

TSSA Legal Update



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Watch Out For Facility Policies in Conflict with Your Lease

Many TSSA members might have informal “operating policies.” Maybe they are posted in your management office. Maybe they are included in a “Policies” or “Rules” addendum to the TSSA Lease you sign with your tenant. In either case, it is important to make sure that your policies don’t conflict with the TSSA Lease, or if you intend them to conflict with the TSSA Lease, that you are aware of this and you are consciously making a decision for your facility rules to trump the language of the TSSA Lease.

**Attention All Tenants:
Prepaid Rent is Not Refundable**

Example of a sign conflicting with TSSA lease.

What Language is Binding?

The lease is binding, if it is signed by the tenant and the facility representative. However, the TSSA Lease specifically says, and always has said, that language included in Paragraph 6, “Special Provisions,” and language attached in any addenda to the lease, “trumps” the language in the lease. For example, the lease (in Paragraph 36) prohibits conducting garage sales and meetings, operating power equipment, playing musical instruments, and other such activities. However, you may want to lease to someone who wants to use his unit as a place for his band to practice. In this case, if you had facility rules that were attached to the TSSA Lease and cross-referenced in Paragraph 7 as an attached addendum, and your rules specifically allowed units to be used for band practice, then these rules would override the provisions of the TSSA Lease.

Where members are more likely to get into unforeseen trouble is if there is a policy simply posted in the management office. If your policy is posted

in the management office, the policy is not binding on a tenant. You may have a policy posted in the management office that says “\$30 for all NSF checks.” However, if your lease, in Paragraph 4(e), lists a different amount (for example, \$20), the maximum you can charge is \$20 without amending the lease. Another example may be an informal sign in the management office stating: “Prepaid rent is not refundable.” This is not consistent with the TSSA Lease, and would not be binding on a tenant unless the TSSA Lease were amended.

The TSSA Lease outlines the conditions for refund of prepaid rent in Paragraphs 28 and 39. There are also legal considerations that would in some cases prohibit you from adopting an across-the-board “no refund of prepaid rent” policy. Regardless of the specific circumstances, be mindful of the following guidelines in the blue box at right:

- 1) Simply posting a policy in your office does not create a legally binding agreement between you and your tenant
- 2) Any provisions that you include in the special provisions section of the TSSA Lease or in an addendum will “trump” any conflicting provisions in the TSSA Lease, and
- 3) In the event that you have created your own special provisions or addenda (as opposed to using the TSSA official or sample forms), it would be a good idea to have your own legal counsel look over your documents.

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TSSA Boat and RV Rental Agreement

Review and Reminder of Important Addenda

TSSA members who offer vehicle, boat and RV storage at their facilities now have a rental agreement geared specifically for this unique situation, the TSSA “Vehicle, Trailer or Boat Self-Service Storage Rental Agreement.”

Vehicle, boat and RV storage presents unique potential hazards and challenges. The Boat and RV Rental Agreement provides additional benefits and protection to TSSA members.

To the extent possible, for ease of use by our members, the paragraph numbers, wording, and formatting of the new Boat and RV Rental Agreement parallel the original TSSA rental agreement language. Some of the more important new language specific to the boat and RV lease is as follows:

Page 1

Fill in the blanks for important information. Page 1 contains fill-in-the-blank spaces for all of the important registration and title information that you will need for boats, vehicles, trailers, and motors. There is a blank for the tenant to fill in the estimated value of the vehicle, boat, trailer, or motor. It is important to have all the information called for in the blanks when leasing this type of storage.

Page 2, Paragraph 4(h)

More blanks for additional charges. Because there are additional charges that may be assessed to a tenant under this new lease, Paragraph 4(h) has been altered to reference the charge per day under lease Paragraph 40(c), which is the charge per day for each day that the tenant is not parked in conformance with the lease requirements (parked over the line, etc.). It also references the charge per day for the tenant’s failure to move his vehicle under paragraph 18(6). Paragraph 18(6) allows you to request that the tenant move his vehicle, and Paragraph 4(g) says that if he does not, you may charge him a daily fee.

Page 3, Paragraph 18(6)

Right to move the vehicle. This paragraph makes it clear that you have the right to require the tenant to move his vehicle if you need him to. You can make a written certified mail request to the tenant to move the vehicle, for facility maintenance or other similar purposes, and if the tenant does not move the vehicle by the date requested (you must give the tenant at least seven days), you may have the vehicle moved, after which time you must notify the tenant of the move. This paragraph also gives you the right to move the vehicle without notice in emergency circumstances.

Page 3, Paragraph 20

\$20,000 value cap—use “over-the-value” addendum if the stored item is worth more. Paragraph 20 in the original TSSA lease addresses non-liability and release for loss

or injury. The language in the new Boat and RV lease is virtually identical to that of the original lease, with the exception that the maximum dollar value of items that may be stored in a unit (or parking space) has been increased from \$5,000 to \$20,000. If your tenant will be storing items worth more than that (such as an RV), you will be able to tell from the first page of the lease where the tenant fills in the estimated value of the vehicle. If the vehicle is worth more than \$20,000, it is recommended that you require the tenant to sign TSSA’s lease addendum (for the RV and Boat lease) for storage of property over \$20,000. (“Addendum for Items Stored in Excess of Maximum Value.”)

Page 5, Paragraph 36(f)

General rules and “additional vehicle” addendum use. This is an entirely new paragraph regarding “Use of Premises.” It provides that only the vehicles listed on the first page of the lease can be stored on the premises (so you will always have all of the relevant information on the vehicles at your premises), and that unauthorized vehicles may be towed at the owner’s expense. If your tenant wants to be able to “swap out” vehicles in his space, you should have the tenant sign the TSSA addendum entitled “Addendum for Additional Vehicle Storage.” It prohibits storage of oil, gas, or other such substances except those contained in the operating parts of the vehicle. It prohibits storage of extra tires, batteries, or other such items. It requires the tenant to shut off all LP gas, propane, and butane tanks during storage of a vehicle, and prohibits the tenant from residing in the vehicle for any length of time.

Page 6, Paragraph 40

Parking rules. This is also an entirely new paragraph, and generally speaks to where and how the tenant may park his vehicle. It provides that the tenant must park between any parking stripes of his space, or otherwise comply with the facility’s parking instructions. It prohibits the tenant from blocking access to any other space, and it outlines remedies in the event the tenant parks incorrectly: in this event the facility may (1) move the vehicle at tenant’s expense to allow other tenants’ access to their space, (2) consider that the tenant is in default (which triggers default rights such as overlock), and (3) charge an additional daily service charge as in Paragraph 4(h).

Paragraph 40 also makes clear that the facility is not in default if the tenant comes to park in his space and finds it taken by someone else, as long as you provide an alternate parking area. It also provides that you can give the tenant five days notice that his space is now ready for occupancy again and he must move his vehicle back, and if he doesn’t move his vehicle back within that five days you can charge him a daily fee as outlined in Paragraph 4(h).

TSSA Form of the Month

“Authorization and Release” vs. “Notice of Abandonment”

Purpose of the Forms

The purpose of the Authorization and Release by Tenant (TSSA Official Form #5-06) form is to provide a document on which you can rely to have the tenant sign and authorize a variety of things. The most common use of the form is to allow the tenant to authorize via his signature that he is abandoning all unit contents. The form can also be used for the tenant to give you authorization for a third party to act as his agent; for the tenant to give you permission to cut his lock; for a tenant’s acknowledgement that all of the contents have been removed in good condition; and for the tenant to acknowledge that he has received all of the contents that you had seized under your chapter 59 lien. With regard to the Notice of Abandonment (form “Misc-4” on the *Goldbook*® Appendix CD), the purpose of this form is to help solidify your position that the tenant has abandoned items in a unit, a decision usually reached when you have cut a lock to do a foreclosure inventory, and to acknowledge that the “abandonment test” in the TSSA lease has been met. If you can declare the unit as abandoned, this eliminates the necessity of having a foreclosure sale. If a tenant has abandoned the unit, it means that the tenant has relinquished all rights to the contents in the space and that the facility may remove any lock, enter, remove and/or dispose of all of the contents. In short, the primary difference between the two forms is who is initiating the action. The tenant is signing off on abandonment by signing and sending back the “Authorization and Release” form. Perhaps the tenant is agreeing to abandonment in exchange for something (for example, the forgiveness of some or all of his outstanding debt). In you are using the “Notice of Abandonment” form, you believe that the tenant meets the legal definition of “abandonment” in the TSSA lease (the most important test being that the unit contains nothing of value to the ordinary person), and you are giving the tenant one last chance to dispute this belief.

How to Use

Regarding the Authorization and Release form, there are five checkboxes, each one used for different circumstances, and the basic scenarios for which you would use this form are described on the form. Let’s briefly cover each of the five checkboxes:

If **Checkbox 1** is checked and the tenant fills in the name of an individual listed as an emergency contact in Paragraph I of the TSSA lease, and the tenant signs the form, you can rely on it as authority to allow the person listed to enter the space, remove all contents, abandon the property, and execute releases on behalf of the tenant. You might use this when the tenant has moved, is in jail, or is otherwise unavailable and there is no one else on the lease who is entitled to access. The tenant might ask you to let a friend in, and you would be wise not to merely rely on a tenant’s

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Self-Storage Solutions

by Connie Heyer, TSSA Legal Counsel
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Q: *We had a tenant who did not pay his storage rent for six months, but now he's paid up and paid for a month in advance, too. Do we have to continue to rent to this individual since he is paid up through an additional month?*

A: No, you do not have to continue to lease to him. Provided that any minimum lease term specified in Paragraph 3 of the TSSA lease has passed, you may always give a tenant 15 days notice of lease termination, even if the tenant has pre-paid some rent. Paragraph 9 of the TSSA lease gives a tenant the right at any time to give 10 days notice of lease termination (provided the minimum lease term has been met), and it gives the lessor the right to give 15 days notice of lease termination. You may use TSSA form E-1 to satisfy the 15-day termination requirement if you like.

As far as refunding any pre-paid rent, refunds are addressed in Paragraphs 28 and 39 of the TSSA lease. The tenant is liable for rent for the remainder of the month of move-out or for 10 days after move-out, whichever date is later.

Q: *We're considering using referral incentives to attract customers. If we did it, we would pay people \$10 - \$15 in cash for each new tenant they refer to us. We were also thinking of using gift certificates or rent credit. Is this legal? May I give tenants who pay on time a cash or rental reduction incentive?*

A: It is a violation of the real estate license act to pay any amount of cash or rental credit as a referral bonus/fee unless the recipient is a licensed broker. The Texas Real Estate License Act prohibits any person who is not a licensed real estate broker from receiving compensation for procuring tenants or assisting in leasing real estate. However, there is an exception to this general rule, and per the Texas Real Estate Commission rules, you may use a gift certificate (such as, to a

restaurant) to compensate a non-licensed person who gives a referral, provided the gift certificate's retail value is \$50 or less.

It is legal to give tenants who pay on time a monetary incentive or a rent credit incentive, but as far as paying non-licensed real estate brokers or sales people a referral fee, that can only be accomplished by a gift certificate in a face amount of \$50 or less.

Q: *What is the proper procedure for filling out a lease if I want to donate a unit to a tenant for a certain amount of time—a church group, for example. How do I protect myself from giving free rent indefinitely but still show the donated time on the lease?*

A: I would suggest filling in the rent and all of the dollar figures in TSSA lease Paragraph 4 just as you would for any other paying tenant. The special provisions "trump" anything else in the lease, so I would also suggest in the special provisions writing something like: "The first "x" months of rent are free. After that time, rent will be due per the above-stated contract rate."

Q: *The tenant we evicted has now threatened our property and us. The tenant had a gate opener for the property and has refused to return it, and we are unable to just change the code. I went over to the local J.P. and was told that the tenant actually has to hurt me before I can put a restraining order on him. Is this true?*

A: It is not the case that somebody actually has to do you harm in order to receive a restraining order. Also, justices of the peace have no authority to issue injunctions, and a restraining order is an injunction (an order for somebody to do something, in this case, stay away from you.) I would suggest going to a lawyer and filing an action in a higher court.

Q: *If I accept a check for the replacement of a "bad check," can I keep the*

tenant locked out until the second check clears the bank? Also, if checks are an accepted form of payment at our facility, can we refuse to accept the check late in the month if we expect that they're about to move out and that the check may not be good?

A: In a situation where someone is making good on a hot check, I would suggest that you not accept a replacement check. Paragraph 5 of the TSSA lease gives you the right to change the permitted mode of payment at any time, upon notice to the tenant. So if the tenant mails you a check or brings a check by, you may either mail the check back or tell him then and there that, "We will no longer accept checks from you; all payments have to be in certified funds or cash." This would take care of the situation of the bad replacement check, and also take care of the situation where you were hesitant to accept a check late in the month.

If you wish, you may put in your rules or special provisions something to the effect that if you receive one NSF check from a tenant, the tenant is automatically required to pay in certified funds for the duration of the lease until further notice from you.

Q: *If you have several united partnerships with the same ownership, and each has less than \$300,000 in income, are the incomes aggregated so that the total income exceeds \$300,000, and taxes will be due?*

A: This is a question best answered by your accountant, but most likely your various related companies will be required to aggregate their income. Taxable entities that are part of an affiliated group engaged in a unitary business must file a combined group report with regard to a \$300,000 threshold for revenue.



2007 Legislative Session Update

Note: This report, while timely, is subject to change as the legislature continues to meet through the end of May 2007. The Texas Legislature Online website is a valuable tool for tracking bills. See the box in the lower right corner of page 5 for details.

The 2007 legislative session is in full swing, and TSSA, as always, is looking out for your interests at the Texas Capitol. The legislative session this year runs from January through the end of May. This article will provide a brief overview of bills of interest under consideration at the Capitol, the current status of the bill, and the potential effect of the legislation on TSSA members.

The good news is that there have been no bills filed, and no amendments to any bills thus far, that would directly affect the self-storage statute—Chapter 59 of the Texas Property Code. Protection of the well-written and fair laws that directly govern the self-storage industry is one of TSSA's top priorities. However, there are several bills that would have a less direct, but nonetheless important effect on our members, and which TSSA is monitoring, supporting, or opposing as appropriate.

▶ **Privacy Issues. HB 59 (Rep. Isett, Lubbock)** would prohibit a business owner from requiring a “biometric identifier” like a fingerprint from a customer. Even more problematic, it prohibits you from requiring a tenant to give you their Social Security number (SSN) as a condition of renting. You need a SSN if you are going to turn unpaid amounts over to a collection agency, and a SSN can be helpful in providing military status checks and in obtaining judgments against tenants who leave owing rent. (Note: As of April 16, 2007, this bill had been satisfactorily amended to allow you to require this information after adapting credit card privacy policy.)

▶ **HB 901 (Rep. Zedler, Arlington)** establishes a “no mail” list, similar to the existing state “no call” list. As of press time, this bill was still pending in the House Business and Industry Committee, and had not been voted

out of committee or voted on by the House. In a nutshell, all mail solicitations other than those addressed to “current resident” would be prohibited if a person's name were on the no-mail list.

▶ **HB 3222 (Rep. Elkins, Houston)** would require any business that collects sensitive personal information in the regular course of business to encrypt any computerized database that contains sensitive personal information (such as SSN's).

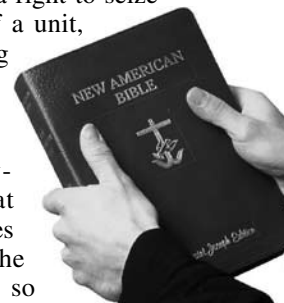
Changes to “Freeze Law”

There is also a bill, which TSSA opposes, that would amend the “freeze law.” **HB 1529 (Rep. Villarreal, San Antonio)** makes it easier for cities to change the rules in the middle of the construction game, so to speak. The “freeze law” is a current law that states that the ordinances and codes applicable to your construction project are “frozen” as of the date your permit is issued. This bill would allow cities to change the rules at any time with regard to any safety-related issue. At the

moment, this bill does not appear to have momentum, as it has not had a hearing before a committee as of press time.

Bibles Exempted from Seizure

▶ **HB 167 (Rep. Raymond, Laredo)** adds “bibles” to the list of items which are exempt from seizure. Current law provides a short list of items which are generally exempt from seizure, but also states that secured creditors' rights granted in other statutes trumps that list. In other words, Chapter 59 makes it clear that you have a right to seize all contents of a unit, so superseding any exemption lists in current law. HB 167, however, says that the “trump” does not apply in the case of bibles, so it would be unlawful in any circumstances to seize someone's bible.



TSSA recognizes that sometimes members unknowingly seize and sell bibles, as they may be stored in boxes or other closed receptacles. There is no legal duty to inventory the contents of units before they are sold at foreclosure, and it would not be feasible in most instances to do so. TSSA is seeking a minor amendment to this bill to clarify that it would be illegal to “knowingly” seize a bible. Thus members who had no knowledge that a bible was in one of the boxes in a unit would not have potential liability.

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2007 Legislative Session Update

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Mandatory Sales Price Disclosure

Probably the biggest issue that TSSA is addressing this session is that of mandatory sales price disclosure. Among the bills that would require sales price disclosure for real estate sales are: **House Bills 1552, 2996, 3820, and 3821** (all introduced by Representative Villarreal, San Antonio); **SB 270** (by Senator Wentworth, San Antonio); and **SB 1935** (by Senator Janek, Houston). TSSA is opposing all of these bills, has testified in opposition to those which have already had committee hearings, and will continue to strongly oppose these bills, primarily for the reasons outlined below.

There are many problems with mandatory sales price disclosure, the most important of which are:

Especially for commercial properties, sales price and market value are not equivalent. Commercial properties are normally valued with heavy reliance on the income method of valuation, as there are many variables that go into the sales price of a commercial property. 1031 tax exchanges, financing conditions, assumption of existing debt, whether the transaction is part of a portfolio transaction, whether personal property is included in the sale, rental rates, lease terms, vacancy rates, management capabilities—all have a bearing on the sales price.

Sales price disclosure will pave the way for real estate transfer taxes. In other states that have sales price disclosure, most of them use the information only to levy a real estate transfer tax, not to value property. Almost all states that have mandatory sales price disclosure also have a real estate transfer tax. For anyone to argue that mandatory sales price disclosure does not typically lead to a real estate transfer tax is simply not supported by the evidence.

Sales price disclosure would inevitably lead to “sales chasing,” a term meaning the appraisal districts’ appraisal of one property by using the highest value from the most recent sales in the property’s area. This value would not take into consideration the differences between the properties (long term leases, use of

the properties, financing, vacancy rates, etc.) Also, unlike some commercial landlords, self-storage owners cannot easily pass along tax increases to tenants, as our leases are never triple net. A sudden drastic property tax increase could be the difference between profitability and economic disaster for a facility.

Appraisal Reform

TSSA is also in support of several bills primarily having to do with streamlining the appraisal process and making chief appraisers and review boards more accountable for their actions. TSSA supports **HB 524** (by Representative Woolley, Houston) which gives property owners the right to compel arbitration in an ad valorem tax protest if the appraised value for the new year is more than a 5% increase over the appraised value for the previous year. This would allow a less expensive means of tax protest. TSSA also supports **HB 2463**, which would allow a property owner to require that ad valorem taxes be imposed on his property on the basis of the five-year rolling average of the property’s taxable value (this bill is sponsored by Rep. Van Arsdale, Houston). This would give property owners more certainty in their tax bills.

▶ TSSA supports **HB 3024** (by Representative Frost, Atlanta) that would increase the burden of proof on the appraisal district in the event of a property’s tax protest. TSSA supports **HB 3490, HB 3491, HB 3493, and HB 3494** (all by Representative Otto, Dayton). These bills, among other things, prohibit the chief appraiser, in many instances, from appealing an appraisal review board’s determination of a taxpayer protest, would require greater representation by individuals who are not officers or employees of a taxing unit on the appraisal district

TSSA is opposing the sales price disclosure bills. Sales price disclosure will pave the way for real estate transfer taxes. In other states that have sales price disclosure, most of them use the information only to levy a real estate transfer tax, not to value property. A sudden drastic property tax increase could be the difference between profitability and economic disaster for a facility.

board of directors, would give parties in an arbitration proceeding for a tax protest the ability to represent themselves, and would amend the makeup of the board of tax professional examiners to include three “public” members. TSSA also supports **SB 1642** (by Senator Williams, The Woodlands), which is identical to **HB 3194**, and would give property owners the right to appeal an appraisal review board’s determination to binding arbitration.

In summary, it is good news thus far in the session that Texas Property Code Chapter 59 does not look to be the subject of any amendments. However, there are several proposed bills, most importantly those related to mandating sales price disclosure, that could have a tremendous effect on self-storage operations, and TSSA is actively protecting your interests at the legislature. Please be on the lookout for TSSA legislative alerts. These are calls to action and requests for assistance from our members to make their opinions known to their legislators. There have been two legislative alerts thus far regarding mandatory sales price disclosure, and chances are there will be more before the session is over. If you have not received these important alerts, please make sure the TSSA office has your correct e-mail address.

To keep an eye on legislative developments that may affect the self-storage industry, visit www.capitol.state.tx.us and use the “Bill Lookup” link to view various bills as they progress through the legislature. Be sure to type in HB or SB along with the bill number to designate either “house bill” or “senate bill.” For example, to look up the status of House Bill 1552 (mandatory sales disclosure), you would enter HB1552.

Mandatory Arbitration: Pros And Cons

Many contracts these days include a clause requiring binding arbitration in the event of a contract dispute. For several reasons that will be discussed in this article, the TSSA rental agreement does not contain a binding arbitration clause. However, owners wishing to include a mandatory arbitration clause may easily do so by attaching special provisions or community rules requiring binding arbitration as an addendum to the TSSA lease or inserting a special provision in paragraph 6 of the TSSA lease. Don't forget, any addendum (including your facility's rules) attached to the TSSA lease should be cross-referenced in the TSSA lease in Paragraph 7 by checking the appropriate check box.

TSSA Lease Provisions

The TSSA lease does not contain a binding arbitration provision (meaning that any dispute arising under the TSSA lease could be taken to court). It is important for TSSA members to have the ability to go directly to an eviction trial or directly to foreclosure under Chapter 59 without having to go arbitration because of a dispute. If you are required to go to arbitration in the event of any dispute, you would have to go through formal arbitration processes and an arbitrator would have the sole say on whether to grant you an eviction or allow foreclosure – even if the tenant was without question delinquent in rent or other amounts. Arbitration would in all likelihood be more time consuming and costly than processing an eviction or foreclosure. In addition to this, if you had to go to arbitration in the event of any dispute, you may not even be able to report unpaid amounts due to a credit reporting agency prior to a ruling by an arbitrator.

Even if eviction and foreclosure procedures were carved out and you did not have to go to arbitration to process evictions and foreclosures, TSSA legal counsel would not recommend inserting a binding arbitration provision into the TSSA lease. Arbitration is somewhat of a “hot topic” on which many people have differing opinions. Some people feel that arbitration works to their advantage in that it can keep legal fees down (there

is no guarantee of this—sometimes it can be as costly if not more costly than a trial). On the other hand, some people are uncomfortable with an arbitrator having the role of “judge, jury and executioner” with no ability to appeal the arbitrator's decision. In contrast, you may appeal the decision of any judge or jury verdict in a trial.

In summary, in the opinion of the TSSA board and TSSA legal counsel, requiring binding arbitration as part of your lease contract is a decision that individual facility owners should make, rather than having mandatory arbitration language built into the TSSA lease.

Arbitration vs. Mediation

The primary difference between arbitration and mediation is that arbitration is normally binding and cannot be appealed (once the arbitrator announces his decision, that's the end – there is no appealing to a court, and both parties are legally bound by his decision). In contrast, mediation only results in a binding resolution of the matter if both sides voluntarily agree to the mediation settlement. In mediation, a mediator tries to help both parties come to a mutually-agreeable settlement, but there is no requirement that the parties reach agreement, and no authority of the mediator to force a settlement. Mediation is simply a way to get the parties together, with a trained mediator, in a good faith attempt to resolve the matter short of a lawsuit.

Paragraph 31 of the TSSA Lease requires parties to go to mediation before filing suit (except for suits involving eviction, rent, or other charges in TSSA lease Paragraph 4). In other words, you need not go to mediation prior to beginning eviction, foreclosure, or other collection remedies. So, if a tenant sues you over anything other than rent/other charges specified in Paragraph 4 or an eviction, you may file a motion with the court to require mediation first, and it should be granted. Also, as a general rule, most courts in Texas require you to go to mediation before they will set your lawsuit on the court's docket to be heard.

Pros and Cons of Arbitration

For TSSA members contemplating whether to include mandatory arbitration in their own community rules or as their own addendum, here is a summary of the pros and cons to consider:

Pros:

Arbitration has the potential to keep costs (such as legal fees) down. Tenants who might otherwise file suit may think twice if they know that they will be before an arbitrator rather than a jury. There is no appeal from binding arbitration, so this is to your advantage if you like the arbitrator's ruling. Case law suggests that the parties can agree to cap damages in an arbitration agreement. Arbitration is generally considered to be more advantageous to defendants.

Cons:

Arbitration can be just as expensive and time consuming as litigation. A “blanket” mandatory arbitration provision would eliminate the ability of a facility owner to proceed directly to eviction or foreclosure (for nonpayment or any other tenant default). If you are not happy with the arbitrator's verdict, you cannot appeal, unlike litigation.

In summary, owners should weigh the pros and cons of including a mandatory arbitration provision as an addendum or special provision to their TSSA rental agreements. Owners should seek the advice of their own legal counsel for assistance in drafting any mandatory arbitration language. Some sample language for members and their own legal counsel to consider for their own facility rules or addendum is printed on the facing page.

Sample Arbitration Addendum Language

It is hereby agreed and understood that except as otherwise provided in this addendum, any dispute, difference or disagreement of any kind whatsoever, whether statutory, contractual, or otherwise, which arises from the services/products provided or relates in any way to the business relationship of the parties to this agreement, shall be, as the sole available remedy, resolved through binding arbitration, rather than litigation. Any such arbitration shall be governed by the Federal Arbitration Act and conducted by one arbitrator in accordance with the rules of the American Arbitration Association. The award determined by the arbitrator shall be final and binding upon all parties and shall be accompanied by a reasoned opinion. Any decision by the arbitrator may be enforced as a judgment in any court having jurisdiction over a party against whom such decision is to be enforced.

The following matters will not be submitted to arbitration absent mutual agreement of Lessor and Tenant: (1) actions by Lessor related to eviction of Lessee for violation of the Rental Agreement; (2) actions by Lessor related to recovery of unpaid amounts due under the Rental Agreement; and (3) actions by Lessor related to foreclosure of Lessor's lien on the basis of unpaid amounts due to Lessor. All other disputes must be submitted to binding arbitration, including disputes by Lessee related to Lessor's action(s) described in this paragraph.

Notwithstanding the foregoing, (1) the arbitrator shall not be authorized to award punitive damages with respect to any such dispute, difference or disagreement; (2) any award in damages shall not exceed \$10,000.00, including attorneys fees and costs; and (3) any arbitration shall be conducted in the county where the facility is located in Texas. Each party shall bear its own costs and expenses, including the costs incurred by each party of any arbitration hereunder, the costs of the record or transcripts thereof, if any, administrative fees, attorney's fees and all other fees involved, unless otherwise allocated in an equitable manner as determined by the arbitrator. [Include a signature line and date line for both the tenant and the facility representative.]

oral request, but rather to have the request in writing. You could use **Checkbox 1** for just this type of scenario.

If **Checkbox 2** is checked and the tenant signs the form, the tenant has authorized you to cut his lock and consented to pay for the lock cutting charges outlined in Paragraph 4 of the TSSA lease. This might happen when a tenant comes into your office and says "Gosh, I've lost the key to my lock and I have no way to get into my unit."

If **Checkbox 3** is checked and the tenant signs the form, either the tenant or the person who is acting for the tenant and who is named in **Checkbox 1** of the form is confirming to you that all the contents have been removed from the tenant's space in good condition. You might want to use this checkbox, for example, if the tenant requests that you let someone into his unit to clean it out for him.

Checkbox 4 can be used when you have seized (overlocked) the unit for non-payment of rent and the tenant later pays in full and moves his things out of the unit at that time. If **Checkbox 4** is checked, the tenant, or the person who is authorized to act for the tenant, is confirming that he has received all of the contents which you had seized under your Chapter 59 lien. He is also acknowledging that all the contents are in the same condition as at the time of seizure. You may want to use this part of the form when you have overlocked the unit and the tenant comes in and wants to pay all sums due and remove all of his things at the same time.

Checkbox 5 deals with the tenant's statement of abandonment of his contents. It is probably the most widely used provision in this authorization form. If **Checkbox 5** is checked and the tenant signs the authorization, the tenant has agreed in writing that he abandons all property left in his space after a specified move-out date. So, after that date, you have the peace of mind knowing that you can enter the unit and throw anything away or give anything to charity and lease the unit to a new tenant; otherwise, sometimes you play a guessing game of "Is this trash or is this someone's treasure?" with the items the tenant leaves behind. Or, this can be useful when you have seized the unit and opened it to inventory the unit and it looks like there is nothing of value in the unit. If the tenant is delinquent on his rent, it may be a good business decision for you to try to strike a deal with the tenant and tell him that you will forgive all or part of the rent in exchange for him simply agreeing to abandon the unit and let you clean it out.

Getting the tenant to "sign off" on abandonment is safer, so to speak, than presuming abandonment

based on the definition in TSSA Lease Paragraph 26, but sometimes the tenant cannot be reached, in which case you may want to use the "Notice of Abandonment" form.

Tip for Use

Make sure the Authorization and/or Release is fully executed and signed by the tenant, and it is always a good idea to compare the signature of the tenant on the form to the signature on the lease.

Notice of Abandonment

Regarding the Notice of Abandonment form, there are two situations under which you can lawfully treat a space and the contents within it as "abandoned" under Paragraph 26 of the TSSA Rental Agreement. In the first situation, the following three factors must be present:

- (1) The tenant must have given you written or oral move-out notice;
- (2) The tenant's lock must have been removed from the space (if the space is lockable) by someone other than Lessor; and
- (3) The move-out date or termination date must have expired.

The second situation is when all of the following three requirements are met:

- (1) The tenant has not paid rent or other sums due;
- (2) The tenant's lock has been removed (if the space is lockable) by someone other than you, or has been removed by you when exercising a statutory seizure; and
- (3) The tenant's space contains nothing of value to the ordinary person.

If all three parts of either of the above two "tests" are satisfied, you may consider the unit and the contents as abandoned. You are not required to send a Notice of Abandonment form as a condition of declaring a unit abandoned under the lease, but as a courtesy, and as an additional "insurance policy" against someone later claiming that the items had value, TSSA legal counsel recommends that you send this notice to the same address (or addresses) that you would normally send a Chapter 59 Notice of Claim, prior to declaring a unit abandoned and cleaning it out.

Can You Use eBay® for your Chapter 59 Foreclosure Sales?

With eBay's popularity seeming to be on the rise, many facility owners have asked the following questions: Can I simply have an eBay auction of my tenants' items at a Chapter 59 sale? Can I select certain items and sell them on eBay instead of at a live auction? The short answer to both of these questions is "no." This article will discuss in further detail what is legally required as far as Chapter 59 foreclosure sales under Texas law, and how, if you choose, an eBay auction could be incorporated into your Chapter 59 foreclosure process.

Chapter 59 Requirements

Chapter 59 of the Texas Property Code outlines the requirements for foreclosures at self-storage facilities. Section 59.045 states that the foreclosure sale must be a "public sale at the self-service storage facility or a reasonably near public place." There is no question that the sale has to take place at the facility or reasonably near public place, and it would seem an inadvisable "stretch," with significant legal risk, to require that an eBay sale satisfies these requirements.

The term "public sale" is not defined in Chapter 59 of the Property Code, but in other portions of the Property Code where a "public sale" is required, the sale clearly contemplates a public auction, at which a live person is offering an item for sale to other live people. For example, in Property Code § 51.002, which is the foreclosure process that your bank would use against you if you defaulted on your mortgage, a "public sale" is required, and the statute further clarifies that the sale must take place on the courthouse steps or in another area designated by the county commissioners. There is no question that this has always been interpreted to mean a live person (vs. a computer or electronic process), going to the courthouse steps, and auctioning off the home to other individuals who are physically present.



How could sealed bids or eBay auctions be incorporated into the process?

By far the easiest and "safest" way to incorporate sealed bid auctions or eBay auctions into your foreclosure process would be for you/your facility representative to be the high bidder and buy the contents of the unit at a live Chapter 59 auction. Then you own the contents and may do with them what you wish, including selling them on eBay or selling them in a sealed-bid auction.

Additionally, in my opinion, you could lawfully combine—if at all feasible—a live auction with a sealed-bid auction or eBay auction. It is probably not feasible to combine a live auction with an eBay auction (the auctions would have to close at the same moment, and the highest bids on eBay and at the live auction might be for the same amount but from two different buyers, etc.). You should also carefully check restrictions on sellers regarding the reasons you can remove something from an eBay auction, if for example, the tenant chooses to come in before the auction ends to pay off the debt.

It may be possible to incorporate a sealed-bid auction into your live auction. If you allow viewing of contents of the units before a sale, as some facilities do, or if you know about a particular item in a unit and have a potential buyer, someone could leave a sealed bid with you. In your live auction rules, you could make it clear that sealed bids are also part of the auction, and that the highest bid could be from either those bidding in person at the live auction or from sealed bidding received in advance. It should be kept in mind that the purpose of the auction is to get the maximum dollar amount on the sale of the contents. This is in both your and your tenant's best interest.

Contract Language

Could you simply contractually agree with your tenant that in lieu of a live, Chapter 59 auction, the tenant will agree to let you utilize an eBay auction? No. The clear language of Chapter 59 forbids waiver of any part of the statute. You may not amend the statutory requirements of a "public sale at the facility or a reasonably near public place" by contract.

In summary, there may be advantageous ways to utilize eBay bidding, sealed bids, or other types of auctions in your Chapter 59 foreclosure process, but these must be in addition to and not in lieu of your live, Chapter 59 auction. Under Texas law you definitely cannot, for example, simply select certain items from your tenant's unit and post them on eBay, while selling the remainder of the contents at a live auction. You must have, in TSSA Legal Counsel's opinion, a public sale (meaning a live, in-person auction), and it clearly must be "at the self-storage facility or a reasonably near public place."

All articles in the TSSA *Legal Update* are authored by **Connie Heyer**. Heyer is a partner in the law firm of Niemann & Niemann, LLC in Austin and serves as legal counsel for the Texas Self Storage Association. She is co-author of the TSSA *Goldbook*®, a comprehensive guide to laws and regulations affecting self-storage owners and managers in Texas. Niemann & Niemann, LLC is also the author of the current TSSA rental agreement and official forms.

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