

BY STEVEN E. LEDER

**Y**ou are awakened by the ring of the telephone at three a.m. The police are calling to report a burglary of 44 storage spaces. You hang up after obtaining a few details. A frightening thought occurs: Are you liable or does each occupant bear his own loss?

The self-storage operator who did not exercise reasonable care for the protection of the occupants' property will be writing checks to cover the losses in the morning. The properly prepared operator can go back to sleep.

Operators are not insurers of the occupant's goods. Simply because the occupant's goods were stolen does not make the operator liable. However, an operator does owe the occupants certain duties, both in contract and in tort. The contractual duty flows from the storage agreement, advertisements, signs or oral representations to potential customers by the operator's employees. For example, suppose one of the 44 occupants who was burglarized selected his self-storage facility because he was told by a storage consultant employed by the operator, or read in an advertisement, that it provided 24-hour watch service. On the night of the burglary there was no watchman on duty. The operator's performance is measured by matching the promise in the contract with the precautions actually taken. If no watchman was on duty, then the operator breached his contract. It may not matter whether the watchman was sick, injured, or kidnapped. If the operator fails to live up to the contract and it results in a loss, the operator bears the loss.

In recent years, the courts have imposed a duty on commercial property owners to exercise reasonable care for the protection of the persons and property of those with whom they do business. This duty applies to self-storage operators. But what is "reasonable care?" There is no bright line test. The courts consider three factors in the setting of the standard of care. First, how do other self-storage facilities in the area operate?

*Steven E. Leder is a partner in the Baltimore, Md. law firm of Niles, Barton & Wilmer and specializes in commercial litigation.*



How others operate is strong evidence of what is reasonable. The courts also consider the foreseeability of criminal acts on or about the premises. A reasonable person takes additional precautions when criminal activity is foreseeable. Certainly, Yogi Berra was right when he said "some things are very difficult to predict. Like the future." The burglary of an occupant's space by a particular burglar is not predictable.

***Goods are stolen from a self-storage unit. Who gets hit with the liability?***

CONTINUED

## LEGAL ADVISOR

Some possibility of criminal activity always exists in our barbarous times. Between these two extremes is a range of foreseeability. Prior criminal acts on or about the premises or in the neighborhood heightens the operator's duty. The closer in time in which the criminal activity occurred, the stronger the evidence. In addition, the operator should take note of seasonal crime. For example, crime may increase and specifically in resorts, during the off season, or during the holidays. You should be aware of such patterns and act accordingly.

Prior thefts do not necessarily make the operator liable for any subsequent thefts. Rather, the duty is to take reasonable precautions to prevent future occurrences. Crime, like the poor, we will have with us always. The operator's duty is not to prevent crime but only to take such reasonable precautions as will deter crime.

In other industries, the courts consider the value of the goods being stored. In the self-storage industry the operator does not have notice of either what is being stored or its value. Nonetheless, many operators have found it useful to write into the contract a provision that the occupant will not store goods over a certain dollar amount; e.g. \$10,000. Obviously, more security is reasonable for the Hope Diamond than for a .25 karat engagement ring. A limitation of value in the contract buttresses the operator's position that he used reasonable precautions to safeguard the occupant's goods, given their understood value.

Finally, the court is free to reject the custom and practice of the industry if it feels the precautions are insufficient for the whole industry.

### Security Precautions

Protective measures considered by the courts include lighting, fencing, gate access systems, surveillance equipment, motion detectors, perimeter beams and watch services. Proper lighting deters criminals who fear discovery. Lighting permits police or security

personnel to detect trouble at an early stage. General illumination, as opposed to direct lighting, results in dark spots and may be found inadequate. Poor lighting is not a reasonable precaution, but even the best lighting alone, is not sufficient.

Fencing varies in extent, type and height. A self-storage area should be completely fenced. A five or six-foot chain-link fence may be deemed inadequate because it can be easily overcome. On the other hand, an eight-foot-high fence topped with barbed wire is likely to satisfy the courts. The fence needs a gate and the gate may be locked and alarmed. Many self-storage facilities have electronic gate access systems. Are the individual doors alarmed?

The occupants provide their own locks, but the type of lock sold by the operator impacts security. Locks with decreased vulnerability to bolt cutters can significantly reduce break-ins. Some facilities have security cameras, motion detectors or perimeter beams. The presence of such security equipment may deter thieves as well as serve as a marketing tool. However, if the self-storage operator promises 24-hour-a-day monitoring, it is important to follow through.

Of course, while each additional security precaution provides additional evidence in court, the operator must live with the bottom line. Does the additional cost yield a commensurate benefit. Further, does the new measure actually work at the particular facility? Some operators, for example, report too many false alarms from motion detectors. Watch services may only be cost effective at a new facility. Remember, the standard is not the prevention of crime, but only "reasonable care."

Finally, watchmen provide a three-fold benefit: Their presence deters crime, they can detect crime, and they can report it. They provide a high level of protection. Their effectiveness can be enhanced through the use of surveillance equipment or burglar alarms. Watch services may stop the

burglary before the burglar decides to stop on his own. Once again, the question is cost effectiveness.

The courts evaluate all these factors in deciding whether or not a self-storage operator met his duty of "reasonable care." The presence, or absence, of any single factor will not tip the balance. All of the precautions must be taken together and each case is judged on its individual facts.

### Illustrations

Susan Cavet leased a unit from a self-storage facility. She purchased a lock and placed her goods in the rented unit. During a periodic check, she noted some pieces of furniture were missing, but there was no sign of forcible entry. A police report was filed. Cavet purchased a new lock and placed it on the unit. Once again, more of her furniture was stolen. Again a police report was filed. This time she replaced the padlock with a rotary style combination lock and there were no further thefts. Cavet testified at trial that she placed her goods at this facility because it advertised that it had an alarm and manager on site. She argued, but was unable to prove, that the alarm system was not working and that the manager was not on duty at the time of the thefts. The court held that although the contract stated the existence of security measures, it did not guarantee the safety of the goods in the facility. The operator was not the insurer of the goods.

In another case, Deborah Jones signed a storage rental agreement with Econo Self Storage, after its manager assured her that 24-hour security was provided. She later learned that the lock on her storage unit had been cut and all of her possessions stolen. The date and time of the theft were unknown. The court found that there was no delivery or exercise of control of Deborah Jones by Econo Self Storage. The court emphasized that there was access to the units between 6 a.m. and 9 p.m. daily. No inventory was made of the goods by

## LEGAL ADVISOR

the facility owner and the goods were never placed in the hands of the operator and the operator had no idea what was stored. The operator testified succinctly, that these were "just units that you control. You put your own lock on and come and go as you please when the gates are open." These cases illustrate that a properly run self-storage facility need not be liable for the losses of its occupants.

### Exculpatory Clauses

An exculpatory provision is a contractual clause in which a party exempts itself from liability for its own negligence. Exculpatory clauses are frowned on by the courts but they are valid, absent any statutory prohibition.

An exculpatory clause is an operator's best friend in that it protects him from liability. It will help you win or short-circuit many claims and law suits.

### Summary

Conducting a brief assessment of your business relative to these issues may insure that, should a burglary be reported one night, you can return to restful slumber. Here is a quick checklist to help you evaluate:

### Security

- Audit precautions taken by nearby self-storage operations.
- Monitor crime in area.
- Evaluate cost to provide adequate or better security (e.g. lighting, fencing, watchman, security system).

### Contracts

- Review contracts, advertising and signage to ensure they accurately reflect security practices.
- Re-evaluate contracts including exculpatory clauses to limit liability in case of negligence.
- Consider implementing provision to limit storage of goods valued above set limits. ■■

*Mini-Storage*  
**Messenger**

Reprinted through the Courtesy of the Editors of  
MINI-STORAGE MESSENGER 800-352-4636  
© 1993 MINICO, INC. All rights reserved.