

## **Lien Gone Bad: Steps to Take to Avoid Incurring Damages When Enforcing a Possessory Lien**

The Indiana Court of Appeals recently highlighted the importance of complying with state lien enforcement codes before enforcing a possessory lien. In *Miller's Turnkey Transport, Inc. v. Cybertek, Inc.*<sup>1</sup>, the plaintiff Miller, a warehouseman, filed suit against Cybertek, for (1) unpaid rent due and (2) to foreclose on its possessory lien.

In 2002, Miller and Cybertek agreed that Cybertek would store certain goods at Miller's warehouse for a fee. On April of 2002, Cybertek delivered its equipment to Miller, but never paid rent. After suing for unpaid rent and to foreclose on its possessory lien, the trial court entered judgment for Miller. The court foreclosed the possessory lien held by Miller, and ordered that the property held by Miller be sold at a state sheriff's sale.

Less than two months after the trial court entered judgment, Miller sold Cybertek's equipment at a private sale, rather than a sheriff's sale, to Noble Paint for \$45,000, with some product sold for scrap and certain other items thrown away. A telephone call took place *after* the consummation of the private sale, between Miller and Cybertek, wherein terms and conditions of the selling process were discussed. Miller did not disclose that the sale already took place and the selling process that was just agreed upon was not followed.

After learning that the private sale took place, Cybertek filed a claim alleging, among other things, that Miller transferred goods to a third-party without authority, criminal conversion, and unauthorized exercise of control of sale proceeds. The trial court determined that Miller's enforcement of its lien did not comply with the Uniform Commercial Code, and held that the fair market value of the goods was \$93,500, far above the \$45,000 sale price that the goods were sold to a third-party. Subsequently, the trial court entered judgment for Cybertek, and Miller had to pay Cybertek \$93,500. Miller appealed.

In order to determine whether a warehouseman exercised a rightful enforcement of a lien on goods in his possession, Indiana Code 26-1-7-209 must be examined. Section 210 of this code provides two alternative methods of enforcing a warehouseman's lien. Under subsection (1), a warehouseman may sell goods by public or private sale "in a commercially reasonable manner," after providing nominal notice. I.C. 26-1-7-210(1). Subsection (2) requires notice that is more formal and defines explicitly the manner of sale. I.C. 26-1-7-210(2).

The court in *Miller* explained that in deciding which section applies depends on whether the goods are "stored by a merchant in the course of his business." I.C. 26-1-7-210(2). In the phrase, "stored by a merchant," the word "merchant" has been interpreted to mean the owner of the goods, rather than the warehouseman. Thus, this important distinction in how Miller was authorized to sell the goods is based on whether Cybertek was a merchant.

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<sup>1</sup> 878 N.E.2d 280 (IN App. 2007).

The court further analyzed whether Miller gave Cybertek proper notice of the enforcement of the warehouseman's lien. Indiana Code 26-1-7210(1) provides for the enforcement of the warehouseman's lien. It states that a lien may be enforced by a public or private sale in a commercially reasonable manner after notification of all persons who claims an interest in the property. The statute requires that the notice include: a statement of the amount due, the nature of the proposed sale, and the time and place of any public sale. Indiana Code 26-1-7-210(2)(b) further requires that the notification must be delivered to the person or sent by registered mail.

Miller failed to provide the notice requirement under Indiana Code 26-1-7-210. The court found that regardless of which subsection applied, either (1) or (2), Miller provided no advance notice at all.

Lastly, in enforcing a warehouse lien, the *Miller* case illustrates that a warehouse must sell in a "commercially reasonable" manner. The warehouse sells in a commercially reasonable manner if the warehouse sells the goods in the usual manner in any recognized market, sells at the price current in that market at the time of the warehouse's sale, or otherwise sells in conformity with commercially reasonable practices among dealers in the type of goods sold. A sale of more goods than apparently necessary to be offered to ensure satisfaction of the obligation is not commercially reasonable, except in cases covered by the preceding sentence.

Ultimately, the Appeals Court of Indiana held the warehouseman, Miller, was liable for \$93,500 in damages for failing to comply with Section 210 because he did not give notice of the private sale. To prevent a lien from going bad, as was the case in *Miller*, warehouseman must ensure compliance with state lien enforcement statutes to avoid unnecessary and costly litigation.

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