

# ROTHFELDER & FALICK, L.L.P.

ATTORNEYS AT LAW

RICHARD L. ROTHFELDER  
rrothfelder@swbell.net  
BOARD CERTIFIED - CIVIL TRIAL LAW

1201 LOUISIANA  
SUITE 550  
HOUSTON, TEXAS 77002

TELEPHONE: 713-220-2288  
FACSIMILE: 713-658-8211  
WWW.ROTHFELDERFALICK.COM

## **CONTRACTUAL PROVISIONS MINIMIZING LIABILITY FOR THE SELF-STORAGE COMPANY**

**PRESENTED TO TEXAS SELF-STORAGE ASSOCIATES  
AT THE WOODLANDS CONFERENCE CENTER ON NOVEMBER 18, 2009**

### **I. INTRODUCTION**

Mistakes happen, whether during the course of our private lives, or in our business practices. The self-storage industry is no different.

Liability often arises for the self-storage operator when he mistakenly affords access to a leased storage unit to an unauthorized individual, who removes property without the permission of the official tenant. This paper addresses some of the procedures that can be implemented by the self-storage operator to protect against these types of mistakes, as well as the contractual provisions that can be incorporated into the self-storage rental agreement to minimize the liability potentially arising from such mistakes.

### **II. PROCEDURES TO AVOID LIABILITY**

A few common sense procedures and contractual provisions should be utilized in a written self-storage rental agreement should be utilized, which first of all should clearly delineates the rights and obligations of the tenant.

Second, rental agreement should contain the main and alternative contact information for the tenant, such as home and cellular telephone numbers, office and home addresses, social security and driver's license numbers should be obtained if possible. As such, the tenant will be available in the event of emergency, or the request of an unauthorized individual to access the storage unit.

Third, the rental agreement should state that only the named tenant will be afforded access to the storage unit. The agreement can go on to provide that the tenant can specify in writing, either upon execution of the original rental agreement or subsequent thereto, additional specifically identified individuals who will be afforded access to the unit. The rental agreement should also secure the tenant's acknowledgement that only he and those individuals who he identifies in writing will be given access to the storage unit, except by court order or other appropriate emergency reasons.

Fourth, once these safeguards for both the tenant and the self-storage operator are agreed to in the rental agreement, they should be meticulously followed. Training should be provided for the self-storage operator to familiarize him with these contractual stipulations, including who is specifically identified as being authorized to access the tenant's storage unit. Undoubtedly, the operator will hear a variety of excuses from unauthorized individuals to access the storage unit, some of which will be fraudulent and others legitimate or even sympathetic. However, the operator should understand that he is under orders to follow the contract, and that he is not authorized to make any exceptions.

### **III. EXCULPATORY CONTRACTUAL PROVISIONS**

Once again, despite the best of intentions and procedural safeguards, mistakes still happen. Even though the operator has been trained and the contract specifies the persons entitled access, paperwork might get mishandled, or new personnel might be duped by criminals. In any event, exculpatory provisions in the rental agreement designed to eliminate or minimize the liability of the self-storage operator should also be employed.

The rental agreement should contain a provision that the unit is not suitable for the storage of heirlooms or irreplaceable property, and that the value of any stored item shall not exceed its salvage value. The following is an example of such an express disclaimer:

Tenant acknowledges and agrees that the Space and the Premises are not suitable for the storage of heirlooms or precious, invaluable, or irreplaceable property such as books, records, writings, works of art, objects for which no immediate resale market exists and objects which are claimed to have special or emotional value to Tenant. Tenant agrees that the value of any items stored shall not exceed, for any purpose, the salvage value of the raw materials of which the items is constituted.

A similar provision would be to actually cap the value of the property stored in the unit at a maximum amount, at least for the purpose of determining the maximum agreed exposure of the landlord. Such a provision is provided in the following example:

MAXIMUM DAMAGES, NOTWITHSTANDING ANY OF THE PROVISIONS OF THIS AGREEMENT, LANDLORD'S MAXIMUM RESPONSIBILITY TO TENANT FOR ANY REASON IS \$100.00. This maximum liability may be changed only by an agreement, in writing, signed by all the parties, setting the larger limit of liability, and providing for proportionately greater rental rates as consideration for the increased limit of liability.

Almost all contracts, whether a self-storage rental agreement or others, contain some sort of indemnity or hold harmless agreement. The following is the type of clause that could be inserted into a self-storage rental agreement:



INDEMNITY. LANDLORD SHALL NOT BE LIABLE OR RESPONSIBLE FOR, AND WILL BE SAVED AND HELD HARMLESS BY TENANT FROM AND AGAINST ANY AND ALL SUITS, LOSSES, DAMAGES, CLAIMS OR LIABILITY OF ANY CHARACTER, TYPE OR DESCRIPTION, INCLUDING ALL EXPENSES OF LITIGATION, COURT COSTS AND ATTORNEY'S FEES FOR INJURY OR DEATH TO ANY PERSON OR DAMAGE OR LOSS TO ANY PROPERTY ARISING OUT OF OR OCCASIONED, DIRECTLY OR INDIRECTLY, BY TENANT OR ANOTHER PERSON OR ENTITY (WHETHER THAT NEGLIGENCE IS THE SOLE OR CONTRIBUTORY CAUSE OF THE RESULTANT INJURY, DEATH OR DAMAGE).

A similar contractual clause is assumption of risk, under which the tenant contractually promises that he is storing his property at his sole risk, and will not look to the landlord for any of his damages, such as the following:

All property stored is at Tenant's sole risk. Landlord is not responsible for loss of or damage to property caused by theft, burglary, criminal conduct, fire, wind, water, rain, storms, tornadoes, explosions, riot, rodents, civil disturbances, insects, sonic boom, vehicle or any other cause whatsoever, nor shall Landlord be liable for personal injuries or death on the premises.

A final exculpatory contractual provision covers the rights or obligations of the tenant to self insure his property. Such an agreement can be part of the self-storage rental agreement, or a separate writing signed by the tenant. The following are the types of provisions that can be included in the tenant's right or obligation to secure insurance:

LANDLORD IS NOT RESPONSIBLE FOR ANY LOSS OR DAMAGE TO TENANT'S PROPERTY STORED WITHIN THE SPACE OR LOCATED ON THE PREMISES, REGARDLESS OF WHETHER SUCH LOSS OR DAMAGE IS CAUSED BY THE NEGLIGENCE OR ACTS OF THIRD PARTIES OR TENANT OR BY ACTS OF GOD. NO BAILMENT IS CREATED UNDER THIS AGREEMENT. LANDLORD IS NOT A WAREHOUSEMAN ENGAGED IN THE BUSINESS OR STORING GOODS FOR HIRE. ALL PROPERTY STORED WILL BE AT TENANT'S SOLE RISK. TENANT AGREES THAT LANDLORD DOES NOT TAKE CUSTODY, CONTROL, POSSESSION OR DOMINION OVER THE CONTENTS OF THE SPACE AND THAT LANDLORD IS NOT PROVIDING SECURITY OR PROTECTION TO THE PREMISES, SPACE OR CONTENTS THEREOF.

Tenant, at Tenant's sole expense, shall maintain on all personal property, in or about the Premises, to the extent of at least 100% of the actual cash value of such personal property, a policy or policies of insurance covering damage by fire, extended coverage perils, vandalism and burglary. Tenant may obtain insurance from the insurance company of Tenant's choice. If Tenant does not maintain insurance for the full value of their personal property stored in the Space, Tenant

shall be deemed to have “self-insured” the property and shall bear all risk of loss or damage. Tenant indicates its decision by initialing below.

- A. Tenant will obtain insurance coverage from \_\_\_\_\_ Initial  
a company of Tenant’s choice.
- B. Tenant elects to obtain insurance under \_\_\_\_\_ Initial  
“payment with rent” plan.
- C. Tenant elects to “self insure” (personally \_\_\_\_\_ Initial  
Assume all risk of loss or damage).

#### **IV. POTENTIAL LEGAL CHALLENGES TO EXCULPATORY CONTRACTUAL PROVISIONS**

Even if the foregoing exculpatory contractual provisions are included in the self-storage rental agreement, the tenant may challenge the enforceability of the provisions under various legal doctrines, such as unconscienability, duress, or adhesion. Under these legal theories, the tenant would essentially argue that he should be excused from the contractual promises he made limiting or eliminating the liability of the landlord, because of his unfair or weak bargaining position [insert discussion about legal theories].

#### **V. CONCLUSION**

The self-storage industry is subject to the same types of mistakes committed in other businesses and our private lives. In order to minimize or avoid the liability arising from such mistakes, procedures should be documented and implemented to avoid the mistakes in the first place. Exculpatory contractual language, properly drafted to avoid legal challenges, should be included in the self-service storage rental agreement to minimize the damage from mistakes that may still occur.