Public Notice in Self-Storage

A winner for consumers, the industry and the public interest

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By **Tonda F. Rush** and **Sara DeForge Hough**,
PNRC co-directors

and
Jessica Conway-Ellis,
legal consultant

Carol S. Pierce,
editor

Gregory Glass,
copy editor/design

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Preface

The Public Notice Resource Center (PNRC) was established in 2003 under the sponsorship of American Court and Commercial Newspapers, Inc., to collect, analyze and disseminate information on public notice about matters of concern to the American public. It focuses upon trends and developments on this critical component of the public's right to know. Public notice through newspapers is required by all states and the federal government on public issues ranging from taxation to public body agendas and private transactions like foreclosure and self storage, where citizens are concerned about the safeguarding of public trust, community oversight and fair-dealing.

Today PNRC is also supported by the National Newspaper Association, the Newspaper Association of America and state press associations across America.

PNRC is the sponsor of the annual Public Notice Journalism Award which recognizes reporters and editors around the country for using public notices in stories that shape their communities and encourage civic involvement.

Tonda F. Rush is a lawyer and writer in Arlington, VA. She is president of American PressWorks, Inc., which manages PNRC. Her background is in the newspaper business and media law. She is a graduate of the University of Kansas Schools of Journalism and Law.

Sara DeForge Hough is an attorney in Fairfax County, VA, and has been practicing as a legislative lawyer for the past eight years. She is a graduate of Loyola University New Orleans College of Law and Saint Michael's College.

Gregory Glass is a lawyer and editor of several international intellectual property publications. He is a graduate of the University of Kansas School of Law and the University of Iowa.

Jessica Conway-Ellis is a consultant on public policy matters. She is a graduate of the University of Colorado School of Law.

Carol S. Pierce is vice president of American PressWorks, Inc. She is an educator by background and has extensive experience in association management. She is a graduate of the Universities of Tulsa and Arkansas Schools of Education.

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Executive Summary

The history of public self-storage is one built through consumer trust and shored up by checks and balances. Now a common sight in most American communities, public-storage facilities provide consumers with the flexibility of keeping prized possessions at relatively low cost when they run out of room in their own homes. Consumers storing property in public storage pay a fee for the safe keeping of their personal property. In return, consumers expect to reclaim the property in good condition. A lucrative self-storage industry has grown around this assumption of trust. But the arrangement does not always work as intended. Humans can make mistakes. Consumers can fail to pay. Facility owners can fail to live up to their obligations.

In today's law, public-storage facilities have the right to seize their renters' property and sell it all for a fraction of its worth when bills are not properly paid. No court or officer of the law is required. Renters must give away this right of sale when they sign storage contracts.

In the place of judicial oversight, lawmakers many years ago ordered personal notice to renters and public notice published in a newspaper to provide checks and balances against the power held by the industry. By providing this notice to the public, facility owners introduce transparency into a commercial arrangement that is otherwise one-sided. The notices improve the chances that, when personal notice has failed or the facility has grievously erred, an auction will be noticed by the public and any wrongs will be averted.

The public notice serves multiple purposes.

1. It provides oversight in lieu of a judge–who is no longer part of the process–to keep seizures and auctions from happening in secrecy.

2. It allows the public an opportunity to bid for property. A bigger market means more compensation for the consumer.

3. It notifies the friends and neighbors when a renter can-

not be found, increasing the chance that someone will reach the owner of the property before it is too late.

4. It provides one more direct notice to the consumer in a belt-and-suspenders system when notice by mail or email fails.

5. It gives a community, consumer advocates and interested neighbors an opportunity to act as private attorneys general, generally overseeing an important business in their community and permitting them to encourage best business practices as the facilities carry out their own business obligations to move beyond defaulting customers.

"The self-storage industry is fighting to eliminate this public notice."

Public notice is a triple win–for the storage business, the consumer and the community.

Independent surveys show that the public counts on newspapers to provide public notice.

But the self-storage industry is fighting to eliminate this public notice to the community. In state after state, the self-storage industry is arguing that the industry should further enhance its power over its renters by providing little public notice of a property seizure and auction, other than on a facility owner's own website. To concerns about few bidders showing up to provide fair value to the losing consumer, the industry responds "the owner may advertise the sale in any other commercially reasonable manner that is likely to attract at least three (3) independent bidders to the sale."[1]

Granting the industry's wish would reverse a half-century of transparency and consumer-oriented due process. The industry's thumb is already heavy on the scale of justice where its consumers are concerned. Eliminating transparency would add more weight that puts consumers at greater risk.

I. Public storage requires trust

For as long as humans have amassed more property than they could carry on their backs, they have needed a safe place to store their possessions.

The farmer in need of silos for grain, the merchant sending cargo abroad and the soldier storing his car while he goes overseas all seek the same assurance: the goods will be safe until claimed by the rightful owner. So when the owner hands off property to a trustee, he expects that at the end of the engagement, the property will be delivered to the right place, for the agreed price and in the agreed condition.

The concept of self-storage grew naturally from the highly mobile America created by the post-World War II generations.[2] According to the Self Storage Association (SSA), it began in the 1960s in Texas.[3] The key to the concept is that consumers rent their own space, install their own goods, access the storage unit as needed and secure it with their own locks.[4]

Today, Americans address their warehousing needs through ubiquitous self-storage facilities, where a renter can secure space that he

can load up himself and access at will, according to terms agreed with the owner of the storage facility. Founded on the principle that personal property can be handed off for safekeeping under a contract or agreement and that at the end of the contracted period, the property can be reclaimed by its rightful owner, public storage has become a multi-million dollar industry. Millions of self-storage contracts have been executed and happily concluded since the 1960s when the industry began. According to the Self Storage Association, an organization representing more than 48,500 U.S. self-storage facilities, the industry has generated more than $24 billion in annual revenues and is, "the fastest growing segment of the commercial real estate industry over the last 40 years and has been considered by Wall Street analysts to be "recession resistant" based on its performance since the economic recession of September, 2008.[5] The SSA reports that 2.3 billion square feet of storage space was used in 2013, a figure greater than three times the size of Manhattan, and approximately 21 square feet per American Household.[6]

"Self-storage grew from the highly mobile America created by post- World War II generations."

But a happy experience does not always occur. Life happens. The individual or company entrusted to keep the property safe can be negligent or malfeasant. Crimes and disasters affecting the storage location occur from time to time. And the person storing his possessions may not always fulfill his own obligations, such as making proper payments as agreed for the safekeeping. Sometimes the default occurs because of poor money management, but other things can happen as well. Divorces, lost ownership documents, military deployments and unnoticed changes in automatic debit or credit accounts can all throw the owner of the goods as well as the owner of the facility off the payment track. So the law has had to develop tools to assign the obligations and right the wrongs.

The burden is on the renter to protect himself or herself

There are relatively few obligations required of the owner of the self-storage facility other than to maintain the facility and maintain the possessions that are being stored in a similar condition as received.

Renters, on the other hand, shoulder the risk with no choice but to sign contracts giving facility owners the right to sell their property if rent is not properly paid. Contracts required by the industry may allow arrears to build up over a short period before the facility is allowed to empty a storage unit and put everything in it on auction. But the facility owner alone determines when that time period is up.

In theory, the proceeds from an auction apply first to the facility's back rent and cost of sales. After that, the balance generally goes to the renter. But since the renter has no control over the auction, the renter has no good way to assure that a proper price is paid.

For facility owners, the business model requires them to get a non-

performing unit emptied and ready to rent again. They have little incentive to promote high prices for the goods in an auction. Large returns do not benefit them. At most, they can recover the back rent and associated expenses for the auction. The rest of the money goes either to the renter or the state.[7] An auction ending in a price that renters may consider a pittance in exchange for their worldly goods should not be unexpected.

"Renters [must] sign contracts giving facility owners the right to sell their property."

Storage sales have become a great venue for bargain hunters, who avidly follow the public notices for tips on upcoming sales.

Nowhere is the joy of the discovered trove more visible than in the reality television show *Storage Wars*.[8] The drama is presented by professional buyers who are required to assess the value of an entire storage unit after a 5-minute inspection and outbid competitors to win the prizes. Were the point of the sale to get the highest price created by highly competitive bidding, there would be no drama.

Some would say the loss of the personal property is the price paid by the scofflaw. The renter should have paid his bills.

But sometimes with the best intentions of all involved–the renters or their family and friends with property in the units and the facility owners and their staffs–things can go badly awry. Because the price of failure of the trust relationship is so high for the renter, the public notice is designed to help tip the balance back toward the renter. After all, the renter stands to lose everything in the unit for only a small compensation. Giving the renter the benefit of maximum public notice is only fair.

Scofflaw or victim?

Of course, debts should be paid. Without faithful rent-payers, the storage facilities would soon be out of business.

And indeed, unpaid debts may be the product of careless or indifferent consumers. But that is not always the case. The vagaries of life can lead to mistakes.

Sometimes the property winds up in the wrong place – Dubey v. Public Storage[9]

Vartika Dubey was erroneously led by the storage facility staff to place her goods in the wrong unit. Although she had faithfully paid her monthly rent, the true renter of the unit she occupied failed to pay his bill and her items–including irreplaceable items like photographs of her children–were auctioned off without her knowledge at a price far less than she thought they were worth. At trial, the evidence indicated that an employee of the facility had later noted the erroneous unit assignment, and changed the number on the contract, but Dubey was not notified of the change. Dubey ultimately won $1.2 million in damages, which included $952,000 in punitive damages.[10]

Because her name was not listed on the contract, damages were granted only to her husband.

Sometimes the personal property owner is not the one who signs the contract – Milwicz v. Public Storage[11]

Leslie Milwicz found no recourse after the sale of her possessions without notice because her name was not listed on the contract with the self-storage facility. Instead, damages were granted only to her husband. She and her husband sued a public-storage facility that they said had sold all of the Milwicz's possessions, including some irreplaceable items, with no notice. The Milwiczs challenged the storage facility's boilerplate contract, arguing the contract itself was flawed. The contract disavowed any responsibility for loss of or damage to property. A California appellate court set aside the contract, but allowed the trial court to consider the damages only to Mr. Milwicz because Leslie had not signed the agreement. So Leslie lost her property and got no court award either.

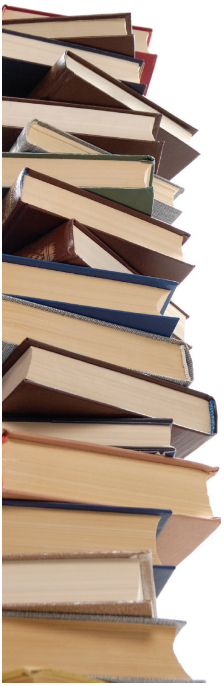
Sometimes the right owner is not found at all before the auction – Cook v. Public Storage[12]

Zachary Luckett successfully recovered his losses when a facility sold all of his possessions for $660 after a notice of default and a notice of lien and sale were returned as undeliverable. Luckett signed a contract with a self-storage facility in Wisconsin where he and his parents stored household items in preparation for his parents' retirement, at which time they expected to move out of the state.

The facility alleged that the rental fees had been consistently late, but the court found they were paid in full during the month of the facility's auction. Luckett and his parents contended that they had had no notice of the auction. It turned out that the facility staff had mistyped the address Luckett had provided to them on the original contract and then failed to update the address after he moved and provided notice to the facility of the new address. The staff had mailed notice of the auction to Luckett, but the notice came back marked undeliverable. The bounced notice did not cause the facility to change its plans for auction. A jury awarded punitive damages of $100,000 in addition to compensation for the $19,000 worth of goods.

Sometimes credit cards get mixed up – Griffith v. PS Illinois Trust[13]
An Illinois couple was awarded nearly $200,000 under the state's fraud and deceptive business practices act after a storage facility failed to give notice of an impending auction despite the good faith efforts of the renters. Cy and Maria Griffith repeatedly tried to pay the storage facility with an automatic payment on their credit card. When their card was lost, they went to the storage facility with the replacement account number. When the Griffiths were told they were in arrears for failure to pay, they returned to the facility to pay the past-due balance with a penalty. Despite their best efforts to pay, they were served with a lien notice. Once again, they visited the facility to pay up and again made arrangements for rentals to be debited to their credit card. Three months later, they noticed the payments were still not being debited, and Maria Griffith visited the facility to find out what went wrong. This time she learned their possessions had been auctioned off, including valuable curriculum materials, poetry and some 800 childrens' books that Maria had planned to use in her work as an educator of teachers.

At trial, the court noted that a second notice had evidently been prepared after the auction and simply placed in a file. Neither of the Griffiths had received it. The court brushed off the storage facility's presentation of a contract that limited the value of stored property to $5,000. The court said: "In applying the facts within the record to the unfairness factors outlined above, we find clear support that (the facility's) conduct was unfair and even baleful in its remorseless attempt to deceive its customers."



Sometimes people violate the law – City of New York and Safeguard Properties
After a month long investigation, over $550,000 in counterfeit goods was seized from a self-storage facility in New York City. As a result, the city filed a nuisance abatement suit against Safeguard Self Storage to prevent any further criminal activity. Safeguard responded by agreeing to work with the city to create stron-

ger guidelines that would be adopted by their 14 existing locations in the city, and any subsequent locations within the five boroughs of New York City and to be ultimately used as a standard for the industry. Among the terms of the agreement is the requirement that Safeguard facilities include in their rental agreements the stipulation that Safeguard will have access to a renter's unit at any time without prior notice in the event that the facility has a reasonable belief that an act considered to be a nuisance, such as storage of illegal goods, is taking place.

Robust public notice heightens community awareness.

In an era when contraband materials in a storage unit may mean criminal enterprise, terrorist plots or environmental hazard, the value of sunshine in an otherwise closed corner of consumer transactions could be an important element of community policing. The new rights and obligations imposed by the state upon facilities gives rise to questions about increased unilateral control by facilities, the possibility that contraband could be quietly removed through a closed sale as well as the chance that a facility may become a repeated focus for criminal activity, whether with the facility owner's awareness or not. Robust public notice heightens community awareness.

Sometimes bad things happen to good people – Consumer Affairs[14]
Numerous examples of problems that arise in the self-storage world are reported on the Internet and in social media. Obviously, problems do not arise in every instance of self-storage use nor is there a suggestion that the industry in general is not acting in good faith toward its customers. The Internet is full of postings from industry participants concerned about doing the right thing. But sometimes things just happen–like this complaint about sold property on a website that calls itself Consumer Affairs:

> *My boyfriend and I decided to rent storage …because we went overseas. Before we left, we had asked about a way to pay internationally and they said we COULD PAY ONLINE THROUGH THEIR WEBSITE. GOOD! We went over-*

seas and we paid for the first few months. At the end of October 2013, the website was down and I had no access to my storage. My boyfriend and I tried to call and email them so many times in 2 months but we never got any response. ...[15]

Another hapless renter fell behind on her payments but was assured by a worker at the storage facility that he would "work with her." In her words:

A renter fell behind but was assured that the storage facility would 'work with her.'

> *…I fell behind on the payments, but did send paperwork to the locale named above and asked them not to auction my things… Mr. ___told me over the phone that he would work with me so that I would not lose my things.*
>
> *However, apparently during that time, after I had spoken with Mr. ___ at the locale and asked him not to auction my things because there was a lot of identifying paperwork with social security numbers, bank info, pictures, etc etc and that I WOULD PAY he went ahead and auctioned them.*[16]

Another renter said she became ill and fell behind on her payments, although she stayed in touch with the facility owner. She tried to pay online, but couldn't. Then she was ill for two months.

> *…However, it never even crossed my mind that without giving me any chance to pick up my things, they would auction all of them for an undisclosed amount. The amount of rent I had fallen behind amounted to 106.00…. I told (the manager) that I would willingly pay the ridiculous charges on my account…if he would not auction my property. He said he couldn't promise, but he would do all that he could. Knowing that there was nothing forcing him to sell my things, I thought they would be there the*

next day. I called to pay …only to find that they had supposedly sold $18,000.00 worth of property for $200.[17]

She said she received no notice by mail of the default and auction.

All of her belongings had been sold despite a bill showing a zero balance.

Sometimes the facility just messes up

Despite paying a late fee and the assurance from the facility that her bill was paid through the end of the month, Deborah Gourley found all of her possessions, stored after her husband died of cancer, had been sold.[18] Although Gourley was late with two payments, she went to the facility to explain her situation and pay all necessary fees.[19] She was assured by the staff her goods were safe and was able to view her possessions still in the storage unit.[20] However, when she returned at the end of the month all of her belongings had been sold at auction despite a bill showing a zero balance and all late fees waived.[21]

Another renter found out about an error through the newspaper notice. Unfortunately, she was too late to reclaim her items. But without the notice, she might never have learned what happened:

Today I was shown an ad that was posted in our local paper stating that my storage unit would be auctioned on March 29 2012 because of monies due. I called to confirm the amount owed so I could go and pay it and was informed that they had already auctioned off my unit. They said a mistake was made with the date of sale and there was nothing i could do about it or anything they can do. What can I do-every picture and home movie of my children, including all of my baby daughter who has passed were in that storage and cannot be replaced. Help me please. [22]

Clearly not all auctions are the result of bad people who do not meet their obligations.

The facility deserves to be paid a fair price for its services. But does the consumer deserve to lose everything when something goes wrong?

That is where the law must step in to strike the right balance between consumer rights and the rights of the storage facility. An important element of this balance is full and vigorous personal and public notice.

Where did that concept of balance come from? It begins with the laws of bailments and liens.

II. Self-storage law

The law of trust: bailments and liens

The legal framework for American self-storage law rests upon the concept of bailments. Scholars say the concept of bailments is found at least as far back as Roman law[23] in a principle called "Pignus."[24] Roman "pignus" was a security interest in which only possession of an item was transferred, with no other property interests included.[25]

The bailment is the safekeeper's right to the certain powers over the property when he takes possession.[26] The right is created by a contract, and the evolution of the common law had given the safekeeper, or bailee, the right to sue a third party or even the bailor or owner.[27] A bailment applies only to chattels, or moveable property.[28] It is a right usually executed in modern law with a "lien."

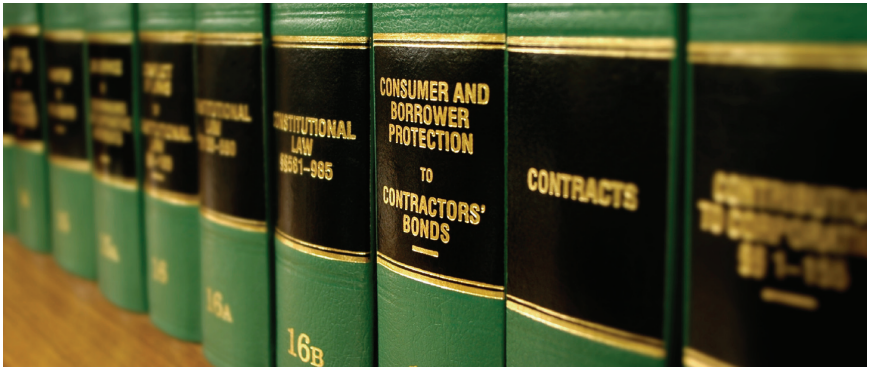
A lien is a "possessory right and depends, for its validity and enforcement, on the *actual possession* of the property by the lienor."[29] The lien gives the possessor the ability and right to continue to hold on to the chattel and keep it under his control until the owner performs his obligation under the agreement.[30]

Most Americans have experience with liens. For example, liens are granted as a condition for a car loan, where the bank has the right of ownership to the car in exchange for granting a loan for the purchase. If the car buyer fails to pay the bank loan, the lien is executed and the car is repossessed. In the storage context, a storage facility holds a lien on a renter's personal property until the bill for storage is paid and the rightful owner reclaims the goods.

Under the common law, the law created by judicial precedent, when a warehouse owner was not paid for his storage, he could hold the goods, and after a stated period of time, sue for a judicial decree ordering a sale.[31] The proceeds would repay the rental fees.

Bailments and liens in modern law

Hosts of situations where contracts for bailments could be established as modern American business grew and matured over the



Republic's 238-year history. A grain-storage facility, for example, could take a bailment on the grain stored, cementing the facility owner's expectation of payment when the grain was removed or sold. A warehouse could take a bailment when it received goods to pass along the supply chain for later sale at retail, on the expectation of payment when the goods proceeded to an ultimate owner.

In the early 1950s, the Uniform Commercial Code (UCC) was introduced to standardize the law across the states.[32] The UCC was created to smooth the flow of commerce between the states by harmonizing the rules of sale and transactions. Adopted, in part, by all states by the mid-1960s, the UCC continued the concept of the warehouseman's lien for providers of storage services. Common law regulation of warehousing was gradually replaced by regulation under the UCC as the states adopted that model code.

The UCC, in most states, made a significant change to the traditional warehouseman's lien by bypassing the oversight of a court and allowing facility owners to proceed from a payment default directly to the auction of goods. The extension of the right to automatically execute a specific lien on the goods was conditioned upon proper notice to the public through a local newspaper and fully-performed notification to all parties known to have an interest in the goods for sale, in addition to observance of other due process requirements.[33]

The requirement for a public notice before the renter's goods can be sold remains in many state laws today.

III. The Self-Storage Facility Act – The industry's answer

For consumers using the popular and relatively new option of self-storage–such as the ones recognizable by the unique orange and purple logo of Public Storage, Inc.–the tradition of warehouseman's laws and liens is important. Like warehousemen under the UCC, today's self-storage facility owners have the right to seize a consumer's property and sell it to retire rental debt. But unlike the warehousemen, today's self-storage facilities do not need a court's permission to seize and sell property.

Today, a few states still regulate types of consumer goods storage through the UCC or older warehouseman statutes. But in the 1980s, a new regulatory regime began to arrive in state capitals. It was called the Self-Storage Facility Act.

In the view of the SSA, self-storage facility owners do *not* actually take a bailment because the facility does not assume custody and control of the property. It prefers to think of its business model as a real estate venture, where space is let for use. In *An Introduction to Self Storage*, SSA says:

> *Self storage was born without a legal status. Because individual storage units are rented or leased and the facility operator does not assume "care, custody or control" of the goods stored, self storage is not classified as a warehouse operation. On the other hand, the traditional landlord/tenant relationship between an apartment house owner and his tenant, is not workable in most jurisdictions because of the expensive eviction procedure and time consuming court process which must be used in dealing with delinquent tenants.*[34]

The courts do not always entirely agree with the industry's view. Courts sometimes impose heavy obligations upon facility owners when they believe injustice has been done.

Public storage legal status in its infancy – Public notice takes center stage

The recognition of public notice as a procedural protection for tenants grew as the new public storage industry grew.

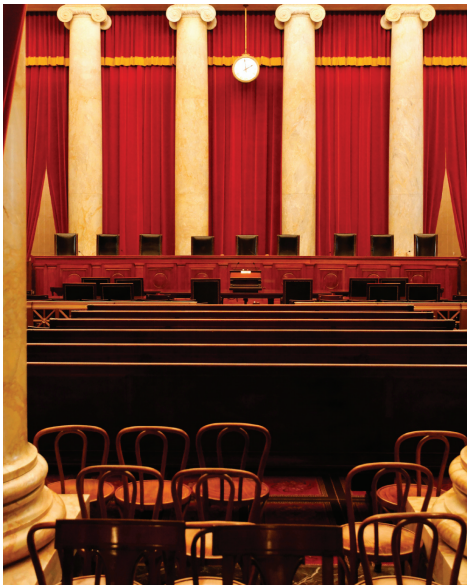
In the late 1970s, consumers who had lost personal items in a storage auction began to clamor for recourse against facility owners who had been granted the authority by the legislatures to go directly to auction without prior judicial oversight. Plaintiffs argued for damages under the general federal civil rights statute, 42 U.S.C. 1983, which provides a remedy in monetary damages for civil rights violations by government officials or those acting under government power.[35] Plaintiffs claimed that facility owners were exercising state powers through their auctions. Plaintiffs claimed not only the loss of the goods but the loss of civil rights from the exercise of state power when goods were sold.[36]

In the 1970s, consumers began to clamor for recourse against facility owners.

That use of Section 1983 opened the door to consumers who lost their property for damages that would far exceed the value of the auctioned property. When a finding by the influential U.S. Court of Appeals for the Second Circuit allowed the Section 1983 claim,[37] the industry was facing significant financial exposure. The industry fought for the U.S. Supreme Court to settle its legal status and reduce the risk.

The landmark case finally came in 1978 from the Supreme Court in *Flagg Brothers, Inc. v Brooks*.[38] Brooks and her family had been evicted from an apartment in Brooklyn and her personal property placed in self-storage by the city marshal.[39] Although she argued that the storage price was too high, she permitted the marshal to proceed.[40] When she failed to pay her bill, the facility owner put her property into auction.[41] Although her items were eventually returned to her, she claimed monetary damages in a Section 1983 lawsuit.[42]

The Supreme Court rejected Brooks's argument that by empowering the facility owner to dispose of her property at auction without oversight of a court, the state had turned the facility owners into the equivalent of government officials.[43] Though Brooks had said the right of auction was a delegation of judicial powers to the facility owners, the Court disagreed.[44] Brooks, the court said, had ample opportunity to use the judicial system on her own behalf to regain her possessions.[45] The Court said in an opinion by Justice William Rehnquist:



"There is no reason whatever to believe that either Flagg Brothers or other respondents could not, if they wished, seek resort to the New York courts in order to either compel or prevent the "surrenders of property"… The fact that such a judicial review of a self-help remedy is seldom encountered bears witness to the important part that such remedies have played in our system of property rights. This is particularly true of the warehouseman's lien, which is the source of this provision in the Uniform Commercial Code which is the law in 49 States and the District of Columbia. The lien in this case, particularly because it is burdened by **procedural constraints** *(emphasis added) and provides for a compensatory remedy and judicial relief against abuse, is not atypical of creditors' liens historically, whether created by statute or legislatively enacted. The conduct of private actors in relying on the rights established under these liens to resort to self-help remedies does not permit their conduct to be ascribed to the State."*[46]

In other words, the facility's right to sell the property without going to court was not an exercise of government powers, but was simply part of a commercial transaction. If Brooks had wanted to stop the sale of her property, it would be up to HER to go to court to halt the sale. A strong dissent by Justice Thurgood Marshall accused the Rehnquist majority of indifference to the poor.[47] He noted that Brooks' take-home pay was $87 a week, making it unlikely she could absorb the costs of going to court to block the sale.[48]

The key to the Court's ruling for the industry was its belief–whether right or wrong–that the "procedural constraints" in the UCC provided sufficient consumer protection to renters. Public notice is one of those procedural constraints.

The self-storage industry saw itself as neither warehouse owners nor as landlord.

After the ruling, the risks to the self-storage industry were minimized. Without the threat of civil rights damages, cases were mostly reduced to contract disputes about the value of the auctioned property. In the months leading up to the Brooks ruling, the ambiguity of the law led storage facility owners to seek their own statutory rules from state legislatures.

Because the industry saw itself as neither warehouse owners nor as landlords, it borrowed some concepts from each of those areas of the law to design its own model legislation to govern storage, seizures of property and auctions. Among the concepts was the UCC requirement for public notice.

States adopt the Self-Storage Facility Act

The Self-Storage Facility Act began with the statutory framework from UCC Article 7 that provided a non-judicial process for converting ownership of items in a storage unit from the renter to the facility owner when the storage rent was not paid. Typical provisions include:

1. The facility owner acquires a lien on the property when it is placed in storage.

2. The renter agrees to a set fee due on a specified date, and if the payment is not made the facility owner may lock the renter out of the unit and proceed quickly to notifications by mail of non-payment.

3. The renter may have as few as 14 days to make good on the payments, after which the facility owner is entitled to move the property out of the unit and prepare for its sale, freeing up the unit of the defaulting renter to go back onto the market for the next customer.

4. The facility owner then is required to place a public notice in a local newspaper announcing a sale of the goods, describing the inventory, the address of the facility and the name of the tenant, as well as the time, place and manner of the impending sale; a prescribed number of days later after the first public notice, the sale can occur.[49]

Under the Act, less than a month after the default the facility owner is entitled to seize the goods and sell them. The tenant is allowed whatever proceeds are left after the back rent is paid and the costs of the sale are covered. If the tenant fails to claim the proceeds, the balance–if there is any–goes to the state treasury under escheatment laws.[50]

IV. The Importance of public notice

Why public notice is crucial to self-storage law

When a consumer signs a storage facility's rental contract, he or she is accepting terms that have been shaped by the self-storage industry by years of legislation and litigation. Hardly in a position to negotiate terms better than the standard agreement, the consumer is agreeing to give the company the right to seize his possessions and sell them for a fraction of their value if something goes wrong and the bill is not paid.

Because the renter is at such a disadvantage in the contractual process, legislatures have deemed public notice crucial to ensure transparency and balance in the process.[51]

The public notice serves multiple purposes:

1. It acts in place of a judge to keep seizures and auctions from happening in private.

2. It allows the public an opportunity to bid for property. A bigger buyer's market means more compensation for the consumer.

3. It notifies the friends and neighbors when a renter cannot be found, increasing the chance that someone will reach the owner of the property before it is too late.

4. It provides one more direct notice to the consumer in a belt-and-suspenders system if and when notice by mail or email fails.

5. It gives a community, consumer advocates and interested neighbors an opportunity to act as private attorneys general, generally overseeing an important business in their community to encourage best business practices.

The importance of the citizen as a backstop to due process is often under-valued. In the course of business, the staff of a self-storage facility may not pay attention to what is being sold in an auction.

But a sharp-eyed citizen might notice a red flag. The checks and balances the public notice provides ensure the process is balanced for all parties.

Public notice under siege: how public notice laws on self-storage are changing

Websites today are as ubiquitous as they are obscure. Best estimates of how many exist are elusive, but it is safe to say there are millions if not billions.

Consider how many websites you actually visit in a day, and then how many you never see. This illustrates what a community is up against when a self-storage facility decides it wants to provide notification of its auctions only on its OWN WEBSITE. Chances you would see it? Slim, if at all.

But state lawmakers are being asked to allow the industry to do exactly that. Claiming that public notices in newspapers do not make people any more likely to pay their bills, the self-storage industry says it should be able stop actually notifying the public when it seizes property and puts it up for sale. A listing on the company's own website is all it should have to do, the industry claims.

However, getting the bill paid is only one purpose of a notice. In the interest of cutting costs, the industry may not be giving full consid-

eration to its own interest in transparency, let alone the concerns of the consumer and the public. But policymakers and stakeholders must consider those concerns. They must remember the friends and neighbors–or even a co-renter who is not on the rental contract–who might spot an auction notice that a renter missed, and save the belongings before it is too late.

They must consider that a wider notice can help bridge the gap when the mailed (or emailed notice) fails.

Most of all, they must be aware that the public notice came into being when the courts were eliminated from the process. The public notice was part of the procedure the Supreme Court was counting on when it ruled in *Brooks*.[52]

Public notice through newspapers bridges the gap when the emailed notice fails.

Without a public notice in the newspaper and without a judge in the auction process, who would be left to oversee the fairness in the storage business?

Additionally, the self-storage industry has successfully lobbied in many states to, in lieu of newspaper notice, permit notice in a "commercially reasonable manner" which is presumed to have occurred if three or more independent bidders attend the sale.[53]

However, this type of notice eliminates the original intent of the legislature and judiciary ensuring notice to the original owner and to the larger community and instead easing the process for those who are simply seeking lower costs of doing business.

One blogger and storage auction buyer advised those new to the business to avoid auctions published in a newspaper because they are too well attended and therefore too difficult to make a profit:

> *If you are new to the storage auction scene, allow me to give you some advice that will save you a great deal of*

time and money. If you are an experienced storage auction buyer, you already know what I am about to tell you. The auctions listed in the business newspaper mentioned above are swarmed with new buyers due to the popularity of the storage auction reality shows on television. Most of these highly publicized storage auctions have 50-100 more people in attendance and it has become more difficult to buy a storage unit at a reasonable price. If you want to make money in this business you have to get off the beaten path and avoid the crowds.[54]

This buyer's eagerness to avoid the competition from other buyers exactly makes the point for greater notice. It is more fair to the owner of the property being auctioned. The intent of the public notice is to be noticed. Here, the public notice in the newspaper is clearly working to accomplish this goal and should be protected.

Why public notice of self-storage belongs in newspapers

Upfront, it is important to state that newspapers are paid to publish the notices. The prices may vary by market. But a typical storage notice in a local community newspaper would cost as little as $50-$100 depending upon its length, according to American Court and Commercial Newspapers, Inc., an industry group that specializes in public notices.[55]

Some storage owners may prefer to save the money–even though they are permitted to recoup the cost from the final sale proceeds.

What can the obscurity of a facility's website cost the consumer or the public? What can it cost the industry's reputation?

The public believes public notice should be in newspapers

In surveys across the country, citizens say newspapers are the place they want to look for public notices.

A 2011 study by independent research company, American Opinion Research, for the Ohio Newspaper Association found that "…53 percent of Ohio adults said newspapers are the preferred source of public notices…"[56] In North Dakota, the newspaper association's *Publisher's Quarterly* states that 84.2 percent of their readers believe that government legal notices should be posted in the newspaper, and 70.2 percent indicate that they would *not* access a government website to view a legal notice.[57] A 2013 survey conducted by an independent third party for the Minnesota Newspaper Association indicates that "78 [percent] of Minnesotans believe keeping citizens informed by publishing public notices in the newspaper is an important requirement."[58] Additionally, voters in Michigan have continued to go to the polls to uphold public notice. Municipalities

have put the issue on the ballot for the last several years and found the voters prefer the newspaper in every example except the city of Novi and the city of Ann Arbor, which had recently lost its daily newspaper,[59] where the voters elected to give the municipality the choice on where to place the notice.

Readers look at public notices on a frequency ranging from "very often" to "sometimes."

In small communities, the population relying upon newspapers for public notice is even higher. The National Newspaper Association's 2013 Readership Survey by the Center for Advanced Social Research at The Donald W. Reynolds Journalism Institute, University of Missouri-Columbia, found that a majority of readers look at the newspaper public notices on a frequency ranging from "very often" to "sometimes."[60] When asked how often they visit another relatively obscure type of website–those of local governments–74 percent said NEVER.[61]

The public trusts the content in a newspaper. A recent report from the Nielsen company found that 67 percent of respondents trust editorial content such as newspaper articles and 61 percent of those polled trust ads in newspapers.[62] Conversely, only 42 percent of respondents trust online banner ads.[63]

When the public regularly reads stories of stolen computer data, malicious computer viruses and scams,[64] is it any wonder that they believe the traditional newspaper is the best place to put notices? Even the popular social media site, Facebook, is not immune to disruption, having faced a worldwide shutdown in June 2014. [65]

Though newspaper readership may be changing, particularly with larger newspapers, the readership still is strong. A sheriff in South Carolina attested to that truth when he found the printed newspaper remains an important channel of communication to his citizens. The sheriff, seeking to clear a backlog of old arrest warrants, pub-

lished notice in either the local newspaper or on the sheriff's website.[66] The result was an overwhelming 7 to 1 response in favor of the newspaper.[67]

In fact, newspapers have been the historical territory in which the public finds public notices. Newspapers provide a venue that is easily accessible, hard to hack into or change, and well-preserved for later research. And most of all, they are independent of whatever entity is being required by the law to provide a public notice, helping to counter the possibility that a self-interested body not much inclined to draw attention to itself might give in to that inclination. The job of a newspaper is to help to inform the public, and public notices fit neatly into that mission.

Newspapers provide a venue that is accessible, hard to hack and well-preserved for later research.

Newspapers are digital and reach the public

The digital age may raise questions in some minds about the use of print as a medium for notification. But most newspapers also post their public notices online through their own associations, which aggregate all of the notices in a given state for the public to peruse. *See for example http://www.pnrc.net/find-a-notice/.* In those arrangements, the consumer has the benefit of the bargain in two ways: the permanence, authenticity and accessibility of a recognized newspaper with the easy indexing and digital convenience of the Internet.

Newspapers offer transparency and objective oversight

Although most laws requiring notice in the newspaper are as old as the reliable media they count on to provide transparency, recent courts have upheld publication by newspaper as a legitimate tool for the government to use to promote transparency.

The most relevant case to come about in recent years, *Fisher v. Rutherford County Regional Planning Commission*, heard in the Chancery Court for Rutherford County, Tennessee, centers on the proposed construction by the Islamic Center of Murfreesboro (ICM) of a mosque in Rutherford County.[68]

The ICM purchased a piece of property for the mosque, submitted a site plan to the County and the planning Commission reviewed and approved the plan at a meeting advertised in the newspaper and available for public view in the planning office.[69] However, a group of county residents filed suit against the Commission arguing the approval of the site plan was invalid because there was inadequate public notice.[70] After the residents were found to lack standing, the *Murfreesboro Post*, the publisher of the public notice, intervened as a named plaintiff in the suit to argue its newspaper was an appropriate and legal venue for the public notices in that county.[71]

At trial, the chancellor had ordered the county to use its public access TV channel and website to provide public notice.[72] However, on appeal the Tennessee Court of Appeals found that publication of the newspaper notice was most appropriate because it was widely circulated to the general public, was the customary location for

county planning commission notices, and any interested person would be able to obtain a copy of the notice either in print or on the newspaper website.[73]

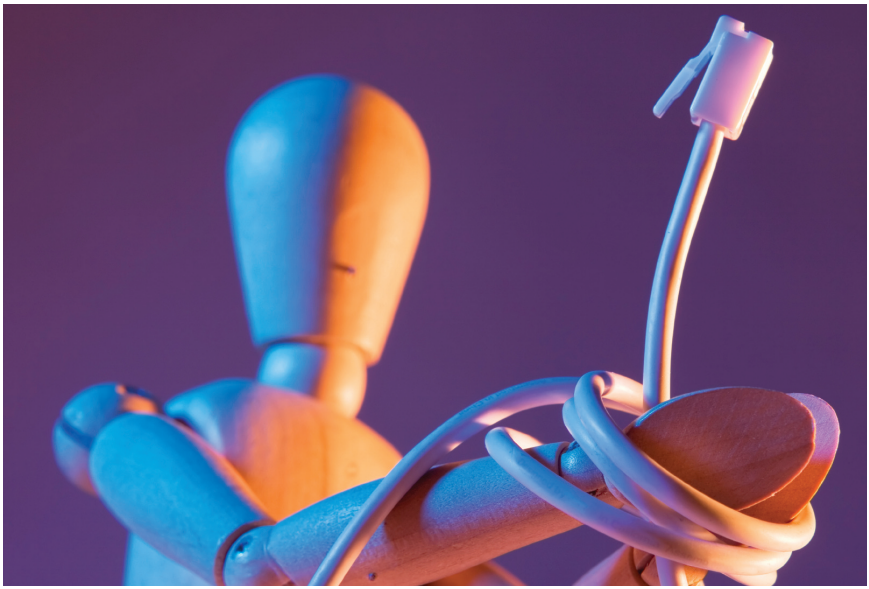
The U.S. Supreme Court declined to hear the appeal of the Murfreesboro citizen group.[74]

Archivability of newspapers ensures notice is provided, which benefits both renters and owners

Newspaper publication has traditionally been and continues to be the best way to archive public notices. A trustworthy record of public notice is a protection for the owner from claims that the auction was performed without notice. For the renter, it can provide recourse if notice failed or was not given.

The law requires newspapers to comply with myriad requirements to qualify as official record publications. And the issues are archived at the newspaper office and at state and local libraries. Affidavits are used to prove notice was given.

In the electronic world, archivability of documents is beginning to



take shape, but has not been an easy process. Many states are beginning to adopt the Uniform Electronic Legal Materials Act (UELMA).[75] According to the American Association of Law Libraries, "UELMA provides a technology-neutral, outcomes-based approach to ensuring that online state legal material deemed official will be preserved and will be permanently available to the public in unaltered form."[76] The Library of Congress works alongside an international coalition of archives and libraries to archive websites using an open source web crawler,[77] however, even with the Library's resources, only a fraction of sites of captured.

Electronic archivability is taking shape, but it has not been an easy process.

Few web sites are capable of providing a complete and authentic electronic record. Unlike a newspaper that provides a hard copy of a document, creating a permanent copy of an electronic website is much harder.[78] Often accessibility of the website is the biggest stumbling block.[79] Without the ability to archive the notice, due process cannot be ensured.

If public notices reach the public, everyone benefits

It isn't surprising that many segments of the U.S. population count on newspapers exclusively for their information, including for public notice because much of America still does not have Internet access.According to the Census Bureau, 30 percent of Americans do not use the Internet at home.[80] Similar results were found in a joint study by the Department of Commerce and the National Telecommunications and Information Administration (NTIA).[81] According to the Federal Communications Commission, 19 million Americans lack access to broadband, with 14.5 million of those living in rural America.[82] Fifteen percent of those 18 and over simply don't use the Internet, according to the Pew research center with most just expressing no desire to go online.[83]

Contrary to popular opinion, the data show that not everyone is online.

The Self Storage Association reports that 47 percent of all self-storage renters have an annual household income of less than $50,000 per year.[84] The Pew Research center finds that only 54 percent of those whose income is less than $30,000/year have a broadband connection at home.[85] For those who make between $30,000 - $50,000/year, the percentage who have broadband increases to 70 percent.[86]

So, the population that may be most in need of public storage, because of loss of their homes, a requirement to move to find work or simple inability to afford storage in their own houses, may overlap considerably with those who do not have meaningful Internet access. An Internet notice letting them know their property is about to be sold simply will not reach these non-Internet users.

Newspaper public notice for the self-storage industry has stood the test of time.

Newspapers have been the historical territory in which the public finds public notices. Newspapers provide a venue that is easily accessible, hard to hack into or change and well-preserved for later research. And most of all, they are independent of whatever entity is being required by the law to provide a public notice, helping to counter the possibility that a self-interested body not much inclined to draw attention to itself might give in to that inclination. The job of a newspaper is to help to inform the public, and public notices fit neatly into that mission.

The newspaper public notice for the self-storage industry has stood the test of time for more than 60 years. Today, with newspapers widely available online and in print, eliminating those notices is hard to justify unless the goal is simply to weaken consumer protection for the enhancement of the industry's short-term benefit. But the weakening of the bond of trust that transparency brings could lead to a growing public reluctance to use the facilities. Where the public notice provides a win-win proposition, diminished transparency is a lose-lose for the consumer, the public and the industry.

Conclusion

When lawmakers are told that public notice of property seizures and auctions is useless because it does not make consumers pay their bills, they are hearing only a part of the story. Public notice accomplishes so much more: transparency in the community, notice to others besides the renter who may have property at stake, safeguards against the failure of more specific mailed (or emailed) notice and procedural safeguard in a system where no judge or court is authorizing a seizure and sale. That the sales of consumers' valuables at self-storage auctions are so notoriously labeled as great ways to get a bargain in television shows like *Storage Wars* should be a big clue to lawmakers. *Someone is about to get hurt*.

Newspaper public notice provides a valuable consumer protection. The self-storage industry should embrace it in the name of good business. Lawmakers should require it in the name of fairness.

Endnotes

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[7] See, e.g. Cal. Bus. & Prof. Code §21705 (2011).

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[9] *Dubey v. Pub. Storage*, 918 N.E.2d 265, 265 (Ill. App. Ct. 2009).

[10] *Id*. at 273.

[11] *Milwicz v. Pub. Storage*, 2010 WL 892298 (Cal. App. 2d 2010).

[12] *Cook v. Pub. Storage*, 761 N.W.2d 645, 645 (Wis. Ct. App. 2008).

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[25] *Id.*

[26] Garn H. Webb and Thomas C. Bianco, *Personal Property and Bailments, Analysis and Explanation in Holt/ Landmark Law Summaries 1-75* (1974).

[27] Paton, *supra* note 23 at 56, 57.

[28] John D. Lawson, *The Principles of the American Law of Bailments, a Companion to the Author's Work on Contracts* 17 (1985).

[29] Webb and Bianco, *supra* note 26 at 1-74.

[30] *Id.* at 74, 75.

[31] *Brooks v. Flagg Bros., Inc.*, 553 F.2d 764, 772-773 (2d Cir. 1977).

[32] The U.C.C. was created by the National Conference of Commissioners on Uniform State Laws, now the Uniform Law Commission.

[33] U.C.C. §7-210 (2003).

[34] Self Storage Association, *An Introduction to Self Storage*, available at: http://www.selfstorage.org/ssa/AM/downloads/09_Abt_IntrotoSS.pdf (last visited Apr. 8, 2014).

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[36] *Id.*

[37] See *Brooks v. Flagg Bros.*, 553 F.2d at 766-769.

[38] *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978).

[39] *Id.* at 153.

[40] *Id*.

[41] *Id*.

[42] *Id*.

[43] *Id.* at 157-158.

[44] *Id.* at 161-163.

[45] *Id.* at 150.

[46] *Id.* at 163 (citing *Steele v. Louisville & Nashville R. Co.,* 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944); *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956).

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[67] *Id.*

[68] *Fisher v. Rutherford County Reg'l Planning Comm'n*, No. 10-CV-1443, (Tenn. Chancery Ct. 16d 2012).

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Public Notice Resource Center, Inc.
P.O. Box 5337 • Arlington, VA 22205
703-237-9806 • Fax: 703-237-9808
www.pnrc.net