MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 p.m. on February 12, 2004 in Room 313-S of the Capitol.

All members were present except:
Representative Dan Williams- excused

Committee staff present:
Jill Wolters, Revisor of Statutes
Diana Lee, Revisor of Statues
Jerry Ann Donaldson, Kansas Legislative Research Department
Cindy O'Neal, Secretary

Conferees appearing before the committee:
Representative Jeff Jack
Judge Robert Fleming, 11th Judicial District, Labette County
Doug Smith, Credit Attorneys Association
Stan Masters, Kansas Self-storage Owner's Association
Stan Stanton, Kansas Self-Storage Owner's Association
John Federico, Kansas Self-Storage Owner's Association

HB 2617 - allowing land surveyors to enter upon property for a land survey, not considered trespass

Dina Fisk provided the committee with some suggested amendments to address concerns of the committee. (Attachment 1)

Representative Patterson made the motion to report **HB 2617** favorably for passage. Representative Jack seconded the motion.

Representative Patterson made a substitute motion to adopt the suggested amendments. Representative Jack seconded the motion. The motion carried.

Representative Jack made the motion to report **HB 2617** favorably for passage, as amended. Representative Patterson seconded the motion. The motion carried.

The hearing on **HB 2655 - civil procedure for limited actions; requested admissions; judicial discretion to allow withdrawal of amendments of admission**, was opened.

Representative Jeff Jack requested the bill to provide judges with the same discretion in Chapter 61 cases as they have in Chapter 60 cases, when a party, through ignorance or other excusable neglect, fails to file answers to requests for admissions. The court could allow the party to withdraw or amend his admission when it will serve the presentation of the case on its merits and there is no prejudice to the other party. (Attachment 2)

Judge Robert Fleming, 11th Judicial District, Labette County, estimated that in Chapter 61 cases 75-80 percent of defendants in limited action cases are pro se and don't really know the way the courts work, as opposed to Chapter 60 cases where both parties are represented by counsel who know the law. (Attachment 3) He requested an amendment which would grant the trial court the same statutory discretion that is now exercised in a Chapter 60 action.

Doug Smith, Credit Attorneys Association, appeared as an opponent of the bill because it would result in more litigation and trials by surprise. (Attachment 4)

The hearings on **HB 2655** was closed.

MINUTES OF THE HOUSE JUDICIARY COMMITTEE at 3:30 p.m. on February 12, 2004 in Room 313-S of the Capitol.

The hearing on **HB 2738 - providing authority for self-storage operators to collect late fees**, was opened.

Stan Masters, Kansas Self-storage Owner's Association, explained that the bill would give authority to the owner of a self-storage facility the right to impose a late fee on someone who fails to pay rent when it's due and would set that amount at $20 per month or 20% of the monthly rental fee. (Attachment 5)

The committee was concerned as to why there would ever be a 20% monthly rental fee charged, when they could collect a $20 late fee, and be reimbursed for their expenses if a lien needed to be filed. They felt that self-storage facilities currently have the ability to include in their contract a late fee and was not sure that it needed to be in statute.

Stan Stanton, Kansas Self-Storage Owner's Association, stated that several other states have similar fees regarding late charges. The proposed bill would also allow them to collect the cost of lien enforcement expenses. (Attachment 6)

The Chairman requested a copy of a blank rental storage contact.

John Federico, Kansas Self-Storage Owner's Association, appeared as a proponent of the bill. He stated that the 20% late fee charge would be only in instances where someone has continually not paid their monthly storage fee.

The hearing on **HB 2738** was closed.

The committee adjourned. The next meeting was scheduled for February 16, 2004.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

By Committee on Judiciary

AN ACT concerning land surveyors; relating to trespassing; amending K.S.A. 2003 Supp. 21-3721 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. (a) A land surveyor, licensed pursuant to article 70 of chapter 74 of the Kansas Statutes Annotated, and amendments thereto, and such surveyor's authorized agents and employees may enter upon lands, waters and premises of a party who has not requested the survey when it is necessary for the purpose of making a survey. If the licensed surveyor has made a reasonable attempt to ~~gain permission from~~ the landowner, such entry shall not be deemed a trespass. Nothing herein shall change the status of the licensed surveyor as an occupier of land.

Comment: ~~give notification to~~ notify

Comment: ~~If a landowner acknowledges receipt~~ Upon notice, such landowner has the right to modify the time and other provisions of the surveyors access upon notification to the surveyor, as long as such modifications do not unreasonably restrict completion of the survey.

(b) While conducting surveys, the licensed surveyor and such surveyor's authorized agents and employees shall carry proper identification as to such surveyor's licensure or employment and shall display such identification to anyone upon request.

(c) A landowner or occupant of the land is not liable for any injury or damage sustained by a licensed surveyor or such surveyor's authorized agents and employees entering upon such landowner or occupant's land under the provisions of this section.

Comment: , except when such damages and injury were willfully or deliberately caused by the landowner or occupant of the land,

(d) Nothing in this section shall be construed to:

(1) Remove civil liability for actual damage to such lands, waters, premises, crops or personal property; and

(2) give the licensed surveyor or such surveyor's authorized agents and employees the authority to enter any building or structure used as a residence or for storage.

Comment: (3) Remove civil and criminal liability for all intentional acts of damage or injury to the surveyor or authorized agents and employees.

House Judiciary Committee
2-12-04
Attachment 1

Sec. 2. K.S.A. 2003 Supp. 21-3721 is hereby amended to read as follows: 21-3721. (a) Criminal trespass us:

(1) Entering or remaining upon or in any land, nonnavigable body of water, structure, vehicle, aircraft or watercraft other than railroad property as defined in K.S.A. 2003 Supp. 21-3761 and amendments thereto by a person who knows such person is not authorized or privileged to do so, and:

(A) Such person enters or remains therein defiance of an order not to enter or to leave such premised or property personally communicated to such person by the owner thereof or other authorized person; or

(B) Such premises or property are posted in a manner reasonably likely to come to the attention of intruders, or are locked or fenced or otherwise enclosed, or shut or secured against passage or entry; or

(C) Such person enters or remains therein in defiance of a restraining order issued pursuant to <u>K.S.A. 2003 Supp. 60-31a05, 60-31a06,</u> K.S.A. 60-1607, 60-3105, 60-3106 or 60-3107 or K.S.A. 38-1542, 38-1543 or 38-1563, and amendments thereto, and the restraining order has been personally served upon the person so restrained; or

(2) entering or remaining upon or in any public or private land or structure in a manner that interferes with access to or from any health care facility by a person who knows such person is not authorized or privileged to do so and such person enters or remains thereon or therein in defiance of an order not to enter or to leave such land or structure personally communicated to such person by the owner of the health care facility or other authorized person.

(b) As used in this section:

(1) "Health care facility" means any licensed medical care facility, certificated health maintenance organization, licensed psychiatric hospital or other facility or office where services of a health care provider are provided directly to patients.

(2) "Health care provider" mean any person: (A) Licensed to practice a branch of the healing arts; (B) licensed to practice psychology; (C) licensed to practice professional or practical nursing; (D) licensed to practice dentistry; (E) licensed to practice optometry; (F) licensed to practice pharmacy; (G) registered to practice podiatry; (H) licensed as a social worker; or (I) registered to practice physical therapy.

(c) (1) Criminal trespass is a class B nonperson misdemeanor.

(3) Upon a conviction of a violation of subsection (a) (1) (c), a person shall be sentenced to not less than 48 consecutive hours of imprisonment which must be served either before or as a condition of any grant of probation or suspension, reduction of sentence or parole.

(d) This section shall not apply to a land surveyor, licensed pursuant to article 70 of chapter 74 of the Kansas Statutes Annotated, and amendments thereto, and such surveyor's authorized agents and employees who enter upon lands, waters and other premises in the making of a survey.

Sec. 3. K.S.A. 2003 Supp. 21-3721 is hereby repealed.

Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

STATE OF KANSAS

JEFF JACK
REPRESENTATIVE, SEVENTH DISTRICT
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HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: JUDICIARY
TAXATION
TRANSPORTATION
SELECT COMMITTEE ON KANSAS SECURITY

Testimony in support of HB 2655

Mr. Chair and members of the committee:

Thank you for the opportunity to testify today in support of HB 2655. This bill is intended to provide judges with the same discretion to do justice in a Chapter 61 limited action case that they currently have in a Chapter 60 case when a party, through ignorance or other excusable neglect, fails to timely file answers to requests for admissions.

Requests for Admissions are very powerful tools in our civil procedure. When a party is served with requests for admissions in Chapter 61, he has only 15 days to either admit or deny the statements in the requests; if he fails to do so, the statements are deemed admitted. These statements are usually written in such a way that once admitted, the opposing party can demand judgment as a matter of law, without ever going through a trial.

Under current law, in a Chapter 60 case, where the party has 30 days to respond to a request for admission and where the parties are usually represented by an attorney, a failure to file responses to requests for admissions is not always fatal to a case, because the court has the discretion to allow the party to withdraw or amend his admission when it will serve the presentation of the case on its merits and there is no prejudice to the other party.

However, if a litigant in a Chapter 61 case, usually a defendant acting without an attorney, fails to properly file his responses to requests for admissions, that is usually it for him, because there is no such judicial discretion, regardless of the reason for the failure to file the responses and regardless of the merit of the defense or claim.

This can and does lead to unjust results; under current law, a defendant with a paid receipt may have a judgment entered against him for a debt he has already paid simply because he was ill, or traveling, or just didn't understand that failing to return the papers he received would prevent him from having the trial that was already scheduled. And there is absolutely nothing the court can do about it.

If we allow the court to exercise its discretion and grant some relief in Chapter 60, when the parties have twice as long to respond and are blessed with the benefit of the advice of an attorney, why would we not allow the same relief under Chapter 61when they do not? Opposition to such discretion, while clothed in the costume of efficiency, would appear instead to be a desire to retain an unfair advantage over a hapless defendant.

TESTIMONY IN SUPPORT OF H.B. 2655

Currently, the discovery provision pursuant to Chapter 61, relating to requests for admissions of fact and genuineness of documents is significantly different from its Chapter 60 counterpart. K.S.A. 2001 Supp. 61-3101(b), the Limited Action provision relating to requests for admissions, provides:

> "Each of the matters requested shall be deemed to be admitted for purposes of the pending lawsuit, unless within fifteen days after the request is served, the party to whom the request is directed submits to the party propounding the request either: "(1) A sworn statement denying specifically the matter requested; or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part."

K.S. A. 2001 Supp. 60-236(a) provides for judicial discretion not found in Chapter 61. It states: "A matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter."

K.S.A. 2001 Supp. 60-236(b) provides:

> "Any matter admitted under this rule is conclusively established unless the judge on motion permits withdrawal

> or amendment of the admission. Subject to the provisions of K.S.A. 60-216, and amendments thereto, governing amendment of a pretrial order, the judge may permit withdrawal or amendment when the presentation of the merits of the action would be subserved thereby and the party who obtained the admission fails to satisfy the judge that withdrawal or amendment will prejudice such party in maintaining such party's action or defense on the merits."

A trial court's discretion to control discovery, to allow amendment of pleadings, and to grant continuances is based upon statutory authority. Presently, no statutory authority authorizes a trial court to allow a party to withdraw or amend admissions in limited action cases.

In most Chapter 60 actions, both parties are represented by counsel who know or should know the law and the consequences of failing to timely respond to request for admissions. Conversely, in many, if not most, of the Chapter 61 actions the defendants are pro se. The following is a typical example of what may occur in a Chapter 61 action. A defendant responds to a summons, appears in court, denies the claim, and files an answer denying the claim. The case is then scheduled for trial. Subsequent to the scheduling, but before the actual trial date, the plaintiff serves upon the defendant request for admissions. The defendant does not respond within the 15-day statutory period. The plaintiff then moves for summary judgment, noting that the material facts in dispute have been deemed admitted by the defendant's failure to deny the request for admissions, and

the Court has no alternative but to grant the motion, even if the defendant otherwise had a meritorious defense.

The Kansas Court of Appeals affirmed the trial court's lack of statutory authority to allow a party to withdraw or amend admissions in a limited action case in Berkshire Aircraft, Inc. v. A.E.C. Leasing Company, No. 87,949 now ordered published by the Kansas Supreme Court.

The proposed amendment, H.B. 2655, contains the same language contained in K.S.A. 2001 Supp. 60-236(b) and would grant the trial court the same statutory discretion that it now exercises in a Chapter 60 action.

Robert J. Fleming
District Court Judge
11th Judicial District – Div. 3
Labette County, Kansas

REMARKS CONCERNING HOUSE BILL No. 2655
HOUSE JUDICIARY COMMITTEE
FEBRUARY 10, 2004

Chairman O'Neal and Members of the House Judiciary Committee:

Thank you for giving me the opportunity to present remarks on House Bill No. 2655 on behalf of the Kansas Credit Attorneys Association and Kansas Collectors Association, Inc. The Kansas Credit Attorneys Association is a statewide organization of attorneys, representing approximately 60 law firms, whose practice includes considerable collection work, and Kansas Collectors Association, Inc., which is an association of collection agencies a in Kansas.

We are opposed to House Bill No. 2655 for the particular reason that, as drafted, it will inevitably result in litigation and trial by surprise.

The proposed amendment allows a judge great latitude in a limited actions matter on the withdrawal of an admission or to change a previously submitted answer without any of the protections provided in KSA 60-236 which ensure such motions are heard well before trial. Furthermore, the present language could place the courts in the untenable position of acting as counsel for parties, making motions on their behalf to modify sworn testimony.

We understand the concern of the courts in ensuring that pro se defendants are fully aware of the consequences of not answering discovery. Many courts throughout the state have adopted procedures which address precisely that concern without impairing the effectiveness of discovery. Those procedures include

a) advice from the bench of the importance of complying with discovery requests and advising parties of potential judgment in the event they ignore discovery;
b) reduced such warnings to writing and those instructions are provided the defendant at the answer date; and
c) it is even common in many counties for one or more pretrials to be held to assist the parties in determining issue for trial without discovery.

Any one of these methods serves the intended purpose of protecting pro se defendants while preserving the effectiveness of discovery.

If the intent is to make Chapter 61 admissions more like Chapter 60 we might support such an effort if the language was changed to clarify that the burden of proving need for amendment is on the movant in the same way as motions to set aside default and if the language is clarify to ensure that litigants are not surprised by a motion at trial to amend answers.

Limited action filings are intended to be a streamlined procedure, permitting a speedy resolution. We believe that this measure is contrary to that many jurisdictions have been able to resolve the "pro se problem" without statutory change that eviscerates discovery.

Thank you again for your time and consideration this afternoon.

Larry N. Zimmerman
Thomas A. Valentine, P.A.

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TESTIMONY OF G. STANTON MASTERS

IN SUPPORT OF HOUSE BILL 2738 ON BEHALF OF
THE KANSAS SELF-STORAGE OWNERS ASSOCIATION
BEFORE THE JUDICIARY COMMITTEE,
KANSAS HOUSE OF REPRESENTATIVES, FEBRUARY 12, 2004

I. Introduction

My name is Stan Masters, and I appear today on behalf of the Kansas Self-Storage Owners Association to urge this Committee to support House Bill 2738, which amends the Kansas Self-Service Storage Act of 1983. That Act is codified at K.S.A. §58-813 through §58-820. Thank you for giving me this opportunity to address the Committee.

My interest in this bill arises from my experience as an attorney representing self-storage owners in Kansas over the past 15 years. I also serve as counsel to the Kansas Self-Storage Owners Association and the Missouri Self-Storage Owners Association.

II. Overview of the Self-Storage Business

The self-storage business is straight forward: A tenant pays rent, usually monthly, in exchange for space the tenant uses to store his or her personal property. As long as the tenant pays rent in a timely fashion, a storage facility generates income for its owners. When a tenant fails to pay rent in a timely fashion for his or her space, the facility's income is reduced. In a

state like Kansas where many storage facilities are owned by smaller operators and have limited numbers of units available, the loss of rent from a single unit can have significant impact. Not only is the owner deprived of rent, but as long as property remains stored in the unit, the facility owner cannot make the unit productive by renting it to a different tenant.

III. The Existing Statute

It was against this backdrop in 1983 that the Kansas legislature enacted the Kansas Self-Service Storage Act (the "Act"). In 1983, one of the Act's sponsors urged passage of the Act because "people in the self-storage business have a problem with people putting their goods in a unit, padlocking the door and taking off. The owners have no mechanism to use to get the goods out and re-rent the storage and have no method of getting their money for the storage." (See Minutes of the House Committee on Federal and State Affairs, April 4, 1983, at pg. 1 of 2.) A storage facility owner testified that "the industry needs the guidelines set forth in the bill so that they can conduct business both for themselves and their customers." (See Ibid.) (emphasis added). Another witness testified that the Act "provides a balance between the tenants and the owners of the units to have a reasonable process on which they can rely to clear up their problems." (See Ibid.) (emphasis added). Based in part on such testimony, the Kansas Legislature passed, and the Governor signed, what became the Kansas Self-Service Storage Act.

IV. The Proposed Legislation

House Bill 2738 seeks to give clear statutory authority to facility owners, in addition to a contractual right, to impose a late fee on an occupant who fails to pay rent when due. The late fee serves two purposes: It is designed to encourage prompt payment of rent, and it compensates for the cost and expense associated with delayed payment of rent. The Bill does not mandate that a late fee be charged, but gives the facility owner who does protection from unnecessary

lawsuits. It also should be kept in mind that a late fee always can be avoided simply by complying with the storage contract's terms, namely by paying one's rent on time. Like the existing Act, the proposed legislation has been drafted with two goals in mind: (1) providing guidance to facility owners and tenants, and (2) being fair to all parties.

In the proposed Subparagraph (i) of Section 1 of K.S.A. 58-814, the Bill tells what the late fee is and is not. A late fee is a fee or charge assessed by an operator for an occupant's failure to pay rent when due. It is solely a question of making a timely payment. A late fee is not interest on a debt or an expense incurred in collecting unpaid rent or enforcing the operator's lien rights. This provision provides clear guidance to all parties and will prevent needless litigation over whether the late fee is subject to usury laws or whether it is a prepayment of expenses for the sale of property that may never occur (if the tenant cures the default and redeems his property as provided in the Act).

In the proposed Section 2(a) of K.S.A. 58-814, the Bill specifically permits a reasonable late fee to be charged. It does not mandate that a late fee be charged or specify the amount to be charged. The Bill, however, does set the upper limit of what a facility owner may charge as a late fee and still be reasonable per se. That upper limit is: "Twenty dollars a month or 20% of the monthly rental amount, whichever is greater for each late rental payment." This provides guidance to all parties by advising both the facility owner and the tenant what the Kansas Legislature has defined as the upper limit of a reasonable late fee amount. The balance of that proposed section would permit a facility owner to charge a late fee that is greater than the per se reasonable amount set by the proposed statute, but it fixes the burden of proving the reasonableness of a higher late fee squarely on the facility owner. This provision is included only to recognize there may be instances in which is it reasonable and appropriate for a storage

operator with higher internal costs to impose a higher late fee. In practice, however, one would certainly expect most storage facilities (if they impose a late fee at all) to opt for the safe harbor of the per se reasonable late fee amount, rather than run the risk of having to prove the reasonableness of a higher fee in court. This helps make the law fair for all parties.

Subsection (b) of Section 2 of the proposed amendment to K.S.A. 58-814 provides that a late fee may not be charged or collected unless it is set forth in writing in a rental agreement or an addendum to the rental agreement. This is another important fairness issue for tenants. By statute, a late fee cannot, and indeed should never, surprise the tenant. This Bill mandates that there be no surprises when it comes to late fees. They must be stated by the facility owner in writing.

Subsection (c) of Section 2 of the proposed amended K.S.A. 58-814 makes clear that if a tenant persists in failing to pay his or her rent until the facility owner has no choice but to foreclose the lien provided by the Act, the facility owner may recover both the reasonable rent collection and lien enforcement expenses, as well as any late fees. Once again, this section gives clear guidelines to both tenants and facility owners.

Sections 3 and 4 are housekeeping provisions relating to the repeal of existing K.S.A. 58-814 and providing for an effective date for an amended K.S.A. 58-814.

IV. The Need for a Statutory Change

A statutory change is needed to eliminate any confusion or disagreements that might exist concerning late fees.

First, House Bill 2738 provides clear guidelines to all parties involved. Merely putting a late fee in a rental agreement, which is a binding contract, may not be enough to avoid confusion, disagreement, and even litigation between facility owners and tenants. Kansas law provides that

"contracting parties may agree to their own terms and impose conditions to a contract so long as the conditions are not illegal or contrary to public policy." See *Hill v. Perrone*, 30 Kan. App. 2d 432, 42 P.3d 210 (2002). Although the Kansas Self-Service Storage Act as it currently exists does not mention late fees at all, I believe parties may place them in contracts and that those provisions are enforceable. Others, however, might argue that the absence of any language regarding late fees in the Kansas Self-Service Storage Act as it currently exists must mean that they are against public policy in Kansas and therefore unenforceable. Although I believe that is an incorrect legal conclusion, that argument could be sufficient to haul a well-meaning facility owner into court to defend a late fee that a tenant had previously agreed to in a written contract. As you might imagine, in a business where a storage unit may yield no more than $50 a month in rent and the property contained in the unit may not be worth more than several hundred dollars, many facility owners would be unable to justify, let alone afford, the costs of vindicating a perfectly legal and enforceable contract provision for a single unit. The very threat of litigation can undo the guidance and fairness that the existing Act seeks to provide. By passing House Bill 2738, disagreement and confusion over late fees is removed and clear guidelines are established for all parties.

Second, under Kansas law, lien statutes are strictly construed. See *Security Ben. Life Ins. Corp. v. Fleming Companies, Inc.*, 21 Kan. App. 2d 833, 838, 908 P.2d 1315 (1995), review denied, 259 Kan. 928 (1996). That simply means that lien statutes must be followed to the letter if the lien is to be valid and enforceable. Section 58-816 of the Kansas Self-Service Storage Act states that the self-storage lien attaches to all personal property stored within leased space for "rent, labor or other charges". House Bill 2738 makes clear that "other charges" includes late fees, thereby eliminating potential, unnecessary litigation over what "other charges" means.

V. Conclusion

House Bill 2738 has been carefully crafted to provide facility owners with clear statutory authority to charge, collect, and recover a late fee if they choose to do so in order to encourage the prompt payment of rent. At the same time, the Bill takes special care to ensure that a tenant cannot be surprised by a late fee and that the amount charged is reasonable. Furthermore, a tenant can avoid the late fee altogether by paying his rent on time. As with the existing Kansas Self-Service Storage Act, this Bill provides clear guidance and is fair to all parties involved in storage transactions. I urge the members of this Committee to support House Bill 2738, and I would be happy to answer any questions you may have for me.

Respectfully submitted,

G. Stanton Masters

Kansas Self Storage Owners Association

1060 E. Santa Fe, Gardner, KS 66030

Ph: 913-856-5757 Fax: 913-856-4440

Testimony In Support of HB2738

Submitted By:
Stan Stanton
President of the Kansas Self Storage Owner's Association (**KSSOA**)

House Judiciary Committee

February 12, 2004

Thank you Chairman O'Neal for the opportunity to testify in your Committee in support of **HB2738**. I appear before you today on behalf of the Kansas Self Storage Owner's Association.

HB2738 is an important bill to our members because

a. It gives **both** the Consumer and the Self Storage Owner <u>protection</u>
b. It gives statutory authority to the Owner to charge a late fee, a common industry practice. (The bill doesn't "require/mandate" a late fee, but only "allows" it).
c. It Protects the Consumer by "capping" the amount of the late fee charge, as well as making clear when the charge applies.

The **KSSOA** asks you to support **HB2738** as this bill will make changes to the Kansas Self-Service Storage Act that will help Kansas self storage owners run their business' by updating the current law that currently does not address this issue. As a matter of additional information, several states have already passed very similar laws regarding late fees including Ohio, Missouri, and Arizona.

Thank you,

Stan Stanton, President
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