

BUT IS IT INSURANCE? INDEMNITY CLAUSES IN SELF-STORAGE RENTAL AGREEMENTS

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Mark G.R. Warren, Esq.
(573) 634-2522

Across the United States, self-storage rental units have become a common sight. Generally, these units consist of free standing buildings that allow each individual access to the unit they rent; some self-storage units however, are found enclosed within a building so that the climate within the individual storage units can be controlled. Many states have some sort of statute with respect to self-service storage facilities.¹ These statutes usually define the duties of the occupant and operator. Most describe and define the duties and liability of the operator and the duties of the occupant with respect to their personal property and to the operator. Additionally, most statutory schemes describe the operator's right to a lien on the occupant's property should the occupant fail to pay their rent. These statutes also tend to describe whether the owner or occupant is responsible for the care and control of the property stored in the self storage facility. In Missouri, this statutory section is found at Mo. Rev. Stat. §415.425, which states that "except as provided in subsection 3 of Section 415.420, unless the rental agreement specifically provides otherwise and until a lien sale under Sections 415.400 to 415.430, the exclusive care, custody and control of all personal property stored in the leased self-service storage space remains vested in the occupant."

Thus, under the Missouri statutes, unless the self storage facility operator has taken control of personal property found in a rental unit, the operator is not responsible for the care, custody or control of the personal property stored in the unit. In essence, the operator is statutorily absolved of responsibility or liability for an occupant's property. The State of Missouri also requires that the lessee "be informed in writing that the lessor either does or does not have liability insurance."²

Notwithstanding statutory protections, most self-storage facility operators in the State of Missouri go to great lengths to make it clear to occupants of the facility, both in rental agreements and by signage, that all personal property owned by the occupant is stored at the occupant's risk, and the operator's agents and employees are not liable for any loss to any property in the storage space for any reason. Likewise, if the operator chooses not to carry liability insurance, this fact and also a release of the operator of all liability for bodily injuries is also found in the rental agreement. This release language is generally printed in bold face type to reduce the possibility that the occupant can claim ignorance of it or to comply with state case law that disclaimers of liability be set in type of a certain size.³

Some self-storage facility operators further require, in the rental agreement, that the occupant acquire and maintain insurance at the occupant's expense for coverage against fire, burglary, vandalism, and malicious mischief for the actual value of the stored property. Failure of the occupant to carry and maintain insurance on the occupant's stored property is a breach of the lease agreement.

Despite the fact that almost all self-storage rental agreements contain exculpatory clauses which release the operator of any liability for property damage and bodily injury, lawsuits on these issues still occur. While the fact that the exculpatory clauses appear in the rental agreements should result in a decision for the operator in each case, such does not always occur. Further, even if the operator wins a case of this nature, such decision may result in adverse publicity against the operator which in turn may engender ill will towards the operator and its business.

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In light of these facts, some operators have elected to make available to the occupants personal property insurance coverage if the occupants do not have other coverage. Of course, providing insurance coverage to the occupants means that the owner or the owner's representative must be properly licensed and comply with all requirements for the sale of insurance. Some states have a limited license with respect to self-storage facility operators who sell insurance of this type. These programs typically require the occupant to pay the premium for the insurance coverage along with the monthly rental payment.

More recently, however, self-storage facility owners have begun to offer programs in which in exchange for a larger monthly rental payment from the occupant, the owner will accept responsibility for certain losses to the occupant's belongings in various specific circumstances; for example, if the facility roof leaks, any damage to the occupant's property will be reimbursed up to a set amount. The occupant is given the opportunity to have a lower rental rate, per the rental agreement, with the standard exculpatory clause favoring the operator, or the owner can pay a higher monthly rent for a plan which eliminates the exculpatory clause normally found in the rental agreements and provides protection for damage to the occupant's property. The question then arises as to whether or not these programs constitute insurance because they transfer risk from the occupant to the owner in exchange for additional rent (which could be construed as premium) paid by the occupant to the owner.

In Missouri, at least, these plans have not been found to constitute the business of insurance for a number of reasons. Because Missouri does not have a statutory definition of insurance, it is instructive to review how insurance has been defined by the United States Supreme Court. In *Group Life and Health Insurance Company vs. Royal Drug Company*, 440 US 205, 99 S.C. 1067 (1979), the United States Supreme Court identified three criteria to use in determining whether a particular practice constitutes the business of insurance. In determining whether a practice is part of the business of insurance, the Court directed that it be determined first, "whether the practice has the effect of transferring or spreading the policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry."⁴ The Court in *Royal Drug* further noted that while none of "these criteria is necessarily determinative in itself," the arrangement between the parties must be examined.⁵

As noted above, in the State of Missouri there is no statutory definition of what constitutes the transaction of insurance. Rather, regulators examine each transaction on its facts to determine if it is indeed an insurance transaction. Likewise, there is no case law in Missouri which finds an indemnity clause constitutes an insurance transaction when the indemnity clause forms a part of a self-storage facility lease agreement.

There are cases, however, which could be considered in the State of Missouri to be instructive to those who wish to know what facts would most likely lead to a conclusion that a transaction constitutes a contract of insurance. In *Bekins Moving and Storage Company of Texas v. Williams*, the Plaintiff sued Bekins for damage to her property allegedly caused by Bekins during a move.⁶ The Plaintiff sought to recover against Bekins based on violations of the Texas Insurance Code and also for negligence.⁷ Bekins asserted, among other things, that the "Transit Insurance" provided to the Plaintiff was not insurance within the meaning of the state insurance code and was merely incidental to its "ordinary business activity," and relied on a portion of the Texas Insurance Code for its argument, Texas Insurance Code Art. 1.14-1 Section 2(a)(2) which indicates that the making of a contract of guaranty or suretyship that is simply incidental to other legitimate business does not constitute the business of insurance.⁸

The Court, however, found otherwise. The Court noted that the "Transit Insurance" provision in Bekins' contract was not a guaranty or a suretyship.⁹ The Court found that the Transit Insurance provisions specifically provided for "insurance protection in the sum of Seventy Five Thousand Dollars," and for an "insurance protection charge of \$480.00."¹⁰ The Court further found that the provisions provided for exclusions of liability in certain instances and provided that "if the amount of the insurance does not cover the

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actual value of the property, the customer shall be regarded as his own 'insurer' to the extent of the difference."¹¹ The Court found that it would construe the provision as insurance as it is designated and not a guaranty or suretyship. Also, the Court found that the Bekins contract "called the coverage insurance," Bekins' representative "called it insurance," it was "paid for as being insurance," the "documents specified the amount of coverage, the parties both believed that Bekins was providing insurance, and the coverage was designed to pay Williams for damage to her property above the stated sixty cents per pound."¹² Therefore, the Court found the coverage was insurance and fell within the insurance code.¹³ While self-storage agreements differ from moving contracts, the methods used in the Bekins case to determine if a transaction is insurance can be applied to self-storage agreements to determine whether provisions in which the owner indemnifies the occupant constitute insurance.

In many business relationships, including a landlord-tenant relationship, it is not unusual for the parties to negotiate a transfer of liability within the context of the business or landlord-tenant relationship, especially in a commercial lease situation. The amount of liability or risk being transferred generally then affects the final rental price negotiated by the parties. The courts in Missouri and other jurisdictions have held that indemnity clauses between parties in standard contracts are permissible. These standard indemnity clauses traditionally have not been considered contracts of insurance.

With respect to a self-service storage facility, the subject of limited responsibility for damage to stored property obtained with an indemnity clause in a rental agreement might appear to be an insurance transaction when the transaction is in fact incidental to the agreement between the owner and operator of a self-service storage facility. Along these lines, the Missouri Court of Appeals has recognized the validity of the inclusion of an indemnity clause in a contract as a "contractual provision in which one party agrees to answer for any specified or unspecified liability or harm that the other party might incur."¹⁴ The Court has also examined exculpatory clauses and found that they are a "contractual provision" which excuse a party from liability which results from negligence or wrongful actions. ¹⁵

The Missouri Supreme Court has also found that indemnity clauses merely shift liability from one party to another and also found that indemnity clauses are acceptable when part of a larger standard agreement.¹⁶

Thus, a landlord in a self-storage facility in assuming and retaining liability in a lease agreement in return for increased rental rate does not appear to be engaging in an insurance transaction in the state of Missouri. An increase in the amount of rent paid for protection to the occupant's property appears to be merely additional consideration in exchange for taking on additional liability in the context of the rental agreement.

However, care should be taken in drafting such clauses so they do not risk being construed as insurance; for example, calling such clauses insurance should obviously never be done and the additional rent received by the operators should not be referred to as a premium payment. Also, within the body of the contract, amounts paid as indemnity for loss also should not be called "coverage," and there should be nothing described as or which acts as a deductible. In short, a clause of this nature should resemble a clause in a business contract in which one party, (i.e., a self-storage facility operator), for additional consideration, undertakes a risk for negligence which is within its ability as an entity to control. A clause of this type in a self-storage facility agreement will probably not, therefore, at least in Missouri, appear to be an insurance transaction. While each of these situations are fact specific, the situation as described above would not appear to constitute the transaction of the business of insurance in the state of Missouri.

Endnotes

1. See Mo. Rev. Stat. §415, et seq.

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2. Mo. Rev. Stat. §415.410.
3. *See Alack vs. Vic Tanny International of Missouri, Inc.* 923 S.W. 2d 330 (Mo. 1996)
4. *Group Life and Health Insurance Company vs. Royal Drug Company*, 440 U.S. 205,99 S.Ct. 1067 (1979).
5. *Id.*
6. *Bekins Moving and Storage Company of Texas vs. Williams*, 947 S.W. 2d 568 (Tx App. 1997).
7. *Id.*, at 572.
8. *Id.*, at 580.
9. *Id.*, at 580, 581.
10. *Id.*, at 581.
11. *Id.*, at 581.
12. *Id.*, at 581.
13. *Id.*, at 581.
14. *Caballero vs. Stafford*, 202 S.W. 3d 683 (Mo. Ct. App. 2006)
15. *Id.*
16. *Alack vs. Vic Tanny International*, 923 S.W. 2d 330, 338 (Mo. 1996).