

# TMSA Legal Update

A Texas Mini Storage Association Publication

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You're holding the first *TMSA Legal Update*, a new publication designed to help members of the Texas Mini Storage Association stay abreast of legal developments in the industry. In addition to the "Self-Storage Solutions" typically found in the *Texas Mini News* and the "Form of the Month," you'll find other useful and timely information.

As you know, legal issues are always changing, and laws concerning self storage continue to evolve. It can be difficult at times to keep up with everything.

That's why we'll be publishing a separate newsletter containing only legal content. We expect to print the *TMSA Legal Update* about twice a year, as the need arises. We've taken the added step of having it hole-punched, and encourage you to keep these special publications in a binder at your facility. We hope you use it along with the *TMSA Goldbook*®, the "Ask the Experts" searchable database at [www.tmsonline.org](http://www.tmsonline.org), and TMSA legal seminars, as part of your legal reference resources to help you run your business both effectively and legally.



One of the many benefits of having a TMSA membership is TMSA's legislative advocacy for its members. During each legislative session, TMSA monitors hundreds of bills for its members and does everything it can to make sure that no bill passes that would adversely affect the self-storage industry. This is just a brief summary of some of the bills that TMSA is following this session that have the potential to affect the self-service storage industry.

#### Late Fees

The bill that has the potential to most affect the self-service storage industry directly is HB 2050. This bill would amend Chapter 59 of the Property Code

to, among other things, cap the amount of late fees that a self-storage facility can charge. The bill also seeks to remove the direct reference to the Texas Deceptive Trade Practices Act (DTPA) in Chapter 59.

It is TMSA's understanding that the removal of the direct reference to the DTPA (Chapter 59 simply says that anyone aggrieved by a violation of Chapter 59 may sue under the DTPA; it does not create an automatic violation of the DTPA) is the primary purpose for this legislation, which was filed at the request of a large self-storage operator that is not a TMSA member. TMSA has expressed its opposition to this

bill to both the company that asked for the bill to be filed and to the legislator who filed the bill.

The bill at this time is not actively moving through the legislative process, but things change on a daily basis in the Legislature. *It is TMSA's position that any potential benefit that could come out of this bill would be outweighed by the potential for unfavorable amendments to Chapter 59 if Chapter 59 is opened up to scrutiny during the legislative process.* Removing the cross reference to the DTPA from Chapter 59 would not remove a tenant's cause of action for DTPA. It would simply remove the direct reference to the DTPA. Our philosophy is "if it ain't broke, don't fix it." Our industry is familiar with Chapter 59; Chapter 59 is fair for both landlords and tenants, and Chapter 59 affords self-storage facilities valuable protection in the form of a superior lien.

#### Locksmiths

HB 2243 would also affect many TMSA members because it would require them to use a locksmith anytime a lock is changed out. Many of our members use

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## Self-Storage Solutions



by Connie Heyer, TMSA Legal Counsel  
Niemann & Niemann, LLP

**Q:** *We have one building in our facility for which the drainage is poor. It has never flooded, but I can see that the road, in a very heavy rain, has the potential to act as a dam. I carry flood insurance on the building and am contemplating increasing my coverage so that it would replace the whole building in the event of a flood. The city has been of little help to me when I advised them of the drainage problem. Since I am aware of the potential rising water risk, do I have the responsibility to advise my tenants in the building? I am concerned about lawsuits should water get in. Obviously, if I mention this potential to the tenants I would risk a mass exodus of the tenants.*

**A:** The TMSA lease provides you with valuable liability protection. The lease, in the bottom left hand corner where the tenant initials, specifically states that the property owner is not liable for damages from water, and you are also not liable for damages due to negligence of the property owner or the property owner's agents. That means that the lease should be a good tool to help protect you in court, but it is not going to stop all lawsuits from being filed, and may not even stop a judge or jury determined to find you liable.

If you were actually aware of previous flooding, then in my opinion, you would definitely need to take steps to remedy the situation so that flooding was unlikely to occur in the future (you can never guarantee that flooding won't occur, but you can hire an engineer to evaluate the situation and take any steps that the engineer recommends). You have a little bit of

a different situation since you only are assuming that due to factors that look like they could contribute to a flood, that there might possibly be a likelihood of future flooding. This, in my opinion, is not a "slam dunk" case for a tenant, but to protect yourself as much as reasonably possible from liability, I would suggest that you obtain the services of a qualified engineer, have that engineer evaluate the drainage, and take the recommended action in accordance with the engineer's recommendations. However, when contemplating whether to hire an engineer, remember that if you do hire the engineer and the engineer gives you specific recommendations, and you do not follow those recommendations, in my legal opinion it would be worse than never contacting a engineer at all.

The standards for "negligence" that a plaintiff's attorney would have to prove in court would essentially be: "What would a reasonable landlord in this same situation do?" If that attorney could convince the jury that any landlord in your same situation would have hired an engineer and remedied the situation (if there is in fact a need of remedy), then you may face potential trouble in court if the worst happens.

**Q:** *We rented a unit to a person who, at the time of rental, listed that she was active duty military. We believe that she is stateside, and we know that she is in arrears and none of the information on her lease or lease application is currently valid. All of our letters (including certified letters) have been returned without a forwarding address. We have tried every avenue that we can think of to try to obtain a current mailing address or other contact information for this tenant. The only number we have been able to obtain was a new telephone number for one of the people listed in the TMSA lease paragraph 1 as a "person with same access rights" as the tenant. This person said the tenant had*

*moved to Austin, but declined to give a current mailing address or phone number for the tenant. We feel that the tenant has abandoned the unit. Can I consider the unit abandoned and clean it out, or can I get this "additional access rights" person to sign the Authorization and/or Release by Tenant form (the form on page 393 of the Goldbook©)? We don't want to dispose of a tenant's possessions, but the tenant has failed to honor the agreement and we've done everything we can to try to contact the tenant.*

**A:** The person with additional access rights should not sign the Authorization and/or Release form. A person with additional access rights signing the Authorization and/or Release form would not provide you with liability protection. The Authorization and/or Release form on page 393 of the Goldbook is for signature by a tenant. The tenant himself or herself needs to authorize you to take the action contemplated by the Authorization and/or Release form. Unless you have written instruction from a tenant that you can confirm the legal validity (such as a power of attorney), of giving someone else the authority to act on behalf of the tenant, the tenant herself needs to sign any Authorization and/or Release form.

If you cannot get in touch with the tenant, you have little choice but to start the foreclosure or eviction proceedings against the tenant. I would recommend that you try to do whatever you can to determine whether the tenant is still on active duty military, as that will make a difference in the foreclosure procedure that you may use. If the tenant is no longer on active duty military, then the tenant is no longer entitled to the protections of the Servicemembers Civil Relief Act, and you may foreclose as usual. If

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## Self-Storage Solutions

the tenant is still on active duty military, please see TMSA legal counsel's article (regarding foreclosure and eviction on active duty military personnel) on *Goldbook*© page 227.

Lastly, regarding "abandonment," in order to declare a unit abandoned, it must meet the definition of abandonment in paragraph 26 of the TMSA lease. In your situation, the tenant would have to satisfy the following criteria for abandonment: (1) the tenant has not paid rent or other sums due; (2) tenant's lock has been removed (including removed by you when exercising the statutory seizure); and (3) the tenant's space contains nothing of value to the ordinary person. If you open the space in the process of foreclosure and find that it does contain items of value to the ordinary person, you cannot consider the property abandoned. Please see paragraph 26 of the TMSA lease for a more comprehensive discussion on the criteria for considering a unit "abandoned."

**Q:** *I purchased an existing facility (through my limited partnership three years ago). At the time of purchase the seller of the facility was a TMSA member and had all the tenants on TMSA leases. I commenced business under a new name (never under the seller's name) and did not purchase the trade name of the seller. A tenant who had leased from the facility before I purchased the facility has declared bankruptcy. I just received a proof of claim in my name, but I wonder whether I am an unsecured creditor with a oral lease or do I have a remedy based upon a lease with the prior owner?*

**A:** First of all, TMSA legal counsel is not an expert in bankruptcy law, so you would be well-served to confirm this answer with a bankruptcy

attorney. However, in TMSA legal counsel's opinion, you are a secured creditor with the right to enforce the lease signed by your predecessor in ownership. Paragraph 31 of the lease (the last paragraph in paragraph 31 of the TMSA lease) makes it clear that the lease is "binding on the parties' successors." So, you are a successor in ownership of the facility and as successor you have "inherited" the rights and obligations of the original lessor/owner under the lease. In my opinion you have a secured claim, based on the written contract that your tenants signed with the former owner.

Paragraph 29 of the TMSA lease discusses the requirement for TMSA membership. The requirement of this paragraph is that the lessor or lessor's management company is, at the time of signing the lease, a member of the Texas Mini Storage Association. As long as your predecessor was a member at the time that the lease was signed with the tenant in question, you legally "inherit" the leases from him. Remember, though, that unless you or your new facility becomes a TMSA member, you may not use TMSA forms for tenants leasing from you after your date of purchase.

**Q:** *Are there any legal liabilities if we make a pesticide called "rat cakes" available to customers? It is not feasible for us to call in an exterminator every time we have a move-out.*

**A:** From a strict legal perspective, an owner or his employees can apply pesticides to the owner's self-storage facility, including inside the units, as long as the pesticides are not "restricted-use pesticides." Essentially, as long as you can buy it over the counter at the grocery store or the hardware store, you may legally apply the pesticides. That being said, TMSA legal counsel advises owners not to have a "do-it-yourself pest control" policy. The potential for liability is simply too great. The liability risks of incorrect application, or any other risk associated with pesticide

application (a small child eating a rat cake, for example) are just too great, and these liability risks are, in all likelihood, not covered under your insurance policy due to the "pollution exclusion" clause present in most standard liability insurance policies.

**Q:** *Are e-mails from the tenants acceptable as confirmation to authorize someone to enter a tenant's storage unit?*

**A:** E-mails are legally sufficient, but strongly discouraged. With e-mails, there is a much greater likelihood that the tenant is not the one sending the e-mail than there is with a phone call, fax, or letter that is signed by the tenant. Under paragraph 18 of the TMSA lease, the lessor has the right to enter if "lessor has express written or oral authority from tenant to enter." So, legally speaking, if the tenant calls you or writes you in any manner (including e-mail) allowing you to enter or authorizing someone else to enter, then you have the right to enter the unit or allow someone else access into the unit. However, anybody can set up an e-mail address, or someone's disgruntled ex-girlfriend with a password could easily send an e-mail from that person's address requesting that you let her in. In TMSA legal counsel's opinion, it's simply too hard to confirm the validity of e-mails to comfortably rely on them. It is much better to have something in writing that is signed by the tenant so that you can compare the signatures of the tenant and have a high level of confidence that it is in fact the tenant who is requesting that you let someone into the facility.

Questions for *Self-Storage Solutions* should be faxed to TMSA at (512) 374-9253 or e-mailed to bhoban@tmsaonline.org

# Self-Storage Sales Tax

As you no doubt know, at the present time there is no sales tax collected on the rental of most self-storage units. However, sales tax must be collected and paid on the following items:

## 1) Vehicles/Trailers

- Rent for vehicle parking/storage and rent for trailer parking/storage. Even if you know that a vehicle or trailer is only one item of many that are kept in a storage unit, you need to pay tax on the entire amount of rent if you collect your rent in a lump sum.

*NO tax is collected on boat storage or storage of a trailer with a boat on it, or for related non-parking charges such as returned checks, towing, late payment charges, overlock charges, certified mail fees, etc.*

## 2) Sales

Most storage facilities offer a number of storage-related products for sale on site as a convenience to their customers. As in any retail business, tax should be collected on these items. And don't forget, people buying the contents of units at auction pay taxes on the sale.\*

*\*Exceptions are sales involving (1) a situation where a buyer delivers you a resale certificate; (2) a situation where a buyer delivers you an exemption certificate; or (3) where a motor vehicle, trailer, boat, or outboard motor is sold. In situation number 3, these taxes are paid at the time the motor vehicle, trailer, boat, or outboard motor is registered with the state.*

Other items for which sales tax must be collected include:

- Any personal "property" sold/rented from your site. This is a technical way of saying:
  - Locks
  - Boxes
  - Plastic bags
  - Labels
  - Packing materials
  - Tape
  - Snack foods, etc.

## 3) Services

When service providers invoice you, those businesses should be charging you taxes. If they do not, it is in your best interest to remind them to, as you may

be held liable. If you want to ensure that you're off the hook, request that they stamp "sales tax included" on the invoice.

- Taxes must also be paid on all real estate services.
 

Examples:

  - Installation of new landscaping and landscaping maintenance
  - Cleaning services (maid and porter- type services) as well as heavy duty cleaning of building exteriors, parking lots, etc.
  - Pest control services when services are performed by a licensed pest control operator
  - Trash removal services performed by private firms or individuals
- Security services
  - Courtesy patrols (Note: off-duty policemen or other peace officers that you hire for security services are not subject to sales tax).
- Other services
  - Any debt collection service for which a separate charge is made. For example, if you hire a collection service and pay them a dollar figure for every collection they make for you, tax is due on the cost of that service.
- Repair and remodeling of your facility. Repair or remodeling work

is subject to sales tax. However, please note that "maintenance" work is not subject to sales tax. The difference in the definition of "repair" and "maintenance" is subtle and rather elusive. The comptroller staff has verbally explained the basic difference between the two definitions by stating that **"fixing something after it is broken is repair and thus taxable, but inspecting, checking, replacing or adjusting something on a regularly scheduled basis before it is broken is maintenance, and not taxable."** It is irrelevant whether you call the item maintenance or repair. If it falls under the comptroller's definition of "repair," it will be taxable.

According to TMSA Legal Counsel, if you have not been paying taxes thus far, it is still best to begin paying taxes on current operations. Getting a sales tax permit and starting to pay taxes does NOT make you any more vulnerable to an audit. In fact, companies without sales tax permits may be more likely to be audited.

This is a very broad overview of a facility owner's sales tax responsibilities. This article alone should not be relied upon to determine if or when sales tax is owed. Please refer to TMSA legal counsel's articles beginning on page 174 of the 2004-2005 *Goldbook*©.

Sales Tax?	Yes	No
Rental of Regular Storage Units		<input checked="" type="checkbox"/>
Rental of Vehicles/Trailer Parking	<input checked="" type="checkbox"/>	
Rental Space for Trailer with Boat		<input checked="" type="checkbox"/>
Other Charges*		<input checked="" type="checkbox"/>
Items Sold at Foreclosure	<input checked="" type="checkbox"/>	
Sale of Ancillaries	<input checked="" type="checkbox"/>	
<b>Services Rendered to a Facility</b>		
Real Property Services	<input checked="" type="checkbox"/>	
Maintenance Services		<input checked="" type="checkbox"/>
Management Company Services		<input checked="" type="checkbox"/>
Vehicle Towing		<input checked="" type="checkbox"/>

**\* Returned checks; late payment charges; overlock charges; lock-cutting charges; certified mail fees; foreclosure charges.**



# Self-Storage Legislation



*Continued ...*

cylinder locks, and they are very easy to change out, so many managers do this themselves. TMSA is supporting an amendment that would exempt our members from the requirement to use a locksmith for tasks such as this. TMSA is working with other similarly-situated trade associations to amend this bill so that it will not affect self-storage facilities.

## **Record Disposal**

Privacy issues are another hot topic in the Legislature this session, and HB 698 would require any self-storage owner (or other business owner) to shred any business record that he wanted to dispose of if that business record had even a person's name on it (name, SSN, address, basically any type of personal information). It is TMSA's position that publicly available information (such as someone's name, address, etc.) is not necessary to shred, and would be unduly burdensome and costly for our members. We are actively supporting amendments to this legislation that would place reasonable exemptions on the type of business records that must be shredded before being discarded.

## **Mandatory Sales Price Disclosure**

There are also several bills in the legislative session right now that deal with mandatory sales price disclosure. This is part of the overall "tax plan." The appraisal districts assert that having mandatory sales price disclosure (in other words, requiring any seller of real property to report the sales price of the property to the appraisal district or comptroller) would result in higher appraised values and thus greater property tax revenue. TMSA is opposed to mandatory sales price disclosure, especially in a

commercial setting. Aside from obvious privacy concerns, there are simply too many variables that go into the purchase price of a commercial building, such as the amount of financing, goodwill, percentage of vacancy, type of financing used, tax free exchange, etc. Comparing your property to other commercial sales for tax valuation purposes is like comparing apples to oranges in most circumstances.

TMSA is actively working against the concept of mandatory sales price disclosure, as are many other interested trade groups, but the fact that the Legislature needs to find money is likely to be an overwhelming force against this effort. The fall-back position that TMSA and other trade groups are advocating is that sales price disclosure, if it must be the law, should result in public information. Under the original bill's language, the sales price information was private information only available to appraisal districts and others in very limited circumstances. This would allow appraisal districts to "cherry-pick," choosing to compare your property only to other properties that have sold for an exceptionally high price. Having sales price disclosure be part of public records will give everybody a fair chance to distinguish his or her property from the comparables that the appraisal district uses to value the property for property tax purposes.

## **Auctioneer Licensing**

Licensing of auctioneers is another topic on the table in the legislative session. HB 2152 deals with licensing of auctioneers, and as filed it does not affect TMSA members' ability to have an owner or manager perform an auction without a license. However, TMSA is closely monitoring this bill to make sure that it is not amended to require anyone conducting an auction to have a license.

## **Taxes**

Lastly, as most everyone has probably read in the paper by now, the biggest topic of conversation in the Legislature are the tax bills- HB2 and HB3. The House passed their tax bill and now the tax bill is being debated by the Senate (the House and Senate must agree on a version of the tax bill before the bill could ever become law, and that has not happened yet and is not likely to happen until the end of the session).

Under the tax plan approved by the House, businesses have the alternative to pay either a payroll tax or a type of franchise tax. The increase in sales tax is to make up for a decrease in property taxes. The Senate plans to rely less heavily on sales tax and at least at the time of this writing, planned on proposing a state-wide property tax. It is far too early in the process to predict what will happen with the tax bill, but both chambers of the Legislature seem determined to pass a tax bill this session.

This is just a brief summary of all of the bills that TMSA is following that have the potential to affect the self-service storage industry. TMSA is actively following more than 260 bills, and more than 4,500 bills were filed this session. The session does not end until May 30, and there is a potential for both positive or adverse amendments to any bill until then.

Keep an eye on TMSA's website to view the legislative bills currently in session at [www.tmsaonline.org](http://www.tmsaonline.org) under "Resources."

## Foreclosure Tips

### Hot Checks

*I have received two hot checks. I followed the advice in the Goldbook© and went to the county attorney's office. They told me that they did not deal with rental situations. Could you clarify this for me?*

**TMSA Legal Counsel:** The county attorney's office, as with the district attorney's office, has discretion as to what they will and won't prosecute. It may be your county attorney's policy that they do not deal with rentals, even though they could if they chose. That shouldn't dissuade you, however, from sending a Notice to Issuer of Returned Check to the tenant.

### Tenant Wants to Bid at Auction

*Can a tenant or other person whose name is on the rental contract bid on their unit at a foreclosure sale? I have a tenant who is \$500 behind in rent and has figured out that she can probably buy the contents of her unit at the sale for less than \$500. Is there any way to keep the current tenant from doing this?*

**TMSA Legal Counsel:** You really cannot keep anyone from bidding at the sale, including the tenant. (An exception might be in the case where a buyer has been disruptive, has written you hot checks in the past, etc.) A tenant has the right to bid on the unit just as any other bidder would. One suggestion for keeping the tenant from getting such a potential bargain at the sale would be for you or your manager to bid the price up at the auction. As a practical matter, you could pay up to \$500 for the unit and not be out any additional money—as the purchase price would simply be credited to the amount the tenant owes you. If you end up being the winning bidder for a unit, don't forget that the unit's contents now belong to you personally (or your manager who submitted the winning bid), and next time you hold an auction, you could simply sell that unit's contents again. This time the sale would need no legal notices or anything like that since you are simply selling your own property.

Also, don't forget that even if a tenant buys his unit back for less than he owes in rent, you can report outstanding amounts due to reporting agencies and file a claim in small claims court against the tenant. For example, if a tenant is \$500 delinquent and ends up buying his contents at a foreclosure sale for \$100, you can, without obtaining any kind of court judgment, report to a credit reporting agency the tenant's \$400 delinquency. Additionally, you could file a small claims action against the tenant for \$400, plus court costs and attorneys fees. Small claims court is very informal. There are no rules of procedure to follow—you simply file a claim by filling out a form that you can get from the Justice of the Peace's office and ultimately go before the JP and explain your case.

### Tenant Relinquishes Unit to Another

*One of my tenants wrote me a signed letter relinquishing her unit and its contents to another person. This new person did not pay the rent, and now it is time to foreclose. What do I do?*

**TMSA Legal Counsel:** You may foreclose on this unit just as you would any other unit. Your lease is still with the tenant and the tenant is still required to make payments. Your foreclosure notices are required to be sent to the last known address you have for the tenant. As a courtesy, in this situation, I would suggest that you send a copy of all of these notices to the person to whom the tenant allegedly relinquished the contents of the unit. This is not legally required, but it might save you some headaches down the line if the person to whom the tenant relinquished the contents gets upset because he did not know that you were going to foreclose.

### How Long to Hold Contents of Unit After Auction?

*After an auction, can I hold the unit for seven days until the bidder's check clears?*

**TMSA Legal Counsel:** Yes, if you have incorporated this condition into your auction rules. It is recommended that before the sale begins, facility owners distribute a set of foreclosure sale rules that all purchasers must abide by. A set of sample rules, which may be added to or taken away from at a facility owner's discretion, can be found on page 12-13, and pages 28-29 of the TMSA Goldbook©. You have the right as the seller of the unit to impose reasonable terms on the sale. The statute's only requirement is that it be a "public" auction. For example, your rules could require that payment be made in cash or certified funds, or you can, as you wish, hold the unit until the bidder's check clears as a condition of your sale.

The only caveat to this practice is that you would probably be considered as having possession of the goods for that seven-day period, and if the goods get stolen, etc., you have potential headaches. One possible suggestion would be to require that payment be made via cashiers' check no later than the end of the next business day after the sale takes place (and hold the goods until that check is received).

### Facilities Require Proof Positive

The TMSA Board of Directors recently approved a straightforward, user-friendly sign for use by member facilities.

**A full-size version of this sign is found on page 8** or available as a free download from the members-only section of the TMSA website at [www.tmsaonline.org](http://www.tmsaonline.org).

TMSA recommends you display this sign (or something similar) to let potential customers know that your managers will require government-issued identification in order to rent a unit. At the same time, potential criminals or terrorists are put on notice that any false information you discover may trigger a call to law enforcement.

If needed, the text could be altered slightly to reflect your company policies. However, members should be careful not to promise to verify ID or other information unless the manager is consistently using government sources to verify that information for every tenant.

It has become common practice for managers to require presentation of a driver's license or other government-issued ID before renting to potential customers. With criminal and terrorist threats continuing to be an issue for self-storage facilities, most responsible site owners and operators consider it a necessary part of doing business and protecting their property. Now, as at many financial institutions, some self-storage sites have also begun requiring not just one, but two forms of positive identification.

The form can be printed on card stock and framed, or blown up to a larger size and reproduced by a printer or copy service.



# Valid ID Required

In order to help you make your leasing decision, the primary criteria for leasing at this facility is as follows:

Each applicant must provide a **government-issued photo ID**, and additional ID upon request, and must allow it to be photocopied.

All applicants must furnish a valid, verifiable current address and phone number.

Applicants providing false information will be reported to law enforcement authorities.



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