.

The court of appeals affirmed. Low contended that the $15,000 limitation was the same type of limitation on liability the court held impermissible under the Wisconsin lien law in Cook. Penn Self Storage countered that the provision in its rental agreement was a limitation on the value of property the tenant could store and that it was a restriction on Low's use of the space and not a limitation of liability as in Cook. The court carefully reviewed the language of the lien law and concluded that the statute did not prevent a self storage facility operator from limiting the value of property that a tenant may store in the rented space. The court then turned its attention to the effect of such a provision. The court took note of the fact that by placing property in her space with a value in excess of the amount permitted that Low had breached the rental agreement. She had the option of requesting permission to store property with a greater value but chose not to do so. The court concluded that the trial

court's decision to limit Low's recovery of compensable damages to $15,000 based upon the rental agreement value limitation was correct.

Legislative Action

This decision is interesting but to some extent the court's holding has been overtaken by recent action of the legislature. Amendments to the Wisconsin lien law that went into effect in June 2010 directly impact how self storage operators should address the issues raised in this case. The lien law now specifically permits self storage operators to limit value by including a provision like the one in the Penn Self Storage rental agreement. The lien law requires such a provision to be in bold type or underlined and in the same size type as the remainder of the rental agreement to be enforceable. This case, like Cook suggests that a waiver of liability provision will not be enforced in lawsuits alleging non-compliance with the requirements of the lien law. Therefore, it is very important that Wisconsin storage operators have value limitation paragraphs in their rental agreements and that they are in full compliance with the lien law. Storage operators without a value limitation in their rental agreement or one that is not in bold type may want to send tenants a notice that the limitation is in effect.

One troubling aspect of the lien sale was the nature of the violations of the Wisconsin lien law. Two involved not having a complying rental agreement, the others not running an advertisement as required by the law and failure to comply with the timing of running the required advertisement. Timing mistakes do occur but not using proper forms is another matter and should never be an issue. Fortunately the limitation on the value of property stored effectively limited the tenant's recovery. It has proven to be an effective defense to wrongful sale suits in other states as well.

New York Court Rejects Electronic Mailing Receipt

Fourteen states currently require lien notices to be sent by certified mail, return receipt requested. The United States Postal Service offers several options for sending letters by certified mail, return receipt requested, ranging from the traditional green card to electronic return receipts that take advantage of more modern technology. A judicial opinion that sheds light on the precise meaning of the phrase "certified mail, return receipt requested" is of interest to storage operators doing business in the states with this notice requirement. New York Supreme Court Judge Joan Madden, in In the *Matter of Lewitin v. Manhattan Mini Storage*, 2010 N.Y. Misc. LEXIS 5815, took a close look at this issue.

The suit arose when Marguerite Lewitin became delinquent in the rental payment for her storage space at Manhattan Mini Storage. Ultimately the facility began lien enforcement procedures. Among other requirements, the New York self storage lien law requires that the facility operator send a notice to the delinquent tenant by certified mail with return receipt requested. Manhattan sent Ms. Lewitin the required notice but she did not respond prior to the lien sale. Shortly after the sale Ms. Lewitin contacted the facility about her property and was informed it had been sold. She filed suit seeking the value of her property.

Certified Mail with Return Receipt

Ms. Lewitin contended that she did not receive the notice of sale as required by the self storage lien law. Judge Madden ruled that the notice sent by Manhattan did not comply with the statutory requirements. The notice was sent by certified mail but not certified mail, return receipt requested. The Judge pointed out that the return receipt function allows the sender to obtain a copy of the signature of the addressee or the addressee's agent, the date delivered and the address of delivery. The judge concluded, *"MMS (Manhattan) has submitted proof of delivery in what appears to be an electronic return receipt, but this document lacks the signature of the addressee and indicates that the mailing was delivered to a different Zip code. There is no indication that Lewitin would have received such a mailing."* Since the Judge found that the notice was not in compliance with the mailing requirements of the New York self storage lien law, Lewitin could pursue her claim for the value of her stored property.

After this decision Manhattan petitioned the court to reconsider its ruling based on additional evidence concerning the mailing. Manhattan conducted an investigation that electronic return receipt is the functional equivalent of paper return receipt and that Ms. Lewitin actually retrieved her lien notice on July 17, 2009. The court rejected the new evidence.

State Law Conflicts with Postal Regulations

This opinion is important for operators with facilities that require notices to be sent by certified mail, return receipt required. It appears to hold that self storage operators can only send lien notices with a paper green card and cannot take advantage of electronic options now offered by the United States Postal Service. The Postal Service and the Domestic Mail Manual, which provides the regulatory details of all domestic mailing, treat the traditional paper green card and electronic versions of return receipt as legally equivalent. The New York law does not define these terms; they are only defined by the USPS and federal regulation. If the storage operator sent and paid for certified mail, return receipt under federal postal regulations that should satisfy the statutory requirements. The return receipt may have contained defects that could have alerted the storage operator that there were delivery problems, but that is a very different issue.

Another troubling aspect of this case is that it may be premised upon a lie. The plaintiff alleged repeatedly that she never received the required notice. However, evidence was presented to the court that she picked up the notice at the post office several weeks prior to the sale. The judge seemed to have ruled that the truthfulness of plaintiff's central allegation in the complaint is not relevant to the outcome. Fortunately this is only a ruling by a trial judge and not an appellate court, but it is disturbing for New York storage operators.

Bankruptcy Would Not Stop Lien Sale

If a delinquent tenant files for bankruptcy most self storage operators know that the U.S. Bankruptcy Code imposes an automatic stay on state remedies including the state self storage lien law and the property cannot be sold. However, what legal obligations does a self storage operator have when the space is rented not by the bankrupt but by the bankrupt's alleged spouse and the space is rented after the bankruptcy was filed? This was the issue before the United States District Court for the Southern District of California in *Silva v. Public Storage*, 2010 U.S. Dist. LEXIS 130413.

The suit arose when Anibal Silva filed for bankruptcy in July 2007. In August of that year Janet Castillo, the debtor's alleged wife, rented a storage space at an El Cajon self storage facility operated by Public Storage. The rental agreement was in the name of Ms. Castillo and there was no reference to Mr. Silva as a tenant or as a person with access to the storage unit. Rent was not paid on the space and the contents were sold in accordance with the California Self-Service Storage Act. Mr. Silva filed an action against Public Storage in bankruptcy court alleging violation of the automatic stay. The bankruptcy court dismissed the debtor suit. Mr. Silva appealed.

Bankruptcy Automatic Stay Did Not Apply

On appeal Mr. Silva contended that the bankruptcy court erred in dismissing his claim that Public Storage violated the automatic stay when it sold his property. Public Storage countered that the automatic stay did not apply to the property in Janet Castillo's space. The court agreed with Public Storage.

The court concluded that the bankruptcy code only prohibits a creditor from commencing or continuing an action against a debtor to collect a pre-petition debt. A creditor is not prohibited from collecting debts incurred after the bankruptcy was filed. However, in collecting the post petition debt the creditor cannot pursue property in the debtor's bankruptcy estate. So a storage operator cannot use the lien remedy to sell property in a storage unit to recover post-petition debt as long as the property is part of the bankruptcy estate. The property in Ms. Castillo's space was not part of the bankruptcy estate. The court pointed out that Mr. Silva never disclosed either to Public Storage or in his bankruptcy filings that the property contained in Ms. Castillo's space was part of the bankruptcy estate. The court also noted that Mr. Silva had claimed that the property in the storage space was exempt from the bankruptcy. If it were exempt it would not be part of the bankruptcy estate and Public Storage had the right to sell it.

Facility Owner Entitled to Collect Post-Petition Rent

This opinion sheds some needed light on a self storage operator's rights during bankruptcy for post-petition debt. The storage operator is entitled to collect rent and other charges that are incurred after the filing of the bankruptcy petition, but may not have a practical means of enforcing its rights if the property in the storage space is part of the bankruptcy estate. This

case also seems to afford self storage operators some protection when there is no way for the operator to determine that property in a storage space is part of a bankruptcy.

The court's opinion and a number of recent state court rulings cast doubt on the wisdom of including an access list in self storage rental agreements. The court specifically indicated that the fact that Mr. Silva was not listed on an access list was significant in its determination that Public Storage had no reason to suspect that the property was part of Mr. Silva's bankruptcy. The result may have been different if Mr. Silva had been listed as a person with access in the rental agreement. We believe that the better practice is not to have a space in the rental agreement that permits tenants to list other persons with access rights. Any person with a key and the gate code is presumed to have access to the space and tenants should be told to be very careful who they give their key and gate code. If storage operators have strong business reasons for collecting this information, the rental agreement should make clear that persons with access are designated by the tenant and are agents of the tenant. Also persons with access do not have any tenant rights and the owner has no legal duties or obligations to persons so designated.

Massachusetts Supreme Court Rules Liability Waiver Unenforceable

The Massachusetts Supreme Court, in *Norfolk & Dedham Mutual Insurance Company v. Morrison*, 456 Mass. 463 (2010), has ruled that liability waivers and hold harmless clauses in a commercial property rental agreement are unenforceable. However, the court also ruled that an agreement by the tenant to purchase insurance does not violate Massachusetts law and is enforceable. This ruling has significant implications for self storage operators and how they draft important sections of their rental agreements.

The suit arose when Cummings Properties rented office space to Dr. Shafer. One of the doctor's patients tripped and fell over a curb in the parking area. The patient brought suit alleging negligence on the part of Cummings and Shafer. Cummings demanded that Shafer and Shafer's insurer, Norfolk, defend and indemnify Cummings in accordance with the provisions of the commercial lease executed by the parties. Norfolk brought suit seeking a judgment declaring that the liability and insurance provisions of the commercial lease were void and that it had no duty to defend or indemnify Cummings in the underlying lawsuit brought by Shafer's patient.

The lease contained a provision that placed liability for bodily injury and property damage on the tenant except when caused by the sole negligence of the landlord. The same provision also required the tenant to defend, indemnify and hold harmless the landlord for any claim arising out of the tenant's use of the premises. Another section of the rental agreement required the tenant to carry a $1,000,000 premises liability policy and name the landlord as an additional insured. Norfolk alleged that these sections of the lease were void under Massachusetts G.L. Chapter 186 section 15. The code section states:

> *"Any provision of a lease or other rental agreement relating to real property whereby a lessee or tenant enters into a covenant, agreement or contract, by the use of any words whatsoever, the effect of which is to indemnify the lessor or landlord or hold the lessor or landlord harmless, or preclude or exonerate the lessor or landlord from any or all liability to the lessee or tenant, or to any other person, for any injury, loss, damage or liability arising from any omission, fault, negligence or other misconduct of the lessor or landlord on or about the leased or rented premises or on or about any elevators, stairways, hallways or other appurtenance used in connection therewith, shall be deemed to be against public policy and void."*

Insurance Requirement Enforceable

The court determined that the prohibition on the enforcement of liability waivers applied to both commercial and residential rentals and was applicable to the office lease between Cummings Properties and Dr. Shafer. The court then turned its attention to the rental agreement requirement that the tenant purchase liability insurance that would protect the landlord from claims like those brought by Dr. Shafer's patient.

The trial judge had ruled that it was void under Chapter 186 section 15 because it amounted to the type of indemnification barred by the statute. The

Massachusetts Supreme Court disagreed. *"Commercial lease provisions requiring a tenant to acquire insurance for the benefit of a landlord have long been recognized and generally upheld."* The court concluded, *"The statute seeks to protect a tenant from overreaching by the landlord with respect to maintaining the safety of the leased premises. It does not seek to limit commercial landlords and tenants from negotiating the apportionment of risk through the acquisition of insurance for their mutual protection and the benefit of third parties."*

This Supreme Court opinion has important operating implications for Massachusetts storage operators. Facility operators cannot rely upon rental agreement liability waivers to protect them from lawsuits for loss of or damage to tenant stored property. In most cases the provision will not be enforced. However, Massachusetts facility owners should not ignore other methods of limiting their liability for such claims. The opinion notes that a requirement to provide insurance is not the same as a waiver of liability and even seems to encourage contracting parties to use insurance to deal with risk. Storage operators may also want to consider alternative ways of limiting liability. A provision that limits the value of property that a customer may store in the rented storage space may provide some protection against claims. For example, the operator may limit the value of property the tenant may store to $5,000 per rented space without the written permission of the owner. The court did not consider such a limitation on value stored, but no Massachusetts court has ruled such a provision is not enforceable.

2011 Legislative Year

State legislatures are starting their 2011/2012 legislative sessions this January. It will be a busy year for the self storage industry. The Self Storage Association and state associations will be working to modernize lien laws in as many as a dozen states. The goal is to update lien laws that were enacted 20 to 30 years ago. These laws went into effect before there was electronic mail or an internet. The U.S. mail is no longer the only or even the best way for legal notices to be sent and newspapers are not the only place for legal notices to be distributed.

State legislatures from Florida to points north and west will consider bills that could change the way that storage operators communicate. Colorado storage operators are considering a bill that would make several important changes to their lien law. The most important changes are:

1. Allows use of the tenant's e-mail address, as an alternative to a postal (street) address, for the purpose of giving required notices of default and sale of the delinquent tenant's property.

2. A dollar limit on the value of property that the tenant may store in a unit, as stated in the rental agreement, shall be deemed the maximum dollar value of all property stored in the unit and as the maximum liability of the owner for any claim for the property.

3. Eliminates the owner's responsibility to notify the sheriff before selling property to satisfy the lien.

4. Eliminates the requirement that the owner advertise a pending sale in a local newspaper of general circulation, substituting a requirement that the sale be advertised in a "commercially reasonable manner." The owner's advertising is deemed to have been commercially reasonable if at least 3 independent bidders attend the sale.

5. Allows a boat or motor vehicle to be towed from the self storage facility if rent is unpaid for 60 days. The owner shall not be liable for the boat or motor vehicle once it is given to an independent towing carrier for transport.

6. Limit circumstances when storage operators will have liability for lien sales that contain personal information of tenants or their tenant's customers.

Each of these changes is designed to address a specific problem for storage operators in the current Colorado lien law. For example, the law now requires that lien notices be sent to the county sheriff before the property is sold. While the cost of this step is relatively low, it serves no discernible public purpose. Eliminating this requirement will not only save storage operators a little money, it relieves the county sheriff of the responsibility of dealing with letters that are never read. The Colorado legislature may not enact all of these changes, but any of them would make the law more responsive to the needs of the state's storage operators.

Manager Training

Self storage operators would be wise to invest in manager training. A smart, well-trained manager is a good investment and a poorly trained manager will cost far more than the expense of the training. One problem that has been the subject of lawsuits in the past year is tenant property mysteriously being put into a space other than the one on the contract. This situation recently arose and was handled by a newly hired site manager. Unfortunately, he did not contact his supervisor for help. He discovered an unrented space with a lock on it. He opened the space, which contained property that appeared to have little value and no indication as to who might be the owner. After two weeks he disposed of the property. What the manager did not do was more significant than what he did.

He did not contact his supervisor for direction. He did not take photos of the property in the space before disposal. He did not seem to consider disposing of the property an extraordinary act that should only occur after much thought and consideration and that could have a significant financial impact on the business. This situation could have been solved by a simple rule: Property is never disposed of without consulting with the facility owner or supervisor. A corollary to this rule would be: We never dispose of property without completing an incident report that includes an inventory and photographs of the contents. Holding lien sales or otherwise disposing of property found in an unrented storage space is an act of great significance and should only be done when site personnel, supervisors and the owner or senior management have approved such action.

Self storage operators should also make it difficult for tenants or anyone else to put property in unoccupied spaces. A rule that all unrented spaces are locked would reduce the likelihood that this situation will arise. If property is found in an unrented space, an incident report should be completed. Site personnel should also check the facility gate access records and contact tenants who entered the facility around the time the property was discovered. These tenants could be contacted and asked if they put any property in an unoccupied space. A notice of the incident could also be posted on the facility website and in the office. If after reasonable inquiry the owner of the property cannot be identified, the facility owner may have to dispose of the property, but the facility will have a clear record of what occurred, the property involved and how the facility responded to it.

The California Work Break Mess

For over two years California employers have not had clear guidance as to their responsibility to ensure employees take legally required rest and meal breaks. It will be at least several more months before the California Supreme Court issues an opinion in its review of the court of appeal court decisions in *Brinker Restaurant Corp. v. Superior Court*, 165Cal. App. 4th 25 (2008) and *Brinkley v. Public Storage, Inc.*, 167 Cal.App.4th 1278 (Cal. App. 2008). The question before the court in both cases is: Are employers obligated to ensure that non-exempt employees take required rest and meal breaks or are they only required to provide employees with the opportunity to take these breaks? Also under what circumstances do claims for such violations qualify for class-action status? The Brinker case has been briefed, yet for unknown reasons the California Supreme Court has not calendared the case for oral argument.

While employers await a decision in Brinker, lower courts are issuing rulings in these cases based upon how they believe the Supreme Court will rule. Recently the 2nd District Court of Appeal, in *Hernandez v. Chipotle Mexican Grill*, 189 Cal. App. 4th 751, denied workers class-action status in a suit against the restaurant for failing to ensure that employees take meal and rest breaks. The court based its decision upon how it predicted the California Supreme Court would rule in Brinker. While this ruling was favorable to the employer, other appellate court decisions have not been. A lawyer involved in employment litigation observed that the Hernandez ruling was not really that significant. Only the California Supreme Court can resolve these issues. Employment lawyers are also puzzled by the Court's slow action on the Brinker case given its importance to both workers and employers.

Property Tax Increases Very Tame

When Public Storage says that its property taxes are increasing more slowly than they had anticipated at the beginning of 2010, it is good news for everyone. In the company's 3rd quarter earnings call, the company was asked if it was "seeing upward pressure, downward pressure" on property taxes. The company response was that it had budgeted for a 3.5% year over year increase in property taxes but that property taxes were only rising at a rather tame 2.5% year over year rate. PS has properties in 38 states so this is not just a single state trend. It appears that while rates are moving higher, property value assessments are not. In fact in some areas facility valuations are declining. Since property taxes are a major expense for self storage facilities, this trend is clearly helpful for storage operators on the expense side. The bad news is that local governments across the country are already planning property tax rate increases for 2011 and with commercial property values stabilizing lower valuations may not offset higher tax rates.

A Quick Flip

The reduction in the cost of video cameras and the storage of digital information should not be ignored by self storage operators. Digital video cameras can be purchased for less than $200 and carried in a pocket. Storage operators should consider incorporating this inexpensive technology into their lien sale procedures. Conducting lien sales is risky. The largest judgments against self storage operators have resulted from the wrongful sale of tenant property. Video cameras will not prevent procedural errors but they can create a very visible record of the type and nature of the property in each space that is sold. Large jury verdicts are usually the result of a combination of procedural mistakes and a poor record of exactly what was in the storage space. The video camera can help improve the second part of this legal equation.

The lien laws in all states give storage operators significant discretion in how thoroughly they inventory and document the contents they sell. The tension is between what is the best practice from a legal prospective and what is practical from an operational standpoint. If the sale of each space was approached from the standpoint of possible litigation, storage operators would have very complete inventories and a complete video record of the contents of every space. From an operations perspective this may not be practical and disruptive of day to day operating procedures. The storage operator needs to strike a practical balance between these needs. This is especially true given that a very small percentage of lien sales result in lawsuits. The video camera should be part of every sale because it can provide dramatic evidence to a judge or jury that the contents in the space were not as valuable as the delinquent tenant claimed.

Side Stepping the 1099 Problem

Business writers have poured a lot of ink into explaining the expanded 1099 reporting requirements and the problems it will cause for small businesses. Unfortunately very little ink has been used to explain when a 1099 is not required. While it is true that the law expands the categories of payees to whom 1099s must be issued, the law also provides an escape. 1099's are not issued when the payment is made by credit or most but not all debit cards. This provides a rather simple alternative for many businesses to issuing 1099s and makes the problem not as monumental as much of the press coverage would lead small business owners to believe.

This change in the law also raises an interesting political question: Who will be the biggest beneficiary of this change in the law? It could be the financial service industry. The expanded reporting requirement is one more reason for businesses to migrate away from payments by cash and check and towards electronic payment methods. More businesses will need to have credit card processing capability and electronic payments are far less costly for banks to process than dealing with cash and checks. Perhaps bankers and other financial service providers are not so Machiavellian, but anything that reduces the number of checks they must process in favor of electronic transactions is a plus. Another beneficiary of the migration to electronic transactions is government. Such transactions are easier to track than cash and check and tax avoidance is a little more difficult.

Supreme Court Rejects Storage Operator's Petition

The United States Supreme Court rejected a petition for review by Tuck-It-Away, Inc., seeking a review of a New York Court of Appeal decision that the facility could be acquired by Columbia University. The Supreme Court's decision to reject Tuck-It-Away's petition is the final chapter in a self storage operator's fight to prevent his New York City facility from being acquired by the University. It is surprising that there were not even four justices that were willing to consider the constitutional implications of using the state's eminent domain powers so that a private university could acquire private property for expansion. Just four years ago a four judge minority appeared to embrace a position similar to Tuck-It-Away's in *Kelo v. New London*, 545 U.S. 469 (2005). While the decision is a disappointment for the owners of Tuck-It-Away, they can take solace in the fact that the tax code provides them with three years to reinvest the funds from the forced sale in another property without owing tax on the proceeds.

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SELF STORAGE ASSOCIATION FOUNDATION
1901 N. Beauregard Street, Suite 450
Alexandria, Virginia 22311

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U.S. Postage
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Tom Morin
Daily Court Review
6807 Wynnwood
Houston, TX 77008-5023