



## Lien Beefs

*By Ed Winn III*

Rental dealers run into a variety of personal-property liens and the laws that create them and allow their enforcement in everyday business. Liens involve the right to take and hold the property of a debtor as security or payment for a debt. Most rental dealers have a general understanding of how liens attach to property and how lien laws work, but some recent state law developments make a review of this topic timely to ensure that rental dealers protect their interests.

At its simplest, a lien is "a charge or security or encumbrance upon property." A lien only exists to secure a debt and without a debt there can be no lien. For example, the bank has a lien on a rental dealer's televisions and other rental merchandise. That lien ordinarily remains attached when the units are delivered into customers' homes. Such liens are statutory, created by state legislatures via the Uniform Commercial Code, which has been enacted in all 50 states.

If the dealer is leasing store space, the landlord probably has a contractual lien on the dealer's fixtures, store furnishings, signs, inventory and all other items of personal property located on the premises. The units a dealer delivers to a repair shop may have a mechanic's or material man's lien attached to them while they are in the shop. These liens are usually possessory liens. They exist only as long as the property is in the possession of the lien holder, in this case, the repair shop. If the dealer should suddenly go under, there might be a fight among the different lien holders as to whose lien is superior. (The general rule is "first in time, first in right.") The superior lien holder will be able to foreclose on the lien, seize the property covered by the lien, cut off the junior, subordinate lien holders, sell the property at auction or otherwise in accordance with applicable law, and use the proceeds to pay down the debt.

Interestingly, rental dealers do not have a lien on their own rental merchandise, whether that merchandise is in a customer's home or in the back room. They do not have a lien because they own the property. They do not have a lien because there is no debt. Many people do not understand this notion, fundamental to the rental-purchase concept, but most rental dealers do.

This distinction between owning something and merely having a lien on something affects how rental dealers can proceed against customers in court to recover merchandise when the need arises, and also affects how dealers proceed when a customer files bankruptcy.

Most of the time, liens placed by a rental dealer's creditors exist on the rental company's assets, but the liens do not affect operations as long as the dealer remains current on his obligations. There are, however, a couple of statutory liens which arise by operation of law and which can affect day-to-day operations in a rental store.

The first is a residential landlord's lien, which exists in most states and is intended to secure the tenant's obligation to pay rent to the landlord. This lien can come into play when the tenant is also a customer of the rental company and leaves town abandoning the rental property in the apartment and owing money to the landlord and the rental dealer both. The landlord may claim to have a lien on the contents of the apartment. The rental property left behind may be the only property of value in the apartment.

In most states, a landlord's lien attaches automatically to all property in the residence, unless the property is exempt. In Texas, for example, there are 15 categories of property to

which a landlord's lien will not attach, including "wearing apparel, schoolbooks, children's toys" and, most important for rental dealers, "goods that the landlord or the landlord's agent knows are owned by a person other than the tenant or an occupant of the residence." That language will exempt all rental merchandise in the dwelling from lien coverage, assuming that it has been marked as rental property.

As a practical matter, landlords do not always carefully inspect merchandise before seizing it. It is not unusual for a landlord to cart off an apartment full of furniture to a storage facility in order to be able to re-lease the space. Ultimately, the landlord is empowered to sell the merchandise seized and use the sales proceeds towards the back rent.

Rental dealers may learn of the landlord's seizure after the dealer's property has been bound up with the rest of the customer's property and stored. Landlords have been known to demand that the rental dealer pay for the cost of retrieving the rental property from storage. In a lawsuit against the landlord, the rental dealer will win, assuming that the property wrongfully seized by the landlord was marked as rental property. However, rental dealers cannot make a living suing landlords. It is far more practical to notify the landlord when the property is initially delivered that the tenant/rental customer in apartment 3-B has the following rental property being delivered and it belongs to Joe's Easy Rentals. The dealer can deliver a short written notice to the landlord and ask that it be put in the tenant's file. Then, if the tenant bolts, the dealer stands a better chance that the landlord will call and invite the dealer to come recover the rental property before hauling off the rest of the tenant's belongings.

A more problematic, albeit rarer, issue can arise when rental customers store rental merchandise in self-service storage units, which have proliferated in recent years. Self-service storage unit owners do not have the degree of control over their rental units that landlords do.

Self-service storage unit owners nonetheless have asked for, and in many states have gotten, special self-service storage unit lien laws enacted. Several of these statutes are supposed to give the storage unit owner a lien on the entire contents of a storage unit regardless of who actually owns the contents. These statutes also often purport to give the owner of the storage facility a first lien, superior to all other liens that may be on the property in the unit. Rental dealers in West Virginia narrowly missed having a storage unit lien law enacted there that would have protected other lien holders, but which did not distinguish between property owned by the lessee/debtor and property owned by others.

Laws such as the Texas and North Carolina storage facility lien statutes, among others, raise obvious constitutional issues. The government, by enacting such statutes, purports to allow the taking of a rental dealer's property without due process of law. These statutes arguably violate the 5th and 14th Amendments of the U.S. Constitution, which prohibit wrongful takings of property by the government. Unfortunately, however, it may remain for some rental dealer somewhere to be called upon to test one of these statutes. It will be neither cheap nor easy to prove the statute unconstitutional. It may mean a trip to the state's Supreme Court. A lot of units may get written off to recalcitrant storage unit owners before some rental dealer finally says, "enough," and commits the time and resources to fight back.

One solution is to be vigilant in the state legislative arena. The rental industry's West Virginia lobbyist spotted the storage facility bill as it was going through the process and had the presence of mind to ask rental dealers if the bill would affect them. Storage unit owners do not want to bother with having to determine ownership when they seize the contents of

a unit for back rent. At the same time, the constitutional argument is compelling and should prevail if there is a bill pending. A number of states already have storage facility lien laws on the books, but not all do. Some diligence in those states today may prevent the needless loss to rental units tomorrow.

APRO members may obtain copies of landlord lien statutes and self-service storage unit lien statutes through the law offices of Ed Winn III, APRO's general counsel.