



Arizona Sale & Foreclosure Manual

by

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Portions of this material deal with law-related subjects at a general level and are not intended for you to rely upon as legal advice. You should consult a lawyer before making a final decision in any situation involving legal issues.

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A WORD ABOUT STORAGE AUCTIONS

Discussions of self-storage auctions inevitably come around to money. Storage operators frequently obsess over how much money they can collect from an auction. Such concern is misplaced. It is important to recognize that:

Self-storage auctions are not about money!

They are about getting your spaces back

so you can re-rent them.

If the money from auctions is that important

to your bottom line,

you have a failure of management.

Your receivables are too high!

– Marmor's Rules

LEASES AND LEASE DEFAULTS

Leases Are Contracts

A lease is a contract, i.e., an agreement between two parties, just like any other contract, like getting paving repairs done or renting a car. Each party to the contract has rights and responsibilities. In the case of storage leases:

	<u>RIGHTS</u>	<u>RESPONSIBILITIES</u>
<u>TENANT</u>	Use of certain space for storage	Pay rent periodically Abide by usage rules and restrictions
<u>OPERATOR</u>	Receipt of periodic rent payments	Make suitable space for storage available under specified rules and restrictions

Events of Default

When either party to a contract fails to live up to its responsibilities under the contract, an event of default is said to have occurred.

Right to Cure

As a general rule, when an event of default occurs, the party who has failed in their responsibilities is entitled to notice of the default (it might have been unintentional), and an opportunity to cure, i.e., repair the default. In effect, late notices sent to a tenant who has not timely paid rent are notices of default giving the tenant an opportunity to fix the failure.

Remedies for Default

When a lease contract is defaulted, the law gives the injured party a choice of remedies.

What You Can't Do

You may not help yourself to any of tenant's stored contents.

What You Can Do

You can:

- Terminate the lease;
- Go to court and sue the tenant for money damages;
- Go to court and seek a forcible detainer (aka an “eviction”);
- Give the claim to a collection agency.

What’s more, the operator can elect to pursue more than one form of remedy. In other words, if use of one remedy doesn’t fully satisfy the loss, an operator can turn to another remedy in an effort to recover the shortfall.

Self-Storage’s Special Remedy: Auction

If the default is monetary in nature¹, i.e., failure to pay rent, the law grants self-storage operators a special remedy: a storage lien, with the right to foreclose the lien and sell the stored contents, i.e., auction them.

The advantages of this special lien remedy are many. It is:

- The fastest remedy by far.
- Self-help; there’s no need to hire an attorney.
- Low cost.

Dotting the “I”s: The Doctrine of Strict Compliance

The ability to sell a nonpaying tenant's possessions gives a self-storage company the ultimate leverage. Few businesses have the ability to actually sell a customer's property to collect a debt. Since we have such extraordinary leverage, the law and the court system are not very forgiving when we make a mistake. In other words, legal theory dictates that the law must be followed *exactly*. The law is clear and definite, outlining precisely what must be done to foreclose on a tenant's property.

While some self-storage lawsuits result from total disregard of the statutes, most result from a relatively minor deviation from the statutory requirements. In order to defend yourself in court, you must always follow the legal procedures exactly. With human nature being what it is, mistakes will invariably be made by the best of managers. The best strategy is to always take the most conservative approach to a problem, especially if you have made an error.

Auctions represent the single greatest exposure to liability in the storage business. This Arizona Sale & Foreclosure Manual goes into detail about all of the necessary steps so you can minimize the risk of future lawsuits.

¹ If the default is non-monetary, for example storing forbidden contents, living in the leased space, or breaking any other usage restriction, this special remedy is not available.

LIENS

Arizona law² grants self-storage operators a lien on the contents stored in a tenant's space in the event of a monetary default under the lease.

What is a Lien?

A lien is a claim in someone else's property. Usually liens are given to secure a debt; e.g., a mortgage is a lien granted to a bank to secure a home loan. Similarly, the Arizona self-storage lien arises to secure payments due from a tenant.

The operator of a self-service storage facility has a possessory lien from the date the rent is unpaid and due on all personal property stored within the leased space **for rent, late fees, and labor or other charges, as well as for expenses reasonably incurred in its sale.**

[A.R.S. §33-1703(A)]

All liens are conditional. That is, nothing can be done with the rights granted by a lien unless some condition is met. For example, in the case of a mortgage lien, the condition is missed payments. When that condition is met, the bank can act on its lien rights.

How Liens Come into Being

Liens arise one of two ways:

- Voluntarily granted by the property's owner. For example, to finance purchasing a boat, the buyer must sign a paper granting the finance company a lien against the boat in case loan payments are defaulted.
- By operation of law. A statute grants a lien automatically in certain situations. Our self-storage lien is granted by operation of law (see the box above).

When the Self-Storage Lien Arises

A storage lien attaches, i.e., comes into being, only when a tenant's account becomes delinquent.

The operator of a self-service storage facility has a possessory lien **from the date the rent is unpaid and due** on all personal property stored within the leased space for rent, late fees, and labor or other charges, as well as for expenses reasonably incurred in its sale.

[A.R.S. §33-1703(A)]

If the rent is due on the 1st of the month and isn't paid, on the 2nd of the month the storage lien attaches. If the tenant cures the default, that lien falls away. A new lien would attach the next time the rent is defaulted.

² See Arizona Self-Storage Statutes, at the end of this manual.

Four Lease Notices

The Arizona Self-Storage Statutes specify that four provisions must be included in your lease in order for a lien to exist:

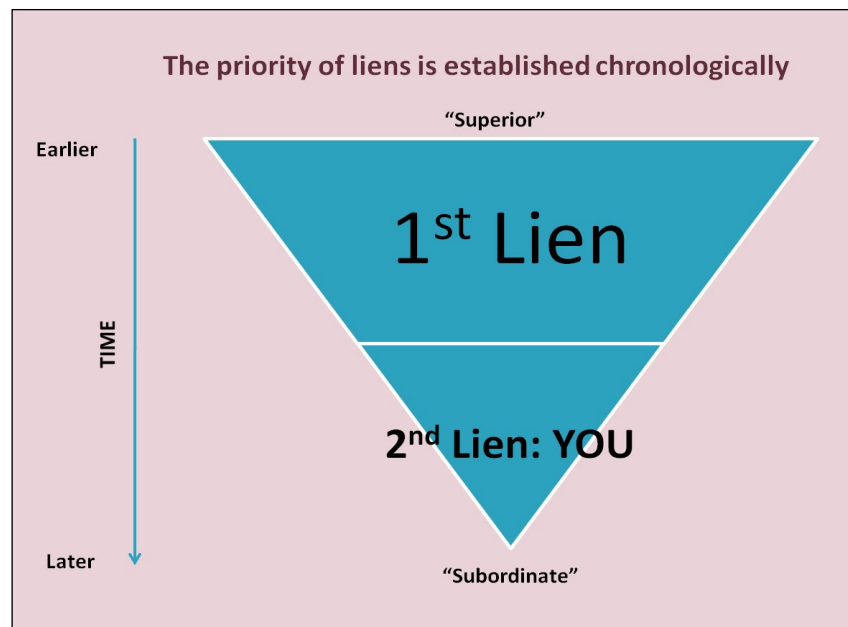
1. A lien accrues as of the date the rent is unpaid;
2. Tenant's property may be sold to satisfy the lien if the rent is unpaid and the tenant is in default;
3. Any insurance protecting the contents of the tenant's unit against fire, theft, or damage must be provided by the tenant; and
4. A late fee will be charged if the rent is late (and when it will be charged).

If these four provisions are not in your lease, you do not have a lien, so you can't foreclose.³ Of course, the AZSA lease contains all the provisions necessary for you to have a lien. Therefore, if you use the AZSA lease and there is a monetary default, you can foreclose on your lien.

Multiple Liens

The reason we care when our storage lien attaches is that there can be multiple liens against the same property. For example, most of us have heard of second mortgages and even third mortgages. Those are multiple liens against the same house. Likewise, while we might have a storage lien against stored property, there may be other liens against that same property. We need to understand the interplay between those competing liens.

Multiple liens have a hierarchy. With some exceptions⁴, that hierarchy is determined chronologically based upon the time each lien is created. Earlier liens are said to be *superior*; liens arising later are said to be *inferior* or *subordinate*.



³ If your lease does not contain the required language, you will have to bring your tenants into a new lease that does contain these four provisions in order to have a lien and be able to foreclose on it. See the Legal & Legislative Resources in the Members Area of the AZSA website for guidance.

⁴ Government liens, for example, are automatically superior to any other liens, regardless of their timing.

Thus, in the picture on the previous page, the 1st lien is superior to both the 2nd and 3rd liens, and they, in turn, are subordinate to the 1st lien. Similarly, the 2nd lien is subordinate to the 1st and superior to the 3rd.

To understand what this means in practical terms, imagine that the blue triangle on the previous page is someone's home, and that they have a first mortgage ("1st Lien"), a second mortgage ("2nd Lien"), and a home improvement loan ("3rd Lien").

Now suppose the homeowner stops making the payments on all of the loans. Let's look at what happens when one of the lenders decides to foreclose its lien and sell the house in order to get itself paid.

1st Lienholder forecloses. The foreclosure by a superior lienholder *wipes out any inferior liens!* In other words, the buyer at the lien sale would get a house free and clear of any liens on it.

3rd Lienholder forecloses. At the other extreme, imagine instead that the lienholder in 3rd place, the most inferior, forecloses its lien. Sale by a subordinate lienholder has no effect on liens that are superior to it. Thus, the 1st and 2nd mortgages remain unaffected by the 3rd lienholder's sale. The buyer at the lien sale would take title to the house subject to both the 1st and 2nd mortgages and would have to keep up the payments on them in order to keep the house.

2nd Lienholder forecloses. In this case, the sale would wipe out the inferior 3rd lien, but would not have any effect on the superior 1st lien. The buyer would take title to the house subject to the first mortgage and would have to keep up the payments on it in order to keep the house.

Why Lien Priorities Matter

As we will see later (see "Dealing with Lienholders" on page 29), there could be other liens against the property stored in a defaulted space which are superior to yours, i.e., they came into being before your storage lien attached (usually the case), so you will have certain legal responsibilities to deal with such superior lienholders. Therefore, it is important for you to know when your liens come into being.

COLLECTION VS. FORECLOSURE PROCESS

The collection process, i.e., chasing tenants for delinquent rent, is a separate activity from the foreclosure process, i.e., turning the gears that result in an auction of the tenant's stored contents. Storage operators frequently confuse the two.

The Collection Process

The collection process consists of all the steps you normally take to try to get a delinquent tenant to pay. **Importantly, all those steps are determined by your company policies.** Those might include:

- Locking the tenant out of the gate/space;
- Assessing late fees;
- Making phone calls to the tenant;
- Sending one or more late letters;
- Sending certified letters.

Whether you do any of them is not a matter of law, only of your company's policy. Often operators create confusion at this stage by calling some of the collection letters "pre-lien notices," etc. Regardless of what you call them, all of these things are just collection efforts and have no bearing on a possible foreclosure sale.

The Foreclosure Process (aka "The Auction Process")

At some point, all of your collection efforts have come to nothing and you make the decision to put a tenant into the lien foreclosure process, i.e., the auction process. From that moment forward, the steps you take are all prescribed by statute. They include:

- Locking the tenant out;
- Inventorying the space;
- Sending two, specific, pre-auction notices;
- Moving the contents (optional);
- Finally selling the contents.

We will cover each of these steps in detail.

"Foreclosing your lien" is not an auction.

It is a process that culminates

with an auction sale.

When to Begin the Auction Process

This is really two different questions.

When *CAN* You Begin the Auction Process?

If the occupant is **in default for a period of more than 30 days, the operator may foreclose the lien** by selling the property stored in the leased space at a public sale, for cash.

[A.R.S. §33-1704(A)]

Per the statute above, the earliest time at which you may begin the process is when the rent has been past due for more than 30 days, i.e., 31 days.

When *SHOULD* You Begin the Auction Process?

This is a question of company policy. Some operators are very aggressive and begin the auction process on any tenant who is 31 days in arrears. This approach clearly has public relations ramifications, but if your facility is full or has a waiting list of renters, that may not matter. It is more common to wait 45 to 60 days before pulling the auction trigger.

Can You Wait Too Long to Begin?

Yes. There is a concept in the law known as *laches* (rhymes with “matches”). Those are failures by an aggrieved party to take action as a result of which the damages suffered become worse. The law does not allow that.

“A manager once called me regarding a defaulted space containing a nice automobile. Could he wait a few more months, he asked, before going to auction, since the car could be expected to bring in that much more money? The answer was a clear no. You cannot enhance your damages by inactivity. A court would disallow the extra money, and the manager would be out that many months’ rent had he waited.” – Richard Marmor

How long then is too long? That’s hard to say. A year is certainly too long to wait. Nine months is also probably too long. Six months? Maybe. As the delay gets shorter, what was black becomes grey, and the grey gets lighter and lighter as the time shortens. Four months is probably as long as a prudent operator ought to delay.

WHAT TO SELL

ALL of the contents of the tenant's space. Let's refer back to that first statute quoted above:

The operator of a self-service storage facility has a possessory lien from the date the rent is unpaid and due on **all personal property stored within the leased space** for rent, late fees, and labor or other charges, as well as for expenses reasonably incurred in its sale, as provided in this article.

[A.R.S. §33-1703(A)]

Keep in mind that as a storage operator, you have no idea who owns anything behind the doors of your facility. In theory, every single space could be filled with property owned by people other than the tenants named on the leases. The law recognizes this. Accordingly, notice that the statute does not grant your lien as against tenant's stored property, but against *all personal property* stored within the leased space. In other words, it doesn't matter whether the tenant owns any of the contents or not. All of the contents go into the sale.

Storage operators often face ex-spouses and other strangers to the lease claiming some interest or ownership in contents that are scheduled to be sold at auction. Such persons might be willing to pay the amount of the delinquency in order to prevent a sale. You may accept the payments and stop the sale, but that gives such non-tenants no rights or access to the contents; that's between them and the tenant. However, knowing that the people are interested in the contents, you may want to include them on a list of people interested in bidding at your auctions.

Sell all of the contents at your auction.

**Never sell only selected objects in order to collect
the delinquent rent while leaving the balance of
the contents alone.**

FORECLOSURE STEPS

Step 1: Cut the Lock!

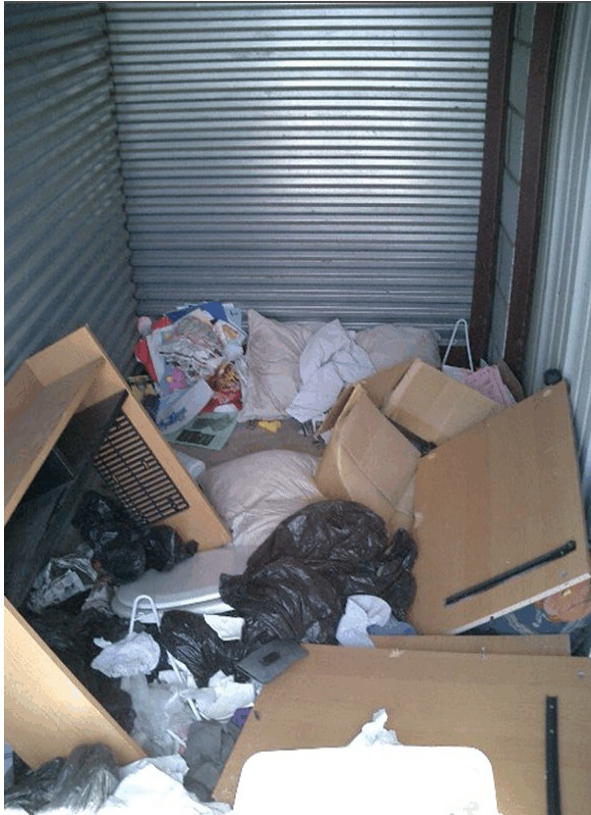
Time and again operators state that they do not cut locks until the day of the actual auction out of fear of liability. **That is a huge mistake.**

- **You have liability anyway.** If the tenant is of a mind to sue, you will be sued regardless of when the lock is cut.
- **You need to know what you're dealing with!**
 - **Is the space EMPTY?** As we will see, our auction process takes almost 60 days to complete. If the space is empty, that's two more months of lost rent.
 - **Is there LIENABLE PROPERTY in the space?** You have specific responsibilities to deal with a possible lienholder prior to selling anything.
 - **Is there a MOTOR VEHICLE OR BOAT in the space?** There are additional steps and potential additional notices required prior to sale.
 - **Are there UNUSUAL CONTENTS in the space?** You might need to seek out specialized buyers in order to conduct a "commercially reasonable sale" as required by law.
 - **Is there PROTECTED PROPERTY in the space, i.e., property prohibited by law from sale?** You will have to take alternative steps for dealing with it.

Later we will review each of those situations.

Is the Space Empty?

This is a more complicated question than it seems on its face. Consider the two auction spaces on the next page.



Space A



Space B

Vacating tenants frequently take the things they value and leave the rest.

Space A appears to contain nothing that a potential buyer would pay money to purchase. It's filled with trash and thus is effectively empty. Take pictures of the trash as a precaution, then dispose of it. Print the photos and keep them in the tenant's file and/or save the photos digitally and store in tenant's digital file.

Space B, though still appearing to be junk-filled, has bags of clothes, a tool case, books, and magazines. If sold, it would likely bring in very little money, but the key is that it would bring in some money. Therefore, it must be sold.

Decision Making Rule: When viewing the contents, if you have to ask the question whether there are contents to sell or trash, you have answered it. There must be enough to sell, or you wouldn't be asking the question.

Moving Contents

You are allowed to move the tenant's contents once you have started the foreclosure process.

If the occupant is in default for a period of more than 30 days and **until the time of sale, the operator**, in addition to denying the occupant access to the personal property, **may transfer the personal property to a place of safekeeping.**

[A.R.S. §33-1704(L)]

When to Move Tenant's Contents

- If there is protected property in the space, it is best to move it out of the space prior to the sale of other contents. It can be moved back if the tenant pays prior to sale and thereby stops the auction.
- If the tenant's space is large, but the amount of contents is small, moving the contents to a smaller space frees up the larger space for re-rental. It also helps the tenant. Since rent continues to accrue until the time of sale, a smaller space means less rent(hence, less damages) accruing. Courts like that, too. Should you be sued for some reason, it shows that you took steps to assist the tenant.

Consolidating To-Be-Sold Spaces

If you have multiple spaces to be auctioned on the same day and several have only small amounts of contents in them, since you are permitted to move contents as you prepare for the auction, you can consolidate those small spaces into one larger space. In this way you can make available two to six spaces for immediate re-rental while the foreclosure process goes along.

For example, designate one, larger, empty space for the sale, say a 10-by-20 (or another size of which you have plenty of inventory). Place the small amount of to-be-sold contents from sale space A6 into one corner. With a piece of chalk, draw a circle around it and write the original space number A6. Similarly, place the small contents from sale space C12 into another corner; circle and label it with chalk with its original space number, C12, etc.

At the time of sale, when the consolidated space is reached, announce to the buyers that the entire space is not being bid on. Rather, bidding is only on "lot A6 in the back-left corner." Following that sale, open the bidding for "Lot C12 in the back-right corner," etc.

Step 2: Send the 1st Notice

You are required by law to mail two pre-auction notices to the tenant. When they are to be sent, what they have to say, and how you have to send them are all prescribed by law.

Before conducting a sale ... the operator shall... send notice of the default by verified mail or electronic mail to the occupant at the occupant's last known address.

[A.R.S. §33-1704(B)(1)]

Note that this notice *must* be sent by a special form of mailing.

Step 3: Send the 2nd Notice

Note that where the 1st notice has to be sent by a special form of mailing, **the 2nd notice *must* be sent by ordinary, first-class mail.**⁵

Send a second notice of default by first-class mail not less than seven days after the mailing date of the first notice to the occupant at the occupant's last known address ...

[A.R.S. §33-1704(B)(2)]

Accuracy is extremely important. Verify spelling, accuracy of information on lien notices against the customer's Lease Agreement and be sure all information is correct. Document all calls, contacts, and the nature of the conversations in the customer's contact log or ledger.

⁵ Without getting into too much law, the reason has to do with the requirement of “due process,” which in this context means enough notice so everyone involved can know to appear and protect their respective interests. Sending notices by different means increases the chances that at least one makes it to the recipient.

PRE-AUCTION NOTICES

Notice Contents

Here's what the law says about the 1st notice:

Before conducting a sale ... the operator shall ... Send notice of the default by verified mail or electronic mail to the occupant at the occupant's last known address.

[A.R.S. §33-1704(B)(1)]

Notice that it says nothing about what ought to be in that notice. (Hold that thought.) In contrast, here's what the law says about the 2nd notice.

Send a second notice of default by first-class mail not less than seven days after the mailing date of the first notice to the occupant at the occupant's last known address that includes:

- (f) A statement that the contents of the occupant's leased space are subject to the operator's lien.
- (g) A statement of the operator's claim, indicating the charges due on the date of the notice and any other charges that may accrue.
- (h) A demand for payment of the charges due within a specified time, not less than 14 days after the mailing date of the second notice or 30 additional days if the address of the occupant is outside of the continental United States.
- (i) A statement that unless the claim is paid within the time stated the contents of the leased space will be sold at a specified time and place, or in the case of protected property, otherwise disposed of at a specified time and place.
- (j) The name, street address, and telephone number of the operator, or the operator's designated agent, whom the occupant may contact to respond to the notice.

[A.R.S. §33-1704(B)(2)]

It's quite specific. The required content is all commonsense information, essentially:

- We have a lien on your things.
- You owe \$ now and will owe \$ more.
- You have to pay by [date].
- If you don't pay, your things will be sold on [date, time, place].
- Here's our contact information.

So, what ought to be in the 1st notice? The same thing! Any less information would really constitute a worthless notice.

Additional Notice Requirement for Vehicles

If the space contains a vehicle or boat, then every notice must contain a description of the vehicle or boat and its VIN (or HIN in the case of boats).⁶

Notices for Online Auctions

Statement (d), the time and place of auction, should be changed to:

Contents will be auctioned off online at www.some-auction-website.com The sale will close on (date) at (time).

Tenant's Right to Redeem

At any time before a sale under this section or before the disposal of protected property, whichever occurs first, the occupant may pay the amount necessary to satisfy the lien and redeem the occupant's personal property.

[A.R.S. §33-1704(C)]

Tenants have the right to redeem (pay the amount due and thus stop the auction) at any time right up to the moment that the gavel falls and the auctioneer says "Sold!"

"I have conducted auctions at which bidding on a sale space was at a close. The auctioneer was chanting, '\$ going once ... \$ going twice ...' when up the driveway ran the tenant with a fist full of money, ready to pay off his debt. The auction had to be stopped, the cash accepted, and the sale of that space cancelled." – Richard Marmor

Arbitrary Payment Deadlines Prohibited

The tenant's right to redeem and stop a sale affects the dates shown in your notices. The notices say, in effect, "you must pay by [date] or your things will be sold on [date]." Those two dates must be the same! The tenant has the right to act up to the moment of sale. Therefore, you cannot adopt some arbitrary deadline for payment. For example, if your sale is scheduled to take place on Saturday, you cannot demand that the tenant pay up by Friday. By law, the tenant has until the gavel falls to act.

Another Recommended Notice Inclusion

As the tenant may pay and stop a sale, include "Cash only will be accepted" in your pre-auction notices. Checks and credit card payments can be stopped.

AZSA Forms

AZSA provides a set of pre-auction notices calls Auction Pre-Sale Notices (*Appendix: AZSA Forms*) and on its website that meet all the statutory requirements. Fill out a few blanks on the first page and your printer will spit out a 1st notice, a 2nd notice, and a file copy, all appropriately dated.

⁶ A.R.S. §33-1704(B)(3)(d)

Who Gets the Pre-Auction Notices

- Tenant. The tenant named on the lease is entitled to notice, of course.
- Other owners. If a vehicle or boat is being sold, then anyone named as an owner on the official records of MVD (records of Game & Fish, in the case of a boat) is also entitled to a duplicate copy of all of the notices, even if their mailing address is the same as the tenant's.
- Alternate contacts typically are not entitled to copies of the notices. That said, your lease should make it clear what, if any, relationship alternate contacts have to the lease. The AZSA standardized lease, for example, makes it clear that an alternate contact appears solely as an accommodation and has no rights vis the space or the lease.

Too Many Notices?

You cannot send too much notice,

but you can send too little.

When in doubt, send it out!

– Marmor's Rules

No judge is ever going to penalize you because you sent too many notices to tenants warning them that they are at risk of losing their property.

Addresses for Notices

Tenant's Last Known Address

All notices, including pre-auction notices, must be sent to the tenant's "last known address." This is a legally defined term.

“Last known address” means that postal address or electronic address provided by the occupant in the rental agreement or the postal address or electronic address provided by the occupant in a subsequent written notice of a change of address.

[A.R.S. §33-1701(A)(4)]

Note that “last known address” must come to you *in writing*, either in the lease (or lease application), or in a writing given to you specifically for the purpose of notifying you of a change of address. It need not be a special form; it just needs to be in writing. For example, a note added atop a rent check pointing out “This is my new address” or the like, would qualify. Attach the notice to tenant’s lease. Do not change the tenant’s records until you actually receive a written notice.

NEVER accept a change of address over the telephone!

Knowledge of Other Addresses

You may encounter other addresses used by a tenant other than the one in your records, for example:

- Appearing on rent checks;
- Used as return addresses on envelopes mailed to you;
- Known to you personally, because you know that tenant has moved;
- Picked up by you in conversation with anybody;
- Appearing on a USPS yellow address sticker.

Mail duplicates of your notices to any such other address, but you must nevertheless still send notices to the “last known address” as defined in the statute above.

Address Tip

A good practice is to simply ask the customer to give a written address change when you receive returned mail with the change of address stickers attached. Occasionally a disgruntled spouse or business partner will change a mailing address without the other person’s knowledge.

Records of MVD

If a motor vehicle or boat is to be sold, any other address for the tenant appearing in the records of the Motor Vehicle Department (or records of the Game & Fish Department in the case of boats), should be added to your list of other addresses used by the tenant.

Other Named Persons

Likewise, other persons appearing as owners in the records of MVD (or Game & Fish) should receive duplicates of all pre-auction notices, *even if their addresses are the same as the tenant's*.

Mailing Pre-Auction Notices

Before conducting a sale ... the operator shall ... send notice of the default by verified mail or electronic mail to the occupant at the occupant's last known address.

[A.R.S. §33-1704(B)(1)]

No More Certified Mail

At one time, this first pre-sale notice was required to be sent by certified mail, return receipt requested, which was an expensive and usually fruitless exercise. (Delinquent tenants often intentionally avoided receiving them in the mistaken belief that doing so would foil the pending sale.)

**IN 2010, THE CERTIFIED MAIL REQUIREMENT WAS
REMOVED FROM THE LAW, THANKS TO AZSA'S
SUCCESSFUL LOBBY EFFORT.**

Verified Mail

Your duty under the law is to *send* notices. It is *not* your responsibility to assure that tenants receive the notices. Therefore, all that is needed is some sort of proof that the requisite notices were sent.

“Verified mail” means any method of mailing that is offered by the United States Postal Service and that provides evidence of mailing.

[A.R.S. §33-1701(A)(17)]

Note that “verified mail” is not a new class of mail offered by the Post Office (that’s a term invented by AZSA). There are actually several classes of mail offered by the Postal Service that provide the sender with some kind of evidence of mailing, i.e., a receipt⁷.

At the time of this writing, the most cost-effective method is by “Certificate of Mailing” at a fraction of the cost of sending a certified letter.

⁷ Certified mail is one of those, albeit the most expensive, so it still qualifies, but it is not required to be used.

Certificates of Mailing

You can use postal form 3817, which is a single receipt for each notice being mailed.

AZSA has a PDF version of this form available for download in the members' section of the AZSA website, and in *Appendix: AZSA Forms*. Then you can print out as many of the forms as you need whenever you need them.

Note the postage on the sample form. Place ordinary, first-class postage on the envelope being mailed. Place the additional cost of the Certificate of Mailing on the certificate itself. The Post Office's cancellation (post mark) is your proof of mailing.

Less Expensive Certificates of Mailing

If you are sending **three (3) or more** notices under certificates of mailing at the same time, you can use other postal forms and the price per letter drops quite a bit.

Form 3877 Firm Mailing Book for Accountable Mail: These general form Post Office receipt books can be used, but have disadvantages:

- They have to be handwritten, which can be tedious if you have number of notices to mail.
- If the book is lost or destroyed, so is your proof of mailing for all of your notices.

Form 3665 Certificate of Mailing – Firm: This is a multiple entry certificate of mailing form, made for the three-or-more purpose.

As with Form 3817 above, AZSA has created a custom Form 3665 specifically for use by Arizona self-storage facilities. This form has been approved by the Post Office.

This PDF form is also available in the members' section of the AZSA website for free download and in *Appendix: AZSA Forms*. It can then be generated whenever needed and can be filled out on-screen before printing.

Note that like the Form 3817, ordinary first-class postage is placed on each notice being mailed. The cumulative added cost for all the Certificates of Mailing listed is then affixed at the top of the form.

Whichever multiple-mailing form you elect to use, if picked up from your office by your mail carrier, the book or form(s) will be taken back to the post office for cancellation and will be returned by your carrier the following delivery day.

Postal Tips

- Before the foreclosure process, when in the collection process, always send late letters (or whatever your company calls them – Preliminary Lien or Late Letters) with the words **"Forwarding & Address Correction Requested"** printed or stamped on the envelope.
- Never open lien notices when they are returned by the postal service.
- Do not make any marks or write on returned lien notices.

"Forwarding & Address Correction Requested"

This tells the postal service that you want the letter forwarded to a new address and that a corrected address form be mailed back to the sender. The postal service charges additional postage for this service. However, this method will prevent losing time in the delinquency process. Without requesting forwarding, the sender would have to mail notices to a new or changed address a second time, thereby slowing the delinquency procedure.

No Notice by Newspaper Publication

At one time, storage operators were required by law to publish notice of their upcoming auctions in the newspaper.

**IN 2010, THE NEWSPAPER PUBLICATION
REQUIREMENT WAS REPEALED, AGAIN THANKS TO
AZSA'S SUCCESSFUL LOBBY EFFORT.**

PUBLICATION IS NO LONGER REQUIRED!

Notices by Email

Let's look again at the 1st notice statute.

Before conducting a sale ... the operator shall ... Send notice of the default by verified mail or electronic mail to the occupant at the occupant's last known address.

[A.R.S. §33-1704(B)(1)]

In addition to verified mail, “electronic mail” is also allowed, but **only for the 1st notice**.

“Electronic Mail”

A statute defines it.

“Electronic mail” means an electronic message or an executable program or computer file that contains an image of a message that is transmitted between two or more computers or electronic terminals and includes electronic messages that are transmitted within or between computer networks **from which a confirmation of receipt is received.**

[A.R.S.§33-1701(A)(3)]

Receipt Required

Notice the requirement highlighted: For an electronic notice to satisfy the statutory requirement, you must receive a confirmation—i.e., a receipt—confirming that your electronic notice was received. Most email programs have a means of putting a receipt request on an email. The problem with that is that the recipient can direct his/her email program to not send a receipt.

There are internet services available (search “email tracking”) through which you can send emails, and for a few cents each they will provide a means of identifying when emails are received and send you back the needed confirmation.

If no receipt is received, the notice fails. It is then as if the notice was never sent. Therefore, if you plan to send 1st pre-auction notices by email, we suggest that you extend your auction timetable by a couple days when you set your schedule to allow enough time to resend any failed e-notices via the Post Office using Certificates of Mailing.

Beyond Email

The technical sounding definition above is designed to change with the times. In addition to email, we have other forms of electronic communication: text messages, social media, Twitter, etc. Today, email fits the bill. Tomorrow it might be something we haven’t even conceived of yet. If you can get a receipt, text messaging would also work. I would strongly advise against using any social media sites for privacy reasons.

WHEN THE CIRCUMSTANCES CHANGE

Change of Sale Date

Can You Change the Planned Date of a Sale?

Yes.

But you must then start the entire sale process over again!

- **If you make the date earlier than noticed:**
 - Recall that the tenant has a right to redeem right up to the time of sale. If you make the date sooner, you deprive the tenant of some of the available time within which to pay and redeem.
 - There are minimum time periods mandated between the sending of pre-sale notices and the sale date. Making a date earlier could make an interval too short.
- **If you make the sale date later than noticed:**
 - Given the tenant's right to redeem, the tenant is entitled to the additional time now available within which to pay and redeem.

Accepting Partial Payments

Often tenants who have received notices that their stored contents are to be sold will make offers of partial payment of the amount due.

Can You Accept a Partial Payment from a Tenant Who is in the Auction Sale Process?

Yes.

But you must then start the entire sale process over again!

If you receive a partial payment by mail, don't simply leave it undeposited in the cash drawer or tenant's file. If you aren't going to accept the payment, send it back to the tenant with a letter of explanation. It would also be prudent to call or email this tenant. Don't forget to make notes in your management software as to why the payment was returned.

Exception: When You Can Accept a Partial Payment

You CAN accept a partial payment from a tenant in the sale process if tenant signs a Partial Payment Agreement (see Appendix: AZSA Forms).

Note that the Partial Payment Agreement offers you two different arrangements that you can make with the tenant. Under both, you agree to accept a partial payment and the tenant commits to how the unpaid balance will be paid off. The difference is whether the pending auction sale will or will not be suspended.

- **Option 1:** The pending sale is to go forward as scheduled. The tenant acknowledges and agrees that the pending sale will go forward as previously scheduled and will only be stopped if the unpaid balance is paid in full prior to the scheduled time of sale.
- **Option 2:** Both you and the tenant agree that the pending sale will be suspended and will not go forward as scheduled. In return, the tenant agrees to a payment schedule for the unpaid delinquency plus the current rent that will accrue during the payment period. If the promised payment commitment is not met by the tenant, the sale will recommence. (Note that the form suggests that the sale will recommence automatically and without further notice to the tenant. Prudence nevertheless suggests that if the sale is restarted, that the notice process be restarted from step 1.)

Your company policy should dictate which option you should use, and in which situations. Once having chosen an option, “X” out the option on the form that you are not using.

“Junk” Spaces

Consider the following:

- Self-storage auctions rarely produce enough money to pay off a tenant’s debt.
- Auctions comprise the single greatest source of liability for storage operators, so avoiding auctions where feasible is a good management goal.

If a to-be-sold space is found to contain marginal contents that could not be reasonably expected to bring in much money anyway, a smart storage operator would be well advised to make a partial or minimal payment deal with the tenant and have the tenant simply move out, thereby freeing up the space for re-rental to a better renter.

INVENTORYING A SPACE

Historically, there have been only two reasons for taking an inventory of to-be-sold spaces. The first reason was found in Arizona statute §33-1704(B)(5), which required that operators publish pre-sale notices in newspapers, and such notices were to contain a description of the property to be sold. However, as noted (see “No Notice by Newspaper Publication” on page 20), *that statute was repealed in 2010*. Thus, this justification for the taking of an inventory went away. However, ...

Tenants store junk, but they lose treasures! – Marmor’s Rules

If you are sued by a tenant whose property was sold at auction, invariably the tenant claims that the lost property had tremendous value. *“That coat hanger had been in our family for generations ... it was the only thing that I had left from grandma ...”* A documented inventory will help rebut such claims and place a truer value on the tenant's property. In the absence of such a record, you are powerless to defend a tenant's claims. This second reason remains as a justification for conducting an inventory.

Recommended Inventory Process

Taking inventory of a sale space is a relatively simple process. There are several items that you will need before starting. They include:

- A digital camera (be sure to save photos/videos onto backup media);
- Plastic or metal numbered seals (available from self-storage lock suppliers);
- Inventory forms (*see Appendix: Operations Forms*);
- A drill or bolt cutters.

Inventories should always be done by two individuals. Typically, the manager and some other disinterested party or property manager. Follow these steps when inventorying a space:

STEP 1: Photograph or video the lock cutting. Be sure to include the person cutting the lock, keeping the unit number and the customer's lock in plain view. Place the cut lock on the floor, just inside the door.

STEP 2: Open the unit door. Take pictures or slowly video the space, showing as much of the space as possible. Take as many pictures as necessary to accurately document the contents of the space. Do not disturb any of the tenant's possessions. Label the pictures if you are using a camera that prints on the spot (Polaroid, etc.).

STEP 3: Place a small write-on/wipe-off board (available at any office supply store) with the space number and date in front of the contents. Digital photos will then have the space details in each photo.

STEP 4: List the contents of the space on the inventory form. Note as many items in the space as possible. Specifically list all items of greater value. Items of lesser value can be described as “miscellaneous household items,” etc.

If the space contains property of a business character (e.g., a copy machine or display cases), or items that may have been financed when purchased, make a note of each such item’s make, model, and serial number (see “Dealing with Lienholders” on page 29).

STEP 5: Check that the pictures and/or video are clear. If the pictures or video are not clear, retake them. Print the photos and keep them in the tenant’s file and/or save the photos digitally and store in tenant’s digital file.

STEP 6: Close the space door, attach the company overlock, and attach a plastic or metal seal. Firmly secure the seal to the latch and write the serial number on the inventory form.

Be careful not to touch or disturb anything when inventorying a space!

Exception: Online Auctions

If your auctions are conducted online, it is highly recommended that you photo-document as much of the contents as possible. *Pull objects from the space for photos if necessary, and even open boxes to reveal contents.* Then post as many pictures as possible of the contents in your online auction listing. The idea is to give bidders as complete an idea of what they are bidding on as is feasible in the circumstance.

Describe, Don't Value

Your task is to describe the contents of the space, not value it. Do not write statements such as “valuable record collection” or even “junky furniture.”

Do not describe items in an inventory as being “leather” or “fur” coats or jackets.

Do not call anything an “antique.” Antiques are generally considered to be old and consequently valuable. Apart from the fact that you may not necessarily be qualified to judge whether an item is an authentic antique, you could be ascribing unjustified extra value to items.

Do not assume that a box labeled “computer” has one inside. Do not list an item on the inventory form unless you can actually see what it is.

Do not describe boxes as “miscellaneous boxes-contents unknown,” but rather “miscellaneous boxes and bags.”

Do not describe items by product name. For example, instead of describing it as a “Lay-Z-Boy” chair, call it a “reclining chair.”

Do watch for items packed in kitty litter, coffee, or sawdust. Drugs and explosives are often packed in these substances. If you encounter a space that appears to be a drug or explosives lab, contact the police. *Do not touch anything in the space.* Illegal drug labs have been known to be booby-trapped.

Do be extremely careful when taking inventory inside a space, for your safety and that of the tenant's goods.

Do have someone with you when entering and/or inventorying a space. Remember that most of your tenants will redeem (pay their delinquent rent) and re-enter their space. It is very common for customers to allege that items are missing from an inventoried space.

MINIMUM SALE TIMELINE

Day 1 - Rent due date

Day 2 - Rent overdue 1 day (storage lien attaches)

*[Default must continue for more than 30 days in order
continue foreclosure process.]*

Day 31 - Earliest day lock can be cut

Also earliest day 1st Notice can be sent

[At least 7 days must separate the mailing of the two notices.]

Day 38 - Earliest day 2nd Notice can be sent

[At least 14 days must separate the mailing of the 2nd Notice
and the date of sale.]*

Day 53 - SALE

**14 days become 44 days if the tenant's address is outside of the
continental U.S. In that case, the earliest sale date would become
day 83.*

If the occupant is in default for a period of more than 30 days, the operator may foreclose the lien.

– A.R.S. §33-1704(A)

Send notice of the default by verified mail or electronic mail to the occupant.

– A.R.S. §33-1704(B)(1)

Send a second notice of default by first-class mail not less than seven days after the mailing date of the first notice.

– A.R.S. §33-1704(B)(2)

[The] second notice of default [shall include] ... A demand for payment of the charges due within a specified time, not less than 14 days after the mailing date of the second notice or 30 additional days if the address of the occupant is outside of the continental United States.

– A.R.S. §33-1704(B)(2)(c)

IMPORTANT: This is a minimum sale timeline, i.e., the shortest possible schedule over which to conduct a storage auction process. Any interval within this schedule can be lengthened. After all, that gives the tenant more time to come up with the money to pay.

Set your schedule as soon as you decide to foreclose and auction, then stick to it. Do not change it!

(See “When Circumstances Change” on page 22)

DEALING WITH SPECIAL CONTENTS

Lienable Property

Lienable property is basically any things that could have been financed when purchased. Such things could have liens against them in favor of the finance company. Typical items might be:

- Business equipment;
- Store fixtures;
- Nice furnishings;
- Newer appliances;
- Vehicles or boats.

Finding Liens

If there is a lien against any object, it can be found online at the website of the Arizona Secretary of State⁸.

<https://azsos.gov>

On the website, follow these steps to check for possible liens.

1. Click “Business” – “Uniform Commercial Code (UCC)”
2. Click “UCC Lien Search.” A search form will open.
3. Enter the tenant’s name in the box:
 - If the tenant is a business, enter the name in the box “Organization.”
 - If the tenant is an individual, enter tenant’s name under “Individual” where indicated.
4. Click “Search.” A list of names will come up.
5. Check the “All” box to the left of “File Number.”
6. Click “View.” A list of files (recorded liens) will come up. You can ignore:
 - Any name not matching your tenant’s, and
 - Any file that shows a second “Termination” filing.
7. Of those remaining, click “View” to see the actual liens.

⁸ Liens against motor vehicles are by law recorded against the vehicle’s title in the records of MVD. (See “Motor Vehicles” on page 45.)

In each case, something more or less like this will appear.

What you should note:

Does this lien predate your lien?

Is this your tenant?

This is the lienholder.

Is this
the stored item you identified?

UCC FINANCING STATEMENT
FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER (optional)

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

ABC Finance Company
641 Lexington Ave
New York, NY 10022

SECRETARY OF STATE
2009 OCT 30 PM 1:39
FILED

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME - insert only debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME

OR

1b. INDIVIDUAL'S LAST NAME: Doe FIRST NAME: John MIDDLE NAME: A SUFFIX:

1c. MAILING ADDRESS: 1234 No South St CITY: Phoenix STATE: AZ POSTAL CODE: 85000 COUNTRY:

1d. SEE INSTRUCTIONS 1d. ADDITIONAL INFORMATION: Not Applicable 1e. TYPE OF ORGANIZATION: Debtor 1f. JURISDICTION OF ORGANIZATION: None 1g. ORGANIZATIONAL ID #, if any: None

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only debtor name (2a or 2b) - do not abbreviate or combine names

2a. ORGANIZATION'S NAME

OR

2b. INDIVIDUAL'S LAST NAME: FIRST NAME: MIDDLE NAME: SUFFIX:

2c. MAILING ADDRESS: CITY: STATE: POSTAL CODE: COUNTRY:

2d. SEE INSTRUCTIONS 2d. ADDITIONAL INFORMATION: Not Applicable 2e. TYPE OF ORGANIZATION: 2f. JURISDICTION OF ORGANIZATION: 2g. ORGANIZATIONAL ID #, if any: None

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNOR of ASSIGNOR (SP) - insert only secured party name (3a or 3b)

3a. ORGANIZATION'S NAME: ABC Finance Company

OR

3b. INDIVIDUAL'S LAST NAME: FIRST NAME: MIDDLE NAME: SUFFIX:

3c. MAILING ADDRESS: 12857 N Scottsdale Rd CITY: Scottsdale STATE: AZ POSTAL CODE: 85200 COUNTRY:

4. The FINANCING STATEMENT covers the following collateral:

Dwyer model ND51 soft drink vending machine
serial number SD554B2135

5. ALTERNATIVE DESIGNATION (if applicable) ☐ LESSOR/LESSOR ☐ CONSIGNEE/CONSIGNOR ☐ BAILEE/BAILO ☐ SELLER/BUYER ☐ AG. LIEN ☐ NON-UCC FILING

6. ☐ THIS FINANCING STATEMENT IS TO BE FILED FOR RECORD (or RECORD) IF THIS REAL ESTATE SECURITY ☐ Other Assignment ☐ 7. CHECK TO REQUEST SEARCH REPORT (S) OR ENROLLMENT ☐ 8. OPTIONAL FILER REFERENCE DATA

FILING OFFICE COPY — UCC FINANCING STATEMENT (FORM UCC1) (REV. 05/22/02)

If things match up and the filing date of the lien pre-dates your lien, then you have stored content subject to a lien, and you will have to take additional steps prior to conducting your auction.

Dealing with Lienholders

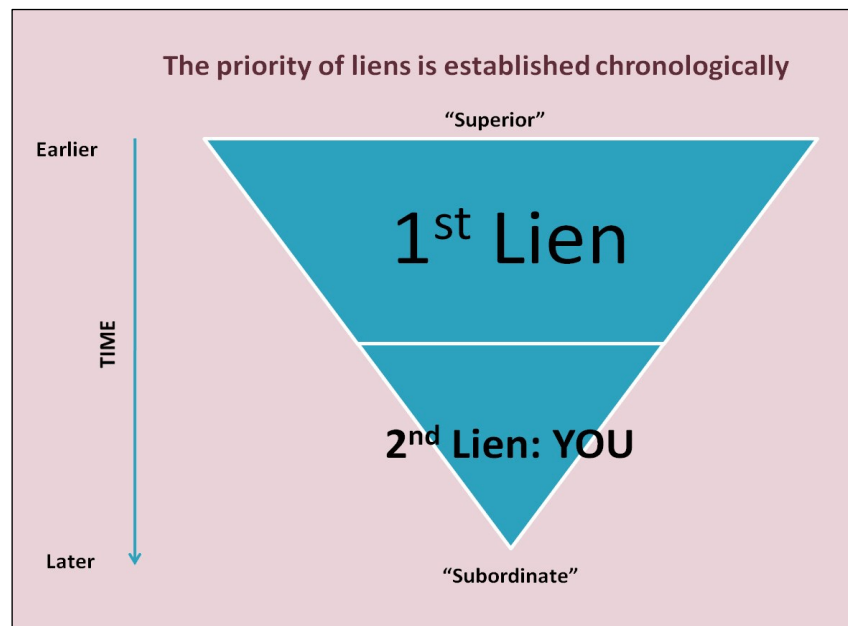
Some storage managers are distressed by the idea that they have to deal with a prior lienholder, but ...

Prior lienholders are like a gift from God!

– Marmor’s Rules

Consider: You are in the position in which you find yourself because someone who presumably had an interest in the stored property ran out of money. Now, in the person of a lienholder, you have been given another party who is interested in the property, who—significantly—*has money!* (After all, they are probably a bank or finance company.) You might get paid 100 percent of the delinquency and not even need to have an auction.

Remember that three-lien hierarchy diagram back in our discussion of Liens (see “Liens” starting on page 4)? This is the more usual situation.



At least 10 days before the sale, send notice by verified mail to any record lienholder or secured party who has an interest in the property to be sold.

[A.R.S. §33-1704(B)(4)]

Therefore, you will have to send a notice by verified mail to the prior lienholder. So, to our minimum time schedule we add:

Day 1 - Rent due date

Day 2 - Rent overdue 1 day (storage lien attaches)

[Default must continue for more than 30 days in order to continue.]

Day 31 - Earliest day lock can be cut

Also earliest day 1st Notice can be sent

[At least 7 days must separate the mailing of the two notices.]

Day 38 - Earliest day 2nd Notice can be sent

[At least 14 days must separate the mailing of the 2nd notice and the date of sale.]*

Day 43 - Latest day to send notice to a prior lienholder

[At least 10 days must separate the day lienholder notices are sent and the date of sale.]

Day 53 - SALE

**14 days become 44 days if tenant's address is outside of the continental U.S. In that case, the earliest sale date would become day 83.*

Remember:

- **You may be dealing with a bank.**
- **Banks are incapable of doing anything quickly.**
- **They may pay you!**

So, don't wait until day 43. Give the lienholder as much notice as you can.

AZSA has a convenient form, Notice to Lienholder, you can use (see Appendix: AZSA Forms).

You *MUST* Notify Prior Lienholders

By law,⁹ all self-storage leases in Arizona must contain a lienholder disclosure provision of some kind. A portion of the AZSA lease is shown below as an example.

2 Lienholders or secured parties with an interest in property to be stored:		
DESCRIPTION OF PROPERTY		
Name	IDENTITY OF LIENHOLDER	
Mailing Address		
City	State	Zip

But as we all know, liens or no liens, tenants rarely fill in the box.

Some storage operators believe that they have no duty to notify any lienholder if the tenant failed to disclose the lienholder's existence on the lease. **WRONG!**

At least 10 days before the sale, send notice by verified mail to any record lienholder or secured party who has an interest in the property to be sold, **of whom the operator has actual or constructive knowledge** either through the disclosure provision of the rental agreement or through any other written or recorded notice of the sale.

[A.R.S. §33-1704(B)(4)]

Liens are recorded with the Secretary of State as notice to the public. Since you can look up and verify if a lien exists, you are legally considered to be "constructively on notice" of its existence.

Prior Lienholders Can Take the Property Without Paying You¹⁰

Any prior record lienor or secured party **may at any time before the sale recover possession of the item** of personal property to which the record lien or security interest attaches.

[A.R.S. §33-1704(B)(4)]

Notice that the statute says nothing about paying you! The lienholder can just take the item. That's one of the benefits of having a superior lien. They don't have to accommodate a subordinate lienholder—you.

But ...

Ask for the money anyway!
— Marmor's Rules

Most of the people at these companies haven't read the law, and it's not your job to educate them.

⁹ A.R.S. §33-1703(C)(1) (See Appendix, "Arizona Lien Law")

¹⁰ The rule is different for motor vehicles and boats (see "Motor Vehicle Lienholders & Owners' Rights" on page 54).

“In 30 years in the storage business, I dealt with a lot of prior lienholders. In every case, I demanded payment of my claim—the delinquency—as a condition of releasing the lien property to them. In all that time, only one finance company responded that they did not have to pay me and that they were entitled to the property. In that single case, my bluff failed, and I had no choice but to release the property. ALL the other finance companies paid me!”
– Richard Marmor

Government Liens

Government liens generally take one of two forms:

- Tax liens;
- Restitution liens.

By law, all government liens automatically become superior, i.e., prior liens, regardless of when they came into being.

Tax Liens

General Rule: You’re out of luck. The property is frozen; you can’t sell it. You basically have only two options:

- A. **Negotiate.** Governmental authorities are rarely interested in bags of clothes and ordinary household items. You can therefore try contacting whatever taxing authority has the lien and try to reason with them, getting them to release their lien or give you permission to go ahead and sell. Failing that ...
- B. **Ask the Tenant to Move Out.** Contact the tenant and offer to forgive the debt if they will simply take their stored contents and go away. You lose your receivable, but at least you get your space back.

Restitution Liens

Restitution liens are liens placed by courts on the property of convicted felons as a means of trying to compensate the victims of the felons’ crimes.

There are two important differences between government tax liens and restitution liens:

1. Restitution liens generally are only placed on significant assets of the criminal, e.g., autos, boats, expensive business equipment, etc. The courts have no interest in ordinary household items.
2. **Importantly, you can sell property that is subject to a restitution lien!**

A self-service storage facility that forecloses its lien pursuant to section 33-1704 **may sell personal property that is subject to a restitution lien.**
[A.R.S. §13-806(J)]

Restitution Lien Catch-22: Sale Proceeds

While you may legally sell tenant contents that are subject to a restitution lien, from the sale proceeds **you may only keep your reasonable costs of sale, not the back due rent. You must surrender the balance of the sale proceeds to the court** administering the lien. (The court will then forward the proceeds to the crime victim who is the lien's beneficiary.)

The proceeds from the sale, less the reasonable costs of sale, shall be paid to the restitution lienholder to satisfy the restitution lien.

[A.R.S. §13-806(J)]

Pre-Sale Notice to a Restitution Lienholder

As with any other prior lienholder, at least 10 days prior to sale, the lienholder is entitled to notice of the pending sale.

Any person listed as the holder of the restitution lien in the public records **may pay the amount necessary to satisfy the lien, redeem the personal property, and recover possession of the personal property.**

[A.R.S. §33-1704(E)]

In other words, the prior lienholder of a restitution lien can elect instead to collect the property and sell it themselves, but unlike other prior lienholders, **they must pay you the amount of your lien.**

So, at least 10 days prior to the date of sale, send a notice by verified mail to the restitution lienholder with this commonsense information in it:

- The identity of the tenant (it's a name they will know well);
- The coming auction (date and time);
- A description of the contents to be sold;

and that ...

- The proceeds from the sale, less the costs of sale, will be paid to them;

But ...

- They have the option to pay the amount of the past due rent (\$) prior to the time of sale, take the property, and sell it themselves if they think they can sell it for more money.

Reasonable Costs of Sale

Reasonable costs of sale are the actual costs you incur in prosecuting the sale process. They might include mailing costs, auctioneers' commissions, perhaps a nominal lock-cutting fee, *some* managers' time, etc.

Arbitrary “auction fees” will not stand up in court. Start with the assumptions that (a) you *will* someday be sued, and (b) if you are really unlucky, you are sued as part of a class action lawsuit attacking *all* the fees charged as against *all* of your tenants. Make sure your fees bear a reasonable relationship to the tasks and you will be much safer.

Protected Property

What is Protected Property?

Self-storage’s most practical remedy for dealing with the stored contents of a defaulting tenant is to sell the stuff, but there is property which by law is not permitted to be sold. In self-storage, we have dubbed such things “Protected Property.” The problem is that if you do sell such things, you are probably breaking some law controlling such property. But, if you do anything other than sell it, you are probably violating the self-storage lien law. It’s a lose-lose situation.

“Protected property” means personal property the sale or disposal of which is regulated by state or federal law and that is one of the following:

- (a) Documents, files, or electronic data that contains personal information relating to clients, customers, patients, or others in connection with the occupant's business.
- (b) Alcoholic beverages.
- (c) Pharmaceuticals other than those dispensed by a licensed pharmacy for the occupant's personal use.
- (d) Firearms.

[A.R.S. §33-1701(A)(12)]

These four classes of protected property most commonly plague self-storage operators.

AZSA was successful in getting the Arizona legislature to recognize the problem and to provide a legal means for dealing with protected property.

First, let’s understand what we’re dealing with.

Documents, Files, and Electronic Data

Note that not just any documents or files qualify. There are basically two concerns here:

- Client/legal/patient files left by some professional, which files might be important to the underlying clients/patients.
- Identity theft (files containing the kinds of information that, if loose, could be used to injure people).

Personal Information

Arizona law defines “personal information.”

“Personal information”:

(a) Means an individual's first name or first initial and last name in combination with any one or more of the following data elements, when the data element is not encrypted, redacted, or secured by any other method rendering the element unreadable or unusable:

- (i) The individual's social security number.
- (ii) The individual's number on a driver's license issued pursuant to section 28-3166 or number on a nonoperating identification license issued pursuant to section 28-3165.
- (iii) The individual's financial account number or credit or debit card number in combination with any required security code, access code or password that would permit access to the individual's financial account.

[A.R.S. §44-7501(6)]

This is just common sense:

A person's last name, plus first name or first initial, along with ...

Their social security number, or

Their driver license (or government ID) number, or

Credit/debit card or other financial account number.

Remember, such information could also look like any of these ...



...and/or some variation of this ...



Alcoholic Beverages

This means ALL kinds of alcoholic beverages, including wines. You need a liquor license to sell any alcoholic beverage.

Pharmaceuticals

Note, that the specification is “Pharmaceuticals other than those dispensed by a licensed pharmacy for the occupant’s personal use.”

This bottle is a pharmaceutical so dispensed. That is not really what the law is aiming for. That said, a prudent manager would be well advised to remove any such medicines spotted in a to-be-sold space.



Pharmaceutical Reps



What the law is primarily interested in is bulk drugs, i.e., the samples and supplies frequently stored by salespeople for drug manufacturers. They can only be dispensed or sold by physicians and licensed pharmacists.

Firearms

Let’s be clear, technically, in Arizona it is legal to sell firearms, provided:

- The firearm is of a type permitted to be sold (not all are); and
- You are selling to someone to whom you are permitted to sell a firearm.

Saleable Firearms

This treatise is not appropriate for a complete discourse of firearms sales. Suffice it to say that if you are comfortable that you are going to auction off a legal weapon, you may, but if you are unsure, this provision of the self-storage lien law will give you a workable alternative.

Allowable Buyers

Sometimes, recognizing a person to whom a firearm should not be sold is simple.



On the other hand, everything on the surface ...



... may not tell the whole story ...



What to Do with Protected Property

If the leased space contains protected property and the operator has actual knowledge of the protected property, **the protected property shall not be sold but is subject to disposal by the operator.**

[A.R.S. §33-1704(F)]

By now, you are likely not surprised to learn that “disposal” is defined in the law.

Proper disposal methods include destruction of the protected property or surrendering the protected property to appropriate state or federal authorities.

[A.R.S. §33-1704(F)]

You can either:

- Destroy the protected property, or
- Surrender it to a government authority.

Note, there is no hierarchy here; you can elect either approach. That said, if it's possible to surrender the property to an appropriate governmental authority, we highly recommend that you pursue that first before destroying anything. The statute actually goes on.

Proper disposal methods include destruction of the protected property or surrendering the protected property to **appropriate** state or federal authorities **if those appropriate state or federal authorities accept the protected property.**

[A.R.S. §33-1704(F)]

Appropriate Governmental Authorities

There are state and federal authorities for just about everything. A sampling:

- The Police
- Motor Vehicle Department
- State Bar Association
- State Medical Board
- State Dental Board
- State Chiropractic Board
- State Board of Accountancy
- Federal Alcohol, Tobacco & Firearms Department
- Etc.

Obviously, to be appropriate, the choice of authority must bear some relation to the property in question. So, although MVD is a state authority, you could not very well expect them to be able to deal with some abandoned medical records.

Acceptance

The governmental authority has to agree to accept the property. You can't just show up at their door with a truck full of a tenant's property or files and dump the stuff in their lobby. So, call them first to discuss.

Some authorities have other powers they can bring to bear on the situation. For example, the State Bar Association, when advised of defaulted storage space containing attorneys' client files, has on some occasions agreed to receive them and take responsibility over them. On other occasions they have refused the files, but contacted the defaulting attorney/tenant, and compelled him/her to pay the delinquent rent and prevent the contents from going to auction.

Destruction

Throwing anything in the trash does not constitute destruction, because removing it from the trash un-destroys it. "Destruction" means rendering whatever it is unfit and unusable for its intended purpose, i.e., incapable of being restored.

More Specifically about Disposal of Protected Property

Documents & Data

Governmental Agency: Look to one of the appropriate state agencies.

Destruction: Shred or burn them. Since often large amounts of papers are involved, we highly

recommend using one of the bonded, truck-mounted shredding services. While this service comes at a cost, that cost can be added to your claim against the tenant.

Alcoholic Beverages

Governmental Agency: The only relevant state agency is the State Liquor Board. In discussions with AZSA, they have it made it clear that they will *never* accept tender of alcoholic beverages. There is thus no point in even calling them.

Destruction: Pour it down the drain. Yes, you *can* drink it, but it's a really bad idea. Consider: if you provide wine storage, for example, there will be a *lot* of wine in a to-be-sold space. Regardless of your alcoholic prowess, there is no way that you could consume it in one sitting. Instead, you would take it into your care and consume it over time. Now view that from the perspective of a third party, e.g., a judge in a court of law. Consider how much that appears as theft of a tenant's property.

Special Alternative: The law provides another alternative for disposing of alcoholic beverages. You can donate the beverages to a 501(c) charity that has a liquor permit for a fund raising event. (And you can take the write-off!)

Pharmaceuticals

Governmental Agency: If you discover illegal drugs, of course, do not touch the materials and contact the police. If you find quantities of legal but controlled substances, contact the DEA. They will come and collect the drugs. For any and all other drugs:

Destruction:

Do not flush them down a toilet. Those chemicals ultimately find their way into our water supply.

Do crush them, mix the crushed drugs with dirt, coffee grounds, or the like, and put them in the trash. For smaller amounts, try dissolving them in water.

Firearms

Governmental Agency: Contact the local police at their non-emergency number and follow their instructions for surrendering the firearms.

Destruction: There is no destruction option in this case.

When to Dispose of Protected Property

**General rule: Dispose of protected property as soon as possible
AFTER the sale of the other contents of the space.**

The recommended course is to remove any protected property discovered in the space and place it temporarily into a different empty space. Remember that you are permitted to move contents to prepare for an auction sale (see "Moving Contents" on page 11). That way, if the sale is held, you can then go on to destroy the protected property. But if tenant has redeemed, you can move the protected property back.

Do not sit on documents and records following a sale. If the papers contain financial account information or ID information, the federal penalties for losing control over them can be *enormously* expensive (think about the data breaches you read about in the news from time to time). It's simply not worth the risk.

REMEMBER

The tenant has the right to redeem and stop a sale right up to the moment that the auction gavel falls. If you have destroyed protected property in anticipation of the auction, and the tenant later redeems, you will be liable for the full value of the destroyed property!

Unknown Protected Property

What if you don't know that there is protected property in a space? The law protects you here.

If the leased space contains protected property and the operator has **actual knowledge** of the protected property, the protected property shall not be sold but is subject to disposal by the operator.

[A.R.S. §33-1704(F)]

There are two ways that you could have actual knowledge:

- You look into the space and you see it;
- The tenant tells you that it is there.

Since 2010, all self-storage leases are to include a disclosure provision in which the tenant can reveal whether there is any protected property being stored.

The AZSA Standardized Self-Storage Lease contains a typical disclosure provision.

ARIZONA LAW REQUIRES SELF-STORAGE OCCUPANTS TO DISCLOSE:	
1 Whether any of the following types of Protected Property is or will be stored in the Leased Space:	
☐	Documents, files or electronic data containing financial, medical, legal or passport information about Occupant's customers, clients or patients (except Occupant's personal records).
☐	Pharmaceuticals (except those dispensed by a pharmacy for Occupant's personal use).
☐	Alcoholic beverages
☐	Firearms

Some operators have commented that the disclosure provision incorporated into their leases includes a 5th box: "None." We think that is ill advised. Like the lien disclosure box, tenants frequently ignore the disclosure, and check nothing. In the form above, the absence of any check marks effectively means that no protected property is being stored. But if there is a "None" alternative and it, too, remains unchecked, then you have no information as to whether there is protected property in the space or not.

IMPORTANT: Lease Disclosure

Like the lien disclosure provision, the protected property disclosure requirement is part of the self-storage lien statute. The requirements are prerequisites for a facility to obtain lien rights when the rent becomes delinquent. **Therefore, if your lease does not have these disclosure provisions, you get no lien rights and you cannot auction tenant contents!**

Protected Property Sold by Mistake

Clearly, it may be difficult, if not impossible, to identify protected property squirreled away in a to-be-sold space. Once again, the law comes to our rescue.

A purchaser in good faith of any personal property sold under this article ... does not acquire ownership of protected property contained in the leased space and shall return to the operator any protected property that is found in the leased space.

[A.R.S. §33-1704(I)(1)]

A buyer at a storage auction does not get title to protected property discovered in a purchased space and must return it to the storage operator.

What if a buyer fails to surrender such discovered protected property? The burden and the fault are on the buyer, not the storage operator. Any ramifications become the buyer's headache.

Notices re: Protected Property

In three places we give notice to defaulting tenant warning what may happen to their stored property, including protected property, in the event that they fail to pay rent.

In the lease

FORMERLY: Of the four notices required by statute to appear in each storage lease, one had to warn in not less than 10-point bold print:

Tenant's property may be sold to satisfy the lien if the rent is unpaid and if tenant is in default.

NOW: That notice in each storage lease has to be changed to (*changes italicized*):

Tenant's property may be sold *or otherwise disposed of* to satisfy the lien if the rent is unpaid and if tenant is in default.

In pre-auction notice letter

FORMERLY: Each notice was to contain a statement that:

Unless the claim is paid within the time stated, the contents of the leased space will be sold at a specified time and place.

NOW: Each notice must contain a statement that:

Unless the claim is paid within the time stated, the contents of the leased space will be sold *or otherwise disposed of* at a specified time and place.

On your wall

FORMERLY: Every self-storage in Arizona had to have a sign on its wall warning:

All articles stored pursuant to a rental agreement will be sold to pay any storage charges overdue for more than 30 days.

NOW: That same sign must read:

Articles stored pursuant to a rental agreement may be sold *or otherwise disposed of* if any storage charges are overdue for more than 30 days.

Unusual Contents

Commercially Reasonable Sale

The *Uniform Commercial Code*, a compendium of laws adopted in all 50 states that address matters governing commerce, mandates that when foreclosing a lien, the sale must be “commercially reasonable,” i.e., conducted so as to produce a reasonable approximation of the fair market value of the things being sold.



It's a true statement that the typical buyers at self-storage auctions, ignoring the fiction of television shows, will bid and buy just about anything being sold at a storage auction.

But when contents being sold are out of the ordinary, i.e. things that your ordinary auction buyer isn't really looking for, the amounts those buyers might be willing to pay typically goes down. Some examples of “unusual items” include caskets; printing equipment; medical or dental equipment; industrial machinery; business machines or equipment; collectibles (e.g., baseball cards or stamp albums).

This list is *far* from complete. It is just meant to give you a flavor of what we're talking about. Does this mean that the “fair market values” of such objects are therefore disproportionately low? No. For some things, it may be that attracting more specialized buyers would be required in order to reach bids that approximate fair market value.

“Some years ago, I discovered a sale space containing many boxes of residential lock hardware, including Schlage, Kwikset, and other brands of lock sets, door handles, and the like, all new and in retail packaging. I got on the phone and called every locksmith within a five-mile radius and alerted them to the coming sale. Several showed up and easily outbid the “regular” auction buyers.” – Richard Marmor

AZSA’S AUCTION WEBSITE

Clearly, it is in your interest to attract buyers to your auctions. As noted previously (see “No Notice by Newspaper Publication” on page 20), the requirement of posting self-storage auctions in newspapers was removed from the law many years ago. In order to provide Arizona storage operators with a tool for announcing their auctions and thereby attracting buyers, AZSA created its Auction Website:

www.selfstorageauctionsaz.com

AZSA members can post their upcoming auctions there for free, and the public can seek auctions to attend for free as well.

Make Your Auction Postings Interesting!

It is strongly recommended that in your auction postings you describe contents that are to be sold in a manner that will attract buyers. Bland entries like “household goods” or “boxes and bags” can hardly be expected to peak anyone’s interest.

Five or More Bidders

While having ideal buyers at every auction is a desirable goal, it’s not always possible. Our lien law therefore provides a protection.

If five or more bidders who are unrelated to the operator are in attendance at a sale held under this section, **the sale and its proceeds are deemed to be commercially reasonable.**

[A.R.S.§33-1704(H)]

So, if five or more independent buyers attend your auction, both the sale and the sale proceeds it produces will be *automatically* considered to be “commercially reasonable.” Does that mean that if only four bidders show up that the sale will not be commercially reasonable? No. That sale will just lack the automatic presumption that it was commercially reasonable. Were a lawsuit over the sale to occur, it might become necessary to demonstrate why in the circumstance the sale should be deemed commercially reasonable anyway. For example, at a rural storage location, it might be impossible to attract specialized buyers for a given character of unusual contents.

Build an Auction Distribution List

The Auction Sign-In Sheet (*Appendix: Operations Forms*) allows you to build a customer base of auction attendees. Most auction attendees are second-hand store owners or flea market vendors. Your most valuable source of auction attendees are those individuals who have attended auctions in the past. Email is a perfect way to notify attendees of an upcoming auction. You may want to set-up a group distribution list titled "Auction Attendees" in your email program and send a notice a week or two prior to your auction.

MOTOR VEHICLES

We get more questions about dealing with motor vehicles found in storage than any other topic. **NOTE: For purposes of this manual, “motor vehicles” includes boats and trailers.**

What is a Motor Vehicle?

32. “Motor vehicle”:

(a) Means ...

(i) A self-propelled vehicle.

(b) Does not include a motorized wheelchair, an electric personal assistive mobility device, or a motorized skateboard. For the purposes of this subdivision ...

54. “Trailer” means a vehicle that is with or without motive power ... that is designed for carrying persons or property and for being drawn by a motor vehicle and that is constructed so that no part of its weight rests on the towing vehicle ...

57. “Vehicle” means a device in, on, or by which a person or property is or may be transported or drawn on a public highway, excluding devices moved by human power ...

[A.R.S. §28-101]

Essentially, it’s a vehicle that is:

- **Self-propelled (except motorized wheelchairs or skateboards);**
- **Includes trailers towed by motor vehicles; and**
- **Could be operated on public roads; but**
- **Are not human-powered.**

What is a Boat?

A boat is pretty much any craft that can be propelled through the water.

When faced with a boat in storage, you likely have TWO different items to deal with: the boat and the trailer it sits on!

5. “Motorized watercraft” means any watercraft that is propelled by machinery whether or not the machinery is the principal source of propulsion.

21. “Watercraft” means any boat designed to be propelled by machinery, oars, paddles, or wind action upon a sail for navigation on the water, or as may be defined by rule of the commission.

[A.R.S. §5-301]

Is It a Motor Vehicle?



This Ford van certainly appears to be a motor vehicle. But it has no engine, no transmission or drive train, and no seats. Strictly speaking, per the definition above, which includes being “self-propelled,” this thing is probably more like a collection of auto parts than it is a vehicle. It was sold nevertheless as a “motor vehicle,” but the description noted the vehicle’s condition.

Decision Making Rule: If you have to ask whether or not something is a vehicle or simply auto parts, you have answered the question. There is enough there to raise a question. The safest and most conservative approach is, therefore, to treat it as a motor vehicle.

Likewise, where disassembled motorcycles are found, including what appears to be most of the parts, the prudent approach would be to sell it as a motorcycle, noting that it is “disassembled.”

Vehicle Sales' Additional Step

Selling a motor vehicle (or boat) injects **ONE ADDITIONAL STEP** to the auction sale process. It requires additional copies of the pre-auction notices to be sent:

If the contents of the leased space include a vehicle:

(a) At the time the notice is sent pursuant to paragraph 1 of this sub-section, send a notice of default by verified mail to the registered owner at the registered owner's most recent address as shown in the records of the department.

(b) At the time the notice is sent pursuant to paragraph 2 of this sub-section, send a notice of default by first-class mail to the registered owner at the registered owner's most recent address as shown in the records of the department.

[A.R.S. §33-1704(B)(3)]

- **When you send your FIRST PRE-SALE NOTICE (by verified mail);**

and

- **When you send your SECOND PRE-SALE NOTICE (by regular mail).**

Send duplicates of those notices to whomever shows up as an owner or co-owner of the vehicle on the state's official records.

- In the case of vehicles, trailers, and the like, those are the records of the Motor Vehicle Department ("MVD").
- In the case of boats, it's the records of the Game & Fish Department.

In each case, you must use the address for such owners found in the official record. (As with any other notice, if you have reason to believe that another address might work for those individuals, then send additional copies—and in the same manner—to such additional addresses.)

If the official record reveals the owner(s) to be:

At	Tenant ONLY	Other Persons
Tenant's last known address	No additional notices are required	Send duplicate notices
Different address	Send duplicate notices	Send duplicate notices

Remember: ALL notices involving vehicles *must* include a description of the vehicle and its VIN.

Obtaining Vehicle Ownership Information

By law, all vehicle title related information is recorded at MVD. At any MVD office, complete a “Motor Vehicle Record Request” form, pay a small fee, and MVD will give you a computer printout with the vehicle’s ownership information. Vehicle title information is also available from some AAA offices.

Motor Vehicle Record Request Form MV46-4416

Motor Vehicle Division
ADOT
Motor Vehicle Division
Records Unit
Motor Vehicle Division
PO Box 2100
Phoenix AZ 85001-2100
www.azdot.gov

MOTOR VEHICLE RECORD REQUEST

• Must be signed and retained on the back.
• At least one **permissible use** must be checked on the back, unless you are requesting your own record.
• See required fees below.

The manner in which the Motor Vehicle Division (MVD) may release information from its driver license or motor vehicle records is regulated by the Federal Driver's Privacy Protection Act (DPPA), 18 U.S.C. 2721-2725 and Title 28, Chapter 2, Article 5 of the Arizona Revised Statutes. It is the responsibility of the individual or entity making a request to gain knowledge of all federal and state laws which govern access to and use of MVD records, and to determine eligibility under these laws.

Anyone who knowingly obtains, discloses, or uses personal information from an MVD record for a use not permitted under these statutes, and anyone requesting the disclosure of personal information who misrepresents their identity or makes a false statement in connection therewith with the intent to obtain such information in a manner not authorized by law, is subject to civil and/or criminal penalties.

Requester Information – proof of identification required

Requester Name (first, middle, last, suffix) _____ Driver License Number or Other ID _____ () _____
Mailing Address _____ City _____ State _____ ZIP _____
Representing Name of business or other organization _____

Driver Record Type _____ Vehicle Record Type _____
☐ Uncertified 30-Month ☐ Certified 5-year ☐ Uncertified ☐ Certified
Motor Record: ☐ Landholder ☐ Title Assignment Notice ☐ Certified Driver Packet (government use only)-Violation Date _____

Criteria – At a minimum, one Primary Criteria is required unless Permissible Use #1 is checked. If the criteria you provide below results in no record or multiple records, then additional criteria will be needed to locate the specific record requested. Providing additional criteria with your initial request may avoid delays in processing, or having to pay for “no record found”.

Driver Record - Primary Criteria
Licensee Full Name (first, middle name or initial, last, suffix) _____ Arizona Driver License/Number # _____ ☐ Has not applied for license ☐ License is suspended or revoked
Licensee Date of Birth (month/day/year) _____ License Expiration Date (month/day/year) _____
Licensee Residence Address _____ City _____ State _____ ZIP _____

Vehicle Record - Primary Criteria
Vehicle Identification Number _____ Arizona License Plate Number _____
Owner Full Name (first, middle, last, suffix) _____ ☐ No plate has been issued
Vehicle Record - Secondary Criteria
Owner Residence Address _____ City _____ State _____ ZIP _____

Fees (per record or document)

	Uncertified	Certified
No fee required for government agencies		
Mail-in (must be notarized)	\$3.00	\$5.00
Drop-off	\$2.00	\$5.00
Supporting microfilm documents	\$3.00	\$5.00
Landholder Record	\$1.50	

MVD Use ☐ Record Located ☐ Amount Paid ☐ Yes ☐ No ☐ Check Number _____ Customer Number _____ Date Paid _____ MVD Agent _____

Comments _____

I am requesting my own record if this box is checked, a Permissible Use box does not need to be checked below.
Permissible Use – I understand that the DPPA, as adopted in Arizona law, requires me to have a permissible use for requesting and receiving an MVD record that contains personal identifying information (e.g., a person's driver license photograph/image, driver license number, name, address and medical/disability information). Based on the specific use checked below, I hereby certify that I am entitled to obtain the requested record under the authority of ARS Title 28, Chapter 2, Article 5.

☐ For use by any government agency, including any court or law enforcement agency, in carrying out its functions or any private person or entity acting on behalf of a government agency in carrying out its functions (Permissible Use #1)

☐ For use by an attorney licensed to practice law or by a licensed private investigator in connection with any civil, criminal, administrative or arbitration proceeding in any court or government agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation and the execution or enforcement of judgments and orders, or pursuant to a court order (Permissible Use #2)

☐ For use by any insurance, that writes automobile liability, or motor vehicle liability policies, and that is under the jurisdiction of the department of insurance or insurance support organization or by a self-insured entity or its agents, employees or contractors in connection with claims investigation activities and anti-fraud activities, relating to underwriting (Permissible Use #3)

☐ For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver license that is required under the commercial motor vehicle safety act of 1985 (49 U.S.C. 31501 through 31517) (Permissible Use #4)

☐ For any other use in response to requests for individual motor vehicle records if the state has obtained the express consent of the person to whom the personal information pertains (see Primary Criteria and one Secondary required) (Permissible Use #11)

☐ For use by any requester if the requester demonstrates he or she has obtained the written consent of the individual to whom the information pertains (signed and notarized Consent to Release Motor Vehicle Record-One Time, form # 95-0463, must be attached) (Permissible Use #12)

Only if a box is checked for one or more of the six permissible uses above, may the requester specifically request the person's driver license photograph/image or medical/disability information. ☐ Uncertified ☐ Certified

☐ For use in connection with matters of at least one of the following: (a) Performance monitoring of motor vehicles, motor vehicle parts and dealers (b) Motor vehicle market research activities, including survey research (c) Removal of non-owner records from the original owner records of motor vehicle manufacturers (Permissible Use #5)

☐ For use in the normal course of business by a business or its agents, employees or contractors, but only: (a) To verify the accuracy of personal information submitted by the individual to the business or its agents, employees or contractors, or (b) if the information submitted is not correct or is no longer current, to obtain the correct information for the purpose of preventing fraud by, pursuing legal remedies against or recovering on a debt or security interest against the individual.

Release for Identification/Transfer or Release License Number _____ Applicable Licensing Agency _____ (Permissible Use #1)

☐ For use in research activities and for use in producing statistical reports if the personal information is not published, re-disclosed or used to contact individuals (Permissible Use #6)

☐ For use in providing notice to the owners of towed or impounded vehicles (Permissible Use #7)

☐ For use by any licensed private investigation agency or licensed security service, as indicated by an additional permissible use (You must check a second permissible use) (Permissible Use #8)

☐ For use in connection with the operation of private toll transportation facilities (Permissible Use #10)

☐ For any other use that is specifically authorized by law and that is related to the operation of a motor vehicle or public safety, including the following (check at least one more of the following):

- ☐ (a) Use by a financial institution or enterprise under the jurisdiction of the Department of Financial Institutions or a federal monetary authority
- ☐ (b) Use by a motor vehicle dealer who is licensed and bonded by the Department or a state organization of licensed and bonded motor vehicle dealers
- ☐ (c) Use by a person who is involved in an accident or the owner of a vehicle involved in an accident if the person who requests the information submits proof to the Department of involvement in the accident
- ☐ (d) Use by a person applying for a bonded title if all of the following conditions exist: (i) The requester verifies to the satisfaction of the Director that the vehicle on which the requester is requesting the record is in the requester's possession (ii) The record is requested in order for the requester to notify the registered owner of the requester's intent to apply to the Department for a bonded title (iii) The requester provides a verification of a vehicle inspection that was performed by an authorized Department employee or agent
- ☐ (e) Use by an operator of a self-service storage facility who alleges both of the following: (i) That the vehicle on which the operator is requesting the record is in the operator's possession (ii) That the record is requested to allow the operator to notify the registered owner and any beneficiaries of record of the operator's intent to foreclose its lien and to sell the vehicle (Permissible Use #14)

Certification – I hereby certify, under penalty of perjury, that any records or information obtained pursuant to this request will be used solely for the uses indicated on this form, and for no other use. I understand that I am prohibited from selling or disclosing the personal information set forth in these records, except in accordance with applicable law. I further acknowledge that MVD, by giving me access to the requested record information, is relying on the truth of the representations contained on this form, and I am indemnifying MVD as my liability to defend, hold harmless and indemnify MVD and any of its officers, employees, agents or contractors, from all actions brought or damages sought by reason of the negligent, improper or unauthorized use or dissemination of the information provided to me by MVD.

Requester Name (first, middle, last, suffix) _____ Requester Signature _____
Acknowledged before me this date _____ Notary or MVD Agent Signature _____
Date _____ County _____ State _____ Commission Expires _____

PRIVACY LAWS

At one time, stalkers and other evildoers could utilize license plate numbers and the public records to assist them in identifying potential targets. Since then, most states have passed privacy laws making public records, e.g., license plate information, private. Now only specific persons are entitled to access to the records.

In 2002, AZSA was successful in getting self-storage operators in the process of foreclosing their liens added to that list of entitled persons. That must be identified on the form.

- ☐ For any other use that is specifically authorized by law and that is related to the operation of a motor vehicle or public safety, including the following (check at least one more of the following):
- ☐ (a) Use by a financial institution or enterprise under the jurisdiction of the Department of Financial Institutions or a federal monetary authority
 - ☐ (b) Use by a motor vehicle dealer who is licensed and bonded by the Department or a state organization of licensed and bonded motor vehicle dealers
 - ☐ (c) Use by a person who is involved in an accident or the owner of a vehicle involved in an accident if the person who requests the information submits proof to the Department of involvement in the accident
 - ☐ (d) Use by a person applying for a bonded title if all of the following conditions exist: (i) The requester verifies to the satisfaction of the Director that the vehicle on which the requester is requesting the record is in the requester's possession (ii) The record is requested in order for the requester to notify the registered owner of the requester's intent to apply to the Department for a bonded title (iii) The requester provides a verification of a vehicle inspection that was performed by an authorized Department employee or agent
 - ☒ (e) Use by an operator of a self-service storage facility who alleges both of the following: (i) That the vehicle on which the operator is requesting the record is in the operator's possession (ii) That the record is requested to allow the operator to notify the registered owner and any beneficiaries of record of the operator's intent to foreclose its lien and to sell the vehicle (Permissible Use #14)

Certification – I hereby certify, under penalty of perjury, that any records or information obtained pursuant to this request will be used solely for the uses indicated on this form, and for no other use. I understand that I am prohibited from selling or disclosing the personal information set forth in these records, except in accordance with applicable law. I further acknowledge that MVD, by giving me access to the requested record information, is relying on the truth of the representations contained on this form, and I am indemnifying MVD and any of its officers, employees, agents or contractors, from all actions brought or damages sought by reason of the negligent, improper or unauthorized use or dissemination of the information provided to me by MVD.

Requester Name (first, middle, last, suffix)

AZSA Custom Record Request Form – Same Content, Easier to Complete

MVD's form is designed to accommodate a *lot* of different applications, so most of the form has nothing to do with self-storage auctions, making it somewhat convoluted. AZSA has produced a Motor Vehicle Record Request form that you can download from the AZSA website (it is also in *Appendix: AZSA Forms*), fill in on-screen, and print out on your own printer. The AZSA form hides all of the portions of the form that have no bearing on self-storage, making it much easier to complete.

The image shows a two-page form titled "MOTOR VEHICLE RECORD REQUEST".

Page 1:

- Header: "Motor Vehicle Division", "Mail Drop 504M", "Records Unit", "PO Box 2100", "Phoenix, AZ 85001-2100".
- Buttons: "Clear", "Print".
- Instructions: "Must be signed and notarized on the back", "At least one permissible use must be checked on the back, unless you are requesting your own record".
- Requester Information: Fields for "Requester Name (first, middle, last, suffix)", "Driver License Number or Other ID", "Daytime Phone Number", "Mailing Address", "City", "State", "Zip".
- Vehicle Record Type: Radio buttons for "Uncertified" (checked) and "Certified".
- Criteria: "At a minimum, one Primary Criteria is required unless Permissible Use #11 is checked. If the criteria you provide below results in no record or multiple records, then additional criteria will be needed to locate the specific record requested. Providing additional criteria with your initial request may avoid delays in processing, or having to pay for 'no record found'.".
- Vehicle Record - Primary Criteria: Fields for "Vehicle Identification Number", "Arizona License Plate Number", "Owner Full Name (first, middle, last, suffix)", "No plate has been issued".
- Vehicle Record - Secondary Criteria: Fields for "Vehicle Record Address", "City", "State", "Zip".
- Fees (per record or document):
 - Over-the-Counter (while you wait) \$3.00
 - Mail-in (must be notarized) \$3.00
 - Drop-off \$2.00
 - Supporting microfilm documents \$3.00
- Bottom text: "Second Page Must Be Signed".

Page 2:

- Page number: "Page 2".
- Notarization: "Notarization is only required if form is to be mailed to MVD. Otherwise sign in the presence of MVD agent.".
- Checkboxes: "is Use by an operator of a self-storage facility who alleges both of the following: (i) That the vehicle on which the operator is requesting the record is in the operator's possession (ii) That the record is requested to allow the operator to notify the registered owner and any beneficiaries of record of the operator's intent to foreclose its lien and to sell the vehicle (Permissible Use #16)".
- Certification: "I hereby certify, under penalty of perjury, that any records or information obtained pursuant to this request will be used solely for the uses indicated on this form, and for no other use. I understand that I am prohibited from selling or disclosing the personal information set forth in these records, except in accordance with applicable law. I further acknowledge that MVD, by giving me access to the requested record information, is relying on the truth of the representations contained on this form, and I am intending that MVD so rely. I therefore agree to defend, hold harmless and indemnify MVD and any of its officers, employees, agents or contractors, from all actions brought or damages alleged by reason of the negligent, improper or unauthorized use or dissemination of the information provided to me by MVD.".
- Signature line: "Requester Signature", "Notary or MVD Agent Signature".
- Fields: "Acknowledged before me this date", "Date", "County", "State", "Commission Expires".
- Footer: "AZSA MVD 46-476 (Rev. 07/15)".

When the form prints out, all of the missing bits re-appear, so the MVD staff will still see the form that they expect to see.

Boat Registration Record Requests

The Game & Fish Department is a good deal more flexible, and will accept most forms of contact, including fax. You can find contact information at <https://www.azgfd.com/Agency/Offices>.

Vehicle Issues

MVD Troubles

It has taken many years for the various MVD offices to become familiar with the needs and procedures of the self-storage industry. Occasionally, some MVD office will still present issues when confronted with a self-storage record request. Fortunately, AZSA has seen to it that there is an MVD procedural memo to which a problematic MVD office can be directed.

If ever an MVD office refuses vehicle ownership information or demands other documentation,¹¹ direct the MVD personnel to:

**MVD POLICY MEMO 10.6.9 dated 25 April 2011
“Self-Service Storage Facility Vehicle Foreclosure Lien”**

No Vehicle Information Found

From time to time, a request for ownership information for a vehicle or boat will come back **“No Information Found.”**

The operator is not required to send a notice pursuant to this paragraph if ownership information for a vehicle is unavailable.

[A.R.S. §33-1704(H)]

The law does not expect you to do the impossible. **If no ownership information is available from the authorities, then the requirement of additional notices (see “Vehicle Sales’ Additional Step” on page 47) is waived.** You can go forward with your sale as you ordinarily would.

No VIN Number Found

This presents a difficult situation. A vehicle cannot be sold absent that identification. There are a couple of options.

- **Alternate labels:** VIN numbers are imprinted elsewhere on vehicles in addition to the dashboard tag and door label (frame tag on trailers), for example, on axles, engine blocks, etc. Some research and telephoning may help to identify alternate spots to check. An internet search for “VEHICLE VIN NUMBER LOCATIONS [MAKE] [MODEL]” can sometimes generate useful information.
- **Level II Inspections:** At one time, it was possible to request that MVD send out an inspector to conduct a “Level II” inspection. In 2010, MVD began refusing to do this for budgetary reasons. As of this writing, there have been reports of some MVD offices resuming that service. If your MVD office will not send someone to you, it may be necessary to bring the vehicle to MVD for such an inspection. **Importantly, if MVD cannot find a vehicle’s VIN, it will assign a new number to the vehicle, thereby permitting you to sell it.** (The cost, if any, of getting a vehicle to MVD in such a situation can be added to your lien claim against the tenant.)

¹¹ Nothing in the law requires any further documentation [A.R.S. §28-455(C)(14)].

Out-of-State Registration

Is the Vehicle Registered Out-of-State? Typically, this is found out in one of three ways.

- The vehicle has an out-of-state license plate;
- Registration or insurance information in the glove box reveals it;
- MVD tells you when you request title information (although MVD claims to have such information, it is rare that they actually produce it).

Nothing in the law mandates that an Arizona storage operator foreclosing its lien must contact other states for title information. However, to avoid possible lawsuits from vehicle owners who might have been denied an opportunity to redeem the sale and recover the vehicle ...

AZSA strongly recommends that if you have reason to know that a to-be-sold vehicle is registered in another state, you seek title information from that state.

How to Contact Other States' Motor Vehicle Departments

An internet search for "MOTOR VEHICLE DEPARTMENT [STATE]" will usually produce the contact information you need. *Be sure to note whether that department has a form and/or fee in connection with a title search.* AZSA provides a form cover letter (*Appendix: AZSA Forms*) that should also be enclosed.

Refusal from Other States' Motor Vehicle Departments

Remember that public records of vehicle registrations are subject to privacy laws in most states, and that AZSA had to get a law passed entitling self-storage in Arizona to have access to such records. Other states may not have such an exception to their privacy protections. The result will often be that either the other state will send a refusal to disclose information to you, or they may not respond at all! *It is important to try anyway.* In the event of a future lawsuit from a vehicle owner, you can demonstrate that an effort was made to get proper ownership information. Keep records of your attempt in the tenant's file.

In the event of a refusal, the information was "unavailable" (see "No Vehicle Information Found" on page 50). You can go forward with your sale in the ordinary course.

Hidden Vehicles

We have all seen "avalanche spaces" like this one, where contents tumble out when the door is opened.

What if there is a motorcycle, trailer, or the like back behind all that stuff?

It likely won't be uncovered until an auction buyer begins to empty out the space.

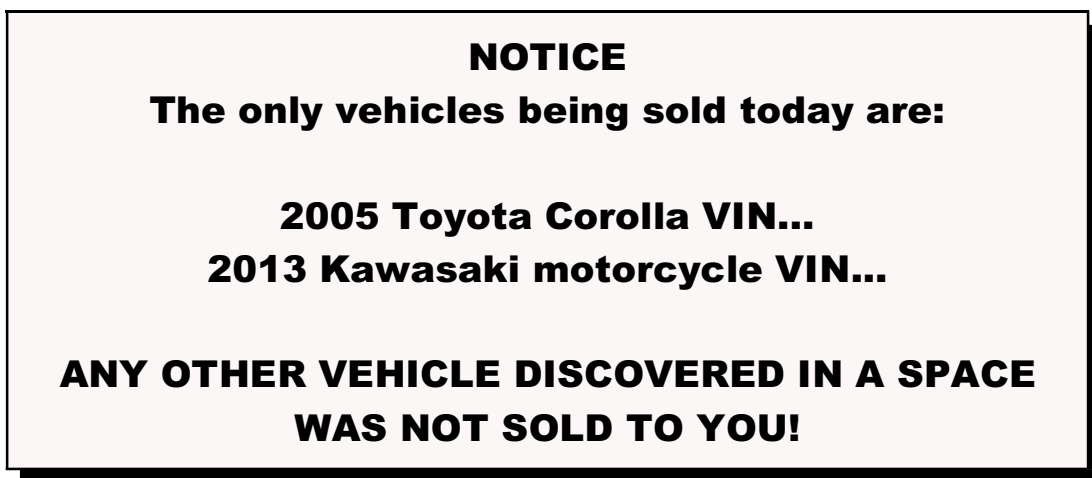
The problem is that you could not have sold the vehicle, because you would not have obtained title information nor notified owners and lenders that appeared on the title.



If you were to recognize the sale of the vehicle anyway, and allow the buyer to take it, you become potentially liable for the full value of the vehicle to the true owner(s) and/or lienholder who were deprived of notice.

AZSA therefore strongly recommends that at any auction, you post a sign identifying the only vehicles being sold in that day's auction.

For example:



No Bonded Titles or Abandoned Vehicles

Prior to 2002, when AZSA was successful in getting this vehicle sale procedure into law, storage operators were frequently frustrated, unable to sell vehicles found in defaulted spaces. MVD would refuse to recognize the validity of the sales and would not record auction buyers' titles. As a result, auction buyers would not bid on vehicles.

Some storage operators, seeking a work-around, would claim that the vehicles were abandoned, and they would follow a process to apply for a title to an abandoned vehicle, also known as a "bonded title." However, ...

**Vehicles in defaulting storage spaces are not "abandoned."
They are the fallout from a defaulted lease contract!**

An abandoned vehicle would be one of no known origin discovered in your parking area one morning or left in your aisle, which is not part of any lease.

Accordingly, per a requirement of the Arizona Department of Transportation, use of the bonded title procedure for a vehicle in a defaulted self-storage space is specifically prohibited by law!

If the contents of the leased space include a vehicle, section 28-4839 does not apply.

[A.R.S. §33-1704(A)]

A.R.S. § 28-4839 is the abandoned vehicle statute.

Documenting a Vehicle Sale

Following sales of vehicles or boats, it is necessary to provide the buyers with paperwork documenting the sales so that the buyers can register their titles with the state. The document to use is a Declaration of Sale,¹² available both in the members area of the AZSA website and in *Appendix: AZSA Forms*.

DECLARATION OF SALE
RESPECTING a certain written self-storage Lease Agreement by and between the following parties:

1. **OPERATOR**
Name: _____
Address: _____
City, State, Zip: _____

2. **TENANT**
Name: _____
Address: _____
City, State, Zip: _____

3. **LEASE DATE** _____ of the leased self-storage space at the facility operated by Operator at said address, in which Tenant could store personal property, which storage space was _____

4. **UNIT NO.** _____

In which Tenant stored personal property, including the following vehicle, as defined in A.R.S. §33-1701:

5. **VEHICLE/WATERCRAFT**
Description: _____
Year, Make, Model: _____
Color: _____
VIN: _____

6. **PRIOR LIEN APPEARING OF RECORD (IF ANY)**
Name: _____
Address: _____
City, State, Zip: _____
Orig. Amt: _____ Record Date: _____ Record No: _____

AND WHEREFORE, Tenant defaulted in the payment of rent under the lease. And following notice to Tenant and other titleholders of record, made in accordance with A.R.S. §33-1704, and after hearing within the time permitted by statute, AND WHEREFORE, Operator duly notified the Lienholder, if any, of said vehicle's sale, and the Lienholder failed to timely appear and recover possession of the vehicle prior to sale, and Lienholder failed to timely appear and recover possession of the vehicle prior to sale.

AND WHEREFORE, accordingly, a sale was held on the date appearing below for this instrument pursuant to A.R.S. §33-1704, at which the successful Buyer was:

7. **BUYER**
Name: _____
Address: _____
City, State, Zip: _____

8. **AMOUNT PAID**
For which Buyer paid: Purchase Price: _____ Plus sales tax of: _____

AND WHEREFORE, all right title and interest of the Tenant and of any other titleholders of record as well as of any holders of liens or encumbrances on the vehicle were thereby terminated and vested in Buyer, free and clear of all rights of any party in accordance with A.R.S. §33-1704.

NOW THEREFORE, Operator releases unto Buyer, all of Operator's right and interest in and to the Vehicle, without warranty or representation of any kind. Buyer accepts the Vehicle "as-is-where-is," and releases all liability with respect to loss, damage, insurance, storage (from and after the moment of sale), title, as well as to any and all cost, duty or obligation owing to any party or governmental agency with respect to the Vehicle, and in so doing hereby agrees that Operator has no claim any and all claims or demands whatsoever by virtue of said Vehicle.

IN WITNESS WHEREOF, Operator and Buyer declare, under penalty of perjury, that the foregoing is true and correct. Executed at _____, Arizona, on this _____ day of _____.

OPERATOR: _____ BUYER: _____
by _____ by _____
Print Name _____ Print Name _____

© 2002-2010 Az Self-Storage Assn. All rights reserved. WHITE COPY: To Buyer for title registration. YELLOW COPY: To Operator for sales records. Form MV001 (Rev. 2/10)

DO NOT DUPLICATE

Following a sale, the buyer and the storage operator must complete and sign the form, certifying to the facts.

The original is given to the buyer to enable him/her to record their title. The storage facility keeps the duplicate copy in the sold space's file.

It is imperative that the form reflect both the sale price of the vehicle and the amount of sales tax paid in connection with the sale. Absent that information, neither MVD nor Game & Fish will accept the form and permit the buyer to perfect title. (See "Sales Tax" on page 58.)

IMPORTANT: Remember that if you sell a boat, you are likely selling TWO objects: the boat and the trailer it rests on. That means the buyer will need TWO Declarations of Sale, one for the boat, the other for the trailer. You may agree with the buyer on the price division between the objects.

¹² When the form was introduced in 2002, MVD refused to produce it, saying that AZSA would have to.

Motor Vehicle Lienholders' & Owners' Rights

Like any other lienholder, holders of liens on vehicles and boats are entitled to notice and an opportunity to act (see “Dealing with Lienholders” on page 29), but with a couple of twists.

Finding Vehicle Lienholders

Unlike other liens, which are recorded with the Secretary of State, liens against motor vehicles are recorded on the vehicles' titles at MVD. (Boat liens are still recorded with the Secretary of State.)

When you submit a Motor Vehicle Record Request (see “Obtaining Vehicle Ownership Information” on page 48), the computer printout you receive will reflect any liens recorded against the vehicle.

Special Right

If the personal property includes a vehicle, **any person listed as a registered owner or lienholder** on the records of the department **may pay the amount necessary to satisfy the lien, redeem the vehicle, and recover possession of the vehicle.**

[A.R.S. §33-1704(D)]

Whereas other lienholders notified of your sale can just take the lien contents, although we demand payment anyway (see “Prior Lienholders Can Take the Property Without Paying You” on page 31), **any holder of a lien against a vehicle or boat and any owner shown on the official public title record can appear and take the vehicle or boat BUT THEY MUST PAY YOU FIRST!**

And a storage operator incurs no liability when releasing the property to that person, even though they are not a party to the lease.

The operator is not liable to the occupant or any other person who claims an interest in the vehicle if the operator releases the vehicle to a person listed as a registered owner or lienholder pursuant to this subsection.

[A.R.S. §33-1704(D)]

THE AUCTION

Sale by Auction

Must the sale be by auction? Here's what our self-storage lien law says.

If the occupant is in default for a period of more than 30 days, the operator may **foreclose the lien by selling the property** stored in the leased space **at a public sale, for cash**, or if the property is protected property, by disposing of the property pursuant to this section.

[A.R.S. §33-1704(A)]

Public Sale

That's all it says, so once again, we must look to the Uniform Commercial Code to govern here. It's arguable that there can be a variety of selling situations that could qualify as "public sales," but using them would leave you exposed to potentially having to prove that in a court of law. On the other hand, an auction in which there is a meaningful opportunity for competitive bidding is unquestionably considered to be a public sale.

AZSA strongly recommends that you use public auctions, whether live or online, as the sole method of conducting your storage lien foreclosure sales.

"A manager who worked for me, claiming to have years of professional experience as a self-storage manager, insisted that auctions should be conducted by sealed bid. 'It's no one's business what the others are bidding!' he declared. He didn't last long in my employ." – Richard Marmor

Must You Use an Auctioneer?

There is nothing in the law that requires that you utilize the services of an auctioneer; you are free to conduct your auctions yourself. That said, there are a number of advantages in using a professional auctioneer.¹³

- **Lock-Cutting.** Many will provide lock-cutting and inventory photographing of to-be-sold spaces as part of their service.
- **Buyer Pool.** Most have a regular following of buyers, thus potentially bringing more buyers to your auctions.
- **Arm's Length Presumption.** Their presence enhances the presumption that a sale was conducted fairly and at "arm's length."
- **Full Accounting.** Complete cash handling and accounting services generally are provided.

¹³ Note that there are several very competent professional auctioneers who are members of AZSA and who provide self-storage lien foreclosure services. Use the red "Suppliers and Services" search button on every page of the AZSA website for referral information.

eBay Auctions

We're sometimes asked whether eBay online auctions could be used for lien sales. The answer is yes, but it's puzzling why anyone would truly want to. Using eBay injects **two headaches** into the lien sale process.

- **Shipping.** Every sold item would have to be packaged and shipped.
- **Balance of Contents.** For every item worthy of a bid at a storage auction, there are typically 20 more objects that no one would want. What's to become of them?

"Some years ago, a manager explained to me that he conducts all of his lien sales by staging large yard sales. That was unacceptable. The problems presented are two-fold: first, the prices are set by the seller, so that would scarcely qualify as a 'public sale.' Second, as with eBay auctions, what do you then do with all the less desirable contents that no yard sale could sell?"

Another manager actually shocked me when he explained that he conducted his auctions like an episode of 'The Price is Right.' Doors were left closed and buyers bid blindly, with him frequently posing, 'You've bought space A, but are you willing to trade that for space B?' I put a stop to that!" – Richard Marmor

Reserve Auctions

A "reserve auction" is one in which there is a minimum acceptable price. That number is not revealed to bidders. If normal bidding meets or exceeds that minimum, the sale goes forward. If the highest bid fails to meet the minimum, the sale is canceled. **There are two problems with reserve auctions:**

- Canceling the auction means two more months without rent on the space, as the lien process must be started again from the top for the next attempt at sale.
- Typical self-storage auction buyers don't like reserve auctions. They will not come back and bid at future auctions.

More importantly, don't lose sight of the true purpose of our auctions. It is to get our spaces back into production. The auctions are not about how much money we can make at them!

[A sale by auction] is with reserve unless the goods are in explicit terms put up without reserve.

[A.R.S. §47-2328(C)]

In other words, all auctions in Arizona are deemed to be with reserve unless the auction is announced to be without reserve.

**Always announce that your auction is being conducted
WITHOUT RESERVE.**

House Bidding

Nothing in the law prohibits a seller from bidding at its own auctions, but it's a bad idea. Self-bidders are referred to as "shills." A few reasons why it should be avoided:

- We have a duty to conduct a "public sale" (see "Public Sale" on page 55). That includes the presumption of true, arm's length, competitive bidding. If the seller is bidding, the contest cannot truly be said to be at arm's length.
- "There's a difference between legal and ethical." – Hannes Combest, CEO of the National Auctioneers Association
- Your buyers will never come back for any future auction.

**AZSA recommends that you announce at your auctions that
"The house reserves the right to bid, but if the house does bid,
it will only make an opening bid."**

When You *SHOULD* Bid

Every storage operator who has held an auction has experienced it: You throw open the door and open the bidding to total silence; the contents apparently being undesirable enough to merit no buying interest.

"Many years ago, I tried unsuccessfully to auction a space. No bidder was interested. I photographed the contents then threw them away. Later I was sued by the tenant for the loss of her things. I lost but, based on the photographs I was able to show the court, the tenant was only awarded a couple of dollars in damages. Then the judge leaned over the bench and reprimanded me, saying 'Next time, make sure you sell the stuff.'" – Richard Marmor

That judge was right. The problem with the self-storage lien law is that it goes into great detail about everyone's duties and responsibilities and what happens when a successful sale is consummated, but it says nothing about what happens when a sale fails. At minimum you must start over and try again later, though why that would be any more successful is doubtful.

When No One Bids

If at your auction no bidder makes any bid, have someone in your employ make a bid of \$1.00.

- By definition, that is an opening bid, per the terms of your announcement.
- If no one else bids, at the least, you have a sale, and what follows is prescribed by law.
- Something psychological happens to auction buyers as soon as someone—anyone—shows interest in the contents being sold. The bidding starts. It may not be much money, but the contents end up sold and removed, which is your true goal.

Sales Tax

Storage Auctions Are Taxable

Arizona has “transaction privilege tax,” which is commonly referred to as “sales tax.” The distinction is subtle, but it directly impacts self-storage auctions, as the tax is on the *transaction*. *As a result:*

All sale proceeds from self-storage auctions in Arizona are subject to sales tax!

Tax Rate

The rate to be charged is the retail rate, i.e., the same rate applied to the sale of locks and boxes. The rate is not the lower commercial leasing–rental–rate.¹⁴

Pass Through

As with any other sale and purchase, the seller is permitted to pass the tax through to the buyer, that is, to add it onto the purchase price. Thus, you may require successful auction bidders to tender not only the amounts of their winning bids, but additionally the tax on them as well (see “Auction Sales Agreement” on page 62).

No Pass-Through: The Math

If sales tax is not added on, then to find the portion of sale proceeds you may keep, divide the sale price by a number. That number is the retail tax rate (expressed as a decimal) plus 1. E.g., if the tax rate is 8.6 percent, divide by 1.086.

For example, assuming:

- The tax rate is 8.6 percent (0.086);
- You sell a space’s contents for \$250; and
- You do not pass the tax through.

The calculation is $\$250 \div 1.086 = \230.20

So, \$230.20 are the sale proceeds that you may keep,

and the difference: $\$250.00 - 230.20 = \19.80

Is the sales tax that must be remitted to the DOR.

¹⁴ AZSA tried unsuccessfully to argue that proceeds from storage auctions are really past due rent being collected in an alternate manner. The tax court disagrees. While the storage operator’s claim arises from a rental arrangement, the auction proceeds arise from the transaction of selling goods.

DOR Always Gets Its Money

The Department of Revenue (DOR) for the State of Arizona and on behalf of the taxing authorities of the various counties and cities, expects to collect its tax revenue *whether or not you pass the tax onto buyers and collect it from them.*

Assume that the local retail tax rate is 8 percent (yours may be different). And assume the auction sale of a space's contents for \$100. Then either:

- **Tax Passed Through:** You collect \$108.00 from the buyer, of which \$8 is tax which must be remitted to the DOR; or
- **Tax Not Passed Through:** You only collected \$100 from the buyer. The DOR takes the position that some of that is tax. Thus, you get to keep \$92.59 (as you divide \$100 by 1.08), and the remaining \$7.41 (8 percent of \$100) must be remitted to the DOR.

Audit!

The state and local taxing authorities are well aware of storage auctions, and when you are audited, they will be looking for the tax on your auctions sales!

"I was once audited by the taxing authority for a certain Arizona city. I was warned in advance that the auditor would be looking for, and I was to have available, my records for the last four years. When the auditor arrived, the FIRST thing she asked to see were the records of my auctions held during the audit period." – Richard Marmor

Tax Exempt Buyers

Frequently, storage auction buyers are buying for resale and have sales tax numbers. They are exempt, i.e., entitled to buy without tax. The Auction Sales Agreement (see page 62) has a sales tax exemption at the bottom that should be signed by such buyers. However, ...

In order for YOU to not have to remit the tax from exempt buyers anyway, it is not enough to just have signed sales tax exemption forms. You must ALSO have a copy of the exempt buyers' sales tax licenses as well!

Make a copy and staple it to the exempt buyers' Auction Sales Agreement, or whatever you use as auction sales contracts.

Online Auctions

Three things are different if you utilize online auctions for your lien sales.

Notices to Tenant

Instead of including the time, date, and place of upcoming auctions, your pre-auction notices to the tenant should note that **“Contents will be auctioned off online at [www.\[auction website\].com](#). The sale will close on [date] at [time].”** (See “Pre-Auction Notices” on page 14.)

Inventory Photos

Take copious photos, and post as many photos as you can with your auction listing (see “Inventorying a Space” on page 24).

Terms of Sale

Remember that the tenant has a right to redeem—pay up and thereby stop the sale—until the moment of sale, i.e., the moment the gavel falls. Tenants who do redeem often wait until the very last minute to produce the money.

Now consider this scenario: A tenant shows up to pay and stop the auction of his things at the very last moment (as most of them do). The manager has to access the tenant’s account and post the receipt, then go online to the auction website, find the specific space being auctioned, and withdraw it from the auction. While all that was going on, the automated auction website closed and posted a successful sale of the contents to an online buyer. One way or another, someone is going to assert that their rights were violated, either:

- **The Tenant** will be angry because his things were sold despite his having produced the payment due, so he wants to sue you; or
- **The Buyer** is upset because he successfully bid and bought contents that are now being denied to him, so he wants to sue you.

The problem is timing. To ensure that there is always a gap within which a tenant can redeem without compromising buyers:

Be sure that your auction terms of sale
provide that no sale is final
until the buyer’s payment is received by you.

CONDUCTING AN AUCTION

Tips for Conducting a Good On-Site Auction

The Notice to Auction Buyers (*see Appendix: AZSA Forms*) and the list of to-be-sold vehicles (see “Hidden Vehicles” on page 51) should be posted and available for auction buyers to read prior to the start of the auction.

Always start the auction at the time indicated on the pre-auction notices that were sent out. Never start the auction early (see “When the Circumstances Change” on page 22).

Anticipate parking problems and direct the attendees to park away from the facility.

Always greet the attendees cheerfully and thank them for their attendance.

Ask everyone to complete Auction Sales Agreements (see page 62).

Point to the location of the dumpsters (if their use is to be permitted by you) and restrooms.

Use a 2nd individual to act as an in-office clerk and record keeper, and if possible, a 3rd person to assist you with:

- Opening and then relocking sale spaces;
- Running sales slips (see page 63) periodically back to the office;
- Sometimes making opening bids (see “When You *Should* Bid” on page 57);
- Unlocking spaces for buyers once they have paid for their purchases;
- Checking spaces after buyers have emptied them and issuing refund authorization slips (see page 64) for clean-out deposit refunds.

Plan your tour. Start the sale at the back of the facility and work your way to the front. Try to sell the smaller spaces first, leaving the larger spaces to sell last.

Before beginning, explain the rules and conduct of the sale, as suggested in the Auction Pre-Sale Announcements Sampler (*see Appendix: AZSA Forms*). The explanation should be clear, loud, and easy to understand.

Be in control of the crowd at all times. Try to keep them moving quickly, yet smoothly. Do not allow attendees to wander.

Allow everyone to look at the space. (For those unequipped, carry a flashlight for bidders to inspect dark spaces.) Once all have viewed, it’s time for “the call.”

Speak clearly and louder than normal. Use a rate of speech that is comfortable for you. Always remain respectful.

Close and relock spaces with *your* lock as soon as each sale is completed. Do not permit buyers to place their locks on spaces.

Tools

If you conduct your auctions yourself, AZSA provides some tools to make the task easier.

Auction Sales Agreement

AZSA created a special form, the Auction Sales Agreement (*Appendix: AZSA Forms*), to serve as a contract which you require auction buyers to sign as a condition of being allowed to bid at your auction.

AZSA strongly recommends that you use these agreements at your auctions.

Everything in it is designed to protect you and your interests!

These should be utilized whether you conduct your auctions, or you use the services of a professional auctioneer.

Here are just a few of the protections and tools it provides.

- **Release of Liability.** Your lease undoubtedly contains a lengthy provision under which tenants and their guests coming onto your property and entering spaces hold you harmless from liability for injuries. Yet, you invite many people onto the property to attend the auction and deal with purchased spaces. You need no less protection from them.
- **Clean-Out Deposit.** Auction buyers frequently are only after one or two items in a space. Left to their own devices, they will take those items and leave you with the balance of the contents. This provision affords you the option of imposing a deposit paid with the purchase money, to be refunded when the buyer shows that *all* contents have been removed.
- **Sales Tax.** Provision for adding and collecting legally mandated sales tax from the sale (see “Sales Tax” on page 58).
- **No Warranties.** Too bad if that big screen TV that you bid on turns out to not work.
- **Clean-Out Deadline.** When is it? What happens if the space is not cleaned out?
- **Inspection Limitations.** What’s allowed, what’s not?
- **Payment Terms.** What you will accept in payment; what you won’t accept.
- **Sales Tax Exemption.** For those buying for resale.
- **Hidden Vehicle Provision.** They’re not purchased, posted signs notwithstanding.
- **Protected Property.** Buyers duties as to any protected property discovered.
- **And much more.**

There is absolutely no downside in using the form.

Bidder Numbers

Use of bidder numbers is recommended. They provide a ready means of controlling who bids and for recording who has purchased which spaces.

The numbers needn't be anything fancy; 3-by-5 index cards on which you pen large numbers with a marker are sufficient. Use a colored card to prevent self-made numbers from being employed by bidders. Once a bidder has completed and signed an Auction Sales Agreement, take a numbered card off the deck, record its number on the Agreement, and give the card to the bidder to use in the sale.

Collect the cards from successful bidders when they pay for their purchases.

Clean-out Deposits

It is recommended that you impose a clean-out deposit that must be given in addition to the purchase price for each space purchased by an auction as a guaranty that the spaces will be fully emptied. The deposit is then refunded upon a showing that the buyer has complied.

Both the Auction Sales Agreement and the Auction Claim Form provide a box in which you can set the amount of the deposit.

Separate the Money

It is recommended that clean-out deposits collected from buyers be segregated from the other auction cash collected. For example, if your deposit amount is \$20 per space and you auction 10 spaces that day, then set aside the \$200 (10 deposits of \$20) in an envelope marked "Deposits." Pay the refunds from that segregated cash when the times come.

Auction Claim Form

This form keeps track of everything needed to document the sale (*see Appendix: Operations Forms*). In advance of your sale, prepare one claim form for each space to be sold, filling in the sale date and the space number. Stack the forms in the order that the spaces will be auctioned.

As each space is sold, record the bidder number and name of the successful bidder in the "Sold To" field and the amount of the winning bid on the claim form, then add your initials in the field labeled "Operator's Initials."

You can hold the claim forms until the end of the auction or have someone run finished forms back to the office periodically throughout the auction. In the office, be sure to record the amount of tax added, as well as any refundable deposit collected. When the bidder pays, sign the claim form but do not give the buyer a copy yet.

Place the claim form with the refund deposit into the envelope for deposits. This provides an easy way to track clean-outs and deposits. If you auctioned 10 spaces that day, you should end the day with 10 refund slips in the envelope.

When the buyer demonstrates that a purchased space has been appropriately emptied, initial the claim form, copy it, and give it to the buyer when you return the refund.

Hence, the Auction Claim Form serves as an individual receipt for each space bought and paid for.

Storage auction bidders frequently buy more than one space at an auction. Group each successful buyer's claim forms together and staple them to the back of that buyer's Auction Sales Agreement in your final paperwork. You then have a complete record of the transactions for that buyer.

Pre-Auction Announcements

It is important to set the ground rules at the auction. AZSA offers a recommended set of announcements you may use, called Auction Pre-Sale Announcements Sampler (*see Appendix: AZSA Forms*). They are time-tested and self-explanatory. One announcement element merits discussion here.

The Tenant Bidder

It is not at all uncommon for a defaulting tenant, or someone on behalf of that tenant, to show up at an auction with the intention of bidding and buying the contents of their space for an amount that is less than what is owed. *There is nothing illegal about that!* That said, consider these things:

- The self-storage auction process is just one remedy available to you in an effort to get yourself paid (see “Remedies for Default” on page 2), and you are not restricted to the use of just one remedy. Although it’s not always practical to do so, you may resort to as many remedies as you like until you are fully paid. So, if the tenant buys their space cheaply, you can still act.
- Self-storage auctions are not about the money! They are about getting spaces back into productive use. Besides, it is axiomatic that—TV shows aside—storage auctions fail to bring in what is owed anyway! Collecting 50¢ on the dollar is generally considered good.
- Self-storage is about being a landlord, not about selling people’s possessions out from under them.
- Auctions represent the single greatest exposure to liability, and are thus the greatest source of lawsuits, in the industry. It therefore makes great sense to avoid an auction whenever possible.

Accordingly, if you can convince a tenant to come forward, either in advance of the sale date or at the last minute, and make some kind of a deal, e.g., pay 50 percent of what is owed and vacate the space, *you are ahead of the game!*

The sample announcements offered by AZSA therefore include one last appeal for such a deal, addressed to the hidden tenant-buyer in the crowd.

“I used that announcement to tenant-buyers at all of my auctions. A surprising number of times, perhaps at one out of every two auctions, someone would step out of the crowd and reveal themselves as being there on behalf of the tenant or were themselves the tenant. Remembering that they were there to pay something anyway, I usually offered a 50 percent deal (sometimes less if the contents were problematic or likely to bring in little money anyway), paid that day, with a vacate-by-Sunday condition, with great success.” – Richard Marmor

Calling an Auction

Calling an auction is simple, and you need not try to speak rapidly like an auctioneer. Most people appreciate a moderate, understandable pace in your speech.

Begin the call by saying: “Do I hear an opening bid on this space?” (Often, opening bids will be whispered to you while viewing of the space is still going on.)

Once you have an opening bid, e.g., \$10, continue by saying, “I have \$10; do I hear 20?” Repeat the call, “I have 10; do I hear 20?” until someone responds. Then recognize that bid by saying, “I have 20; do I hear 30?” And so on. The larger the space, generally the larger the initial increments. For example, “I have 200, do I hear 250?” Then as the auction progresses, increments tend to shrink. E.g., if no one responds to the 250 ask, try a smaller jump: “I have 200, do I hear 225?” etc. Do not allow increments to shrink to tiny amounts, e.g., \$1 or less.

When no one responds, say, “I have \$200 going once (pause), \$200 going twice (pause), SOLD for \$200.” (Pausing allows some bidders to jump back into the bidding.)

Have the winning bidder display their bidder number. Mark that number and winning bid amount on the space’s sales slip. Do not give the slip to the buyer. Place it at the bottom of your stack of sales slips or have your helper run it back to the office.

Close and relock the space with *your* lock. DO NOT allow the buyer to apply a lock.

Before selling the final space, advise the crowd that it is the last one. Remind them that they must pay at the office. Be sure to thank them for coming and offer to keep their names to be contacted for future auctions.

Documentation & Record Keeping

Needless to say, documentation and record keeping are vitally important in defending yourself in court. At some point, some disgruntled customer will challenge your right to sell their belongings and your procedures followed. You could have done everything right yet lose a lawsuit because you could not provide proper documentation of compliance. Thus, having a well-documented file on the procedures that were followed, the attempts to contact the tenant, and the attention given to accurately following the legal procedures not only provides proof of compliance, often it will dissuade a tenant from even filing a lawsuit. **You should not sell a space that does not have complete documentation demonstrating that you followed the law.**

All documentation, especially legal notices, returned mail, lease agreements, and changes of address become your primary evidence when defending a lawsuit.

Keep all documentation regarding an auctioned delinquent tenant, even those documents from previous delinquent periods. Old delinquent files show a pattern of misbehavior and support your case that the tenant was aware of the consequences of nonpayment.

All auctioned delinquent account records should be kept off site and organized for easy access. Disgruntled or unknowing employees can destroy valuable legal records if left at the facility.

Questions regarding excess funds, account handling, and notification should be answered by your

supervisor/owner as applicable. Never send copies of an auctioned tenant's files without first contacting your supervisor/owner.

Filing Auction Documents

Most inquiries made by auctioned tenants are made long after the space has sold. Most former tenants do not remember their space numbers, but they certainly remember their names. Therefore, the best system for indexing auction records is alphabetically by last name. All records should be placed in an envelope and properly labeled with the customer's name, the space number, and date of the auction, plus the facility stamp. Give the envelopes to your supervisor/owner for filing, as applicable. If the filing system is computerized, the records can then be searched by the date of sale, customer name, and/or space number.

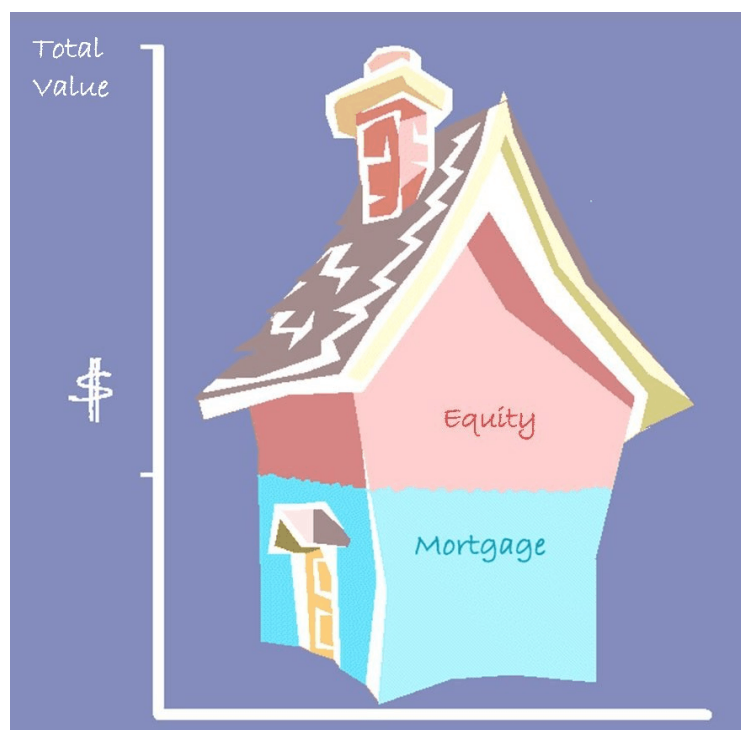
AUCTION PROCEEDS

IMPORTANT:

- **The auction process is a remedy.**
- **The goal is to be made whole.**
- **You may never profit from it!**

Tenant's Equity

Consider buying a home. You save money but not enough to pay for the house, so you get a loan for the balance and give the bank a mortgage to secure the loan. When you move in, the economics look sort of like this.



The blue portion of the house's total value is the bank's share—the money it put in.

The pink portion is your share—the money you put in. That's your "equity."

Over time, as you make monthly payments, the dividing line between pink and blue will slowly go down, as the blue portion shrinks and is replaced by pink.

At the same time, the value of the house will be increasing. The result is that the pink portion, your equity, will keep getting larger.

Were you to sell at any point, whatever is left of the blue portion will go to the bank. ALL the rest will go to you.

For a tenant's stored property in lien, the exact same situation exists! The blue portion is your unpaid rent claim. All the rest of the value of those contents is the tenant's equity. If those content are sold at auction, just like the bank and its mortgage loan, all you are entitled to is the blue portion.

Distribution of Sale Proceeds

The distribution of sale proceeds, as described below, may surprise you.

If a sale is held under this section, the operator shall distribute the proceeds in the following manner:

1. To pay all reasonable costs of sale.
2. To satisfy the valid claims of any lienholder or secured party not otherwise subordinated pursuant to section 33-1703, subsection A.
3. To satisfy the operator's lien.
4. To satisfy the valid claims of any record lienholder or secured party subordinated pursuant to section 33-1703, subsection A.
5. To the occupant on demand.
6. If the occupant does not claim the balance due to the occupant within 90 days of the sale, the operator shall pay the balance to the department of revenue.

[A.R.S. §33-1704(G)]

In other words, they go to:

- 1. You, but only for your reasonable costs of sale;**
- 2. Any remaining prior lienholder;**
- 3. You, for rents and fees;**
- 4. Tenant;¹⁵**
- 5. Arizona Department of Revenue.**

Prior Lienholders

If there is a prior lienholder, you will have contacted them and afforded them an opportunity to deal with the items subject to their lien (see "Dealing with Lienholders" on page 29). If such lienholders fail to come forward, that does not distinguish their lien rights. You can still sell the property, but sale proceeds will have to be sent to the prior lienholder, up to the amount of their unpaid lien.

¹⁵ The law provides that any holder of a lien subordinate to the storage operator's is actually fourth in line; however, that situation is extraordinarily rare.

Tenant's Claim to Proceeds

After the costs of sale, after any prior lienholder's claim, and after the storage operator's claim, whatever proceeds remain constitute the tenant's equity. It's the tenant's money.

Tenant Must Claim

The tenant has 90 days within which to ask for the surplus proceeds from you. *You have no legal duty to seek out the tenant in an effort to get the money to him/her.* That said, if you have the ability to contact the tenant, the nice thing to do would be to let him/her know that there is money available. It is also good public relations.

Arizona Department of Revenue

If the tenant fails to come forward and claim surplus proceeds within 90 days, then you must pay them to the Arizona Department of Revenue (Unclaimed Property Division). A tardy tenant can still claim the surplus proceeds from the Department of Revenue for up to two years after that. The storage operator is out of the picture at that point.

AUCTIONING LIENED PROPERTY

When tenant contents have liens against them, more often than not the liens are recorded against specific pieces of property, as opposed to all of tenant's stored property. Because prior lienholder's right to proceeds comes ahead of yours:

Always sell lienied property separately from other contents.

Therefore, sell the property subject to lien in one lot, and the balance of the contents in a second lot.

Two examples will demonstrate why.

Suppose you open a to-be-sold space and discover two vending machines.

After conducting a lien search at the Secretary of State's website (see "Finding Liens" on page 27), it turns out one machine has a \$500 lien recorded against it. The other has no liens on it.





Now suppose that you sell both machines as a typical sale, i.e., all of the contents in a single lot, for \$300.

The superior lienholder has a \$500 claim, so after deducting your reasonable costs of sale, you would have to pay *all* of the remaining sale proceeds to the prior lienholder.

You get to keep nothing beyond costs of sale.

Suppose instead that you first sell the machine that is subject to a lien as one lot, and it sells for \$100.

Then you sell as lot #2 the remaining machine with no lien on it, and it sells for \$200.

Since the prior lienholder's rights only extend to the machine on which they have a lien, after deducting your reasonable costs of sale, you must send the balance of the \$100 sale to the prior lienholder.



Because that lienholder has no claim to any of the proceeds from the sale of second machine, ***you get to keep all of those proceeds!***¹⁶

¹⁶ But not more than your claim for delinquent rents and fees, of course.

WHEN THINGS GO WRONG

Let's look at a couple of self-storage lien law statutes. First:

If the operator complies with this article, **the operator's liability** arising from the sale:

1. **To the occupant is limited to the net proceeds** received from the sale of the personal property.
2. **To other lienholders or a secured party is limited to the net proceeds** received from the sale of any personal property covered by that other lien.

[A.R.S. §33-1704(J)]

So, if you dot the "I"s and cross the "T"s of the lien sale process, a storage operator's liability is limited to the "net proceeds" from an auction sale. Whether that is a good or bad thing depends upon the definition of "net proceeds." There's a statute defining them.

"Net proceeds" means the total proceeds received from the lien sale less the total amount of the lien.

[A.R.S. §33-1701(A)(7)]

In other words, net proceeds—the limit of your liability if all the rules are followed—is:

The total proceeds from the sale

– The amount of your lien

Surplus Proceeds

Remember, the entire point of the lien sale process is to be made whole, *a storage operator may not profit from it* (see "Auction Proceeds" on page 66). So, the limit of liability here, the "surplus proceeds," is nothing more than the money which the storage operator is not entitled to keep anyway! It's the money owed to others.

BUT if the rules are not followed precisely:

Any person aggrieved by a violation of any provision of this article may bring a civil action. In any civil action brought for a violation of this article, **in addition to any award for damages, the court may impose a civil penalty not to exceed five hundred dollars** and may award reasonable attorney's fees and court costs.

[A.R.S. §33-1706]

A \$500 fine doesn't sound like much, but it's those other words, "in addition to any award for damages" and "attorney's fees and court costs," that could amount to *thousands* of dollars!

Self-storage tenants store junk, but they lose heirlooms!

– Marmor's Rules

Conversion

The Law does not like to see people lose their property, whatever the reason. Therefore, the lien sale process is rigorous. As a result, it is replete with legal pitfalls and potential problems. Because the law spells out exactly what procedures must be followed to be legal, it is unforgiving if those procedures are not followed.

Generally, if tenants decide to sue a facility, they sue under a "conversion theory." In the law, "conversion" occurs when someone is deprived of their property without a legal process having been followed. It doesn't matter that the person owed money at the time. If the legal process wasn't followed exactly, the property was sold illegally. The party that sold it then becomes liable for the value of the property at the time of conversion, *plus* compensation for the time and money necessary to replace the lost property, *plus*, in some cases, punitive damages, *plus*, generally, court costs and attorney's fees.

Texas Storage Facility Learns Hard Lesson

A tenant was late and inventoried for inclusion in the next auction. The tenant paid the past due rent; however, the manager failed to remove the space from the sale list. As a result, the space was mistakenly sold at auction.

When the mistake was discovered, the facility contacted the auction buyer in an effort to buy back the lost property, but the buyer had already sold it.

The tenant sued and won the case. The jury awarded the tenant over \$1.2 MILLION as follows:

Value of the stored property	\$70,000
Cost to repurchase property	35,000
Sentimental value of memorabilia	250,000
Exemplary damages	510,000
Attorney's fees	<u>346,000</u>
Total	\$ 1,211,000

Lease Liability Limitations

The AZSA Standardized Lease contains a provision limiting the total value of property stored by a tenant. Other industry leases ought to have similar common sense limitations.

But, **such lease limitations on liability are not bulletproof!** In some jurisdictions, courts have upheld them, but other courts have looked through them, so they are no guarantee against painful adverse lawsuit losses.

Insurance

It is therefore highly recommended that storage operators have and periodically review, with their insurance provider, their insurance for:

- Customers' goods legal liability coverage; and
- Wrongful sale coverage.

Sold in Error

It happens.

In the event, a storage operator does not have many options. The problem is that the fact that the property was sold by mistake does not obviate the sale; it nevertheless happened. The auction buyer does now own the property that was sold. A facility can try to:

- **Repurchase.** Try to buy back the sold contents from the auction buyer, even if that means offering the buyer a profit as an incentive.
- **Compensate the Tenant.** Try to arrive at an amount of money that the injured tenant will accept as compensation for the lost property.

Most Common Errors

The two most common errors committed by storage operators are:

- **Improper notification** (see "Pre-auction Notices" on page 14).
- **Undocumented changes of address** (see "Addresses for Notices" on page 16).

Foreclosure Sale Checklist

Failure to systematically approach lien sales can be costly! The best approach is to use a Delinquent Sale Checklist on each and every space that is to be sold (*see Appendix: AZSA Forms*).

Another good practice, if possible, is to have your owner or property manager review every file before a space is sold. A second pair of eyes can often find overlooked problems.

Try to Avoid a Sale

Take 50¢ on the dollar and a quick vacate and consider yourself to be ahead of the game (see “Pre-Auction Announcements” on page 64).

**Anything you can do,
any deal you can make,
that will avoid a sale of a tenant’s contents
is in your best interest.**

ABOUT THE AUTHORS

Carol Mixon Krendl, a well-known self-storage industry expert and owner of SkilCheck Services, has been involved in the industry since 1984. Carol worked as a corporate trainer for a large self-storage developer with 69 properties and trained over 200 managers. She has also owned and operated self-storage properties. An expert in the self-storage field, she has written many articles on a variety of industry topics, including a quarterly newsletter on sales and customer service. Carol is a speaker and trainer in high demand at industry events around the country.

On the national level, Carol has been active in the Self Storage Association for over 20 years. She utilized her degree in secondary education by being active on the Education and Membership Committees. Carol also served as President of the SSA's Western Region, Director on the SSA Board for over 10 years, and on its Executive Committee from 1998-2001. On the state level, Carol served on the California Self Storage Association Board of Directors and currently serves on the Arizona Self-Storage Association Board of Directors as Chair of the Education Committee.

Richard Marmor has been in the storage industry in the Phoenix area for over 30 years. He was the founding president of AZSA, and is its lobbyist at the Arizona Legislature, where he authored many of the self-storage industry's laws. An attorney, Richard co-authored the AZSA Standardized Lease. He is also the creator of most of AZSA's forms and much of the legal content on the AZSA website. Richard's book, Arizona Self-Storage Statutes Commentated, is available for purchase on the AZSA website.

Richard's legal contributions to AZSA are informed by his experience as a self-storage owner and operator of multiple properties for several decades. He is a regular speaker at the AZSA annual conference and educational workshops around the state, and his articles appear regularly in AZSA's newsletter, *Behind Closed Doors*.