

Mini- Storage Messenger

QUESTION: Are late fees still a big deal?

Answer: Four years ago everyone was buzzing about late fees in the self-storage industry. Several electric companies, cable TV companies, etc. and then later self-storage REITs had been sued over their late fee practices. Everyone seemed to become very cautious of their late fees. Eight states enacted some sort of law defining appropriate late fees for self-storage facilities in their state Arizona, California, Maine, Missouri, North Carolina, Ohio, West Virginia, and Maryland. It appears to owners the dust has settled and I am hearing again that Owners are charging high late fees, multiple late fees in one months and sometimes even a per day late fee after a certain number of days.

In fact, the dust has not settled on late fees, there are still lawsuits regularly regarding late fees and, self-storage owners and operators still represent a viable target for a class action lawsuit on the basis that the late fees are a punishment rather than a fair and reasonable estimation of the costs incurred due to the tenant's late payment.

You may have noticed about a year ago a major video chain announced "the end of late fees". This chain did not stop charging late fees because of their generosity. Rather, it stopped charging late fees because it was sued in class action lawsuit which put together members within a state of each video club who had paid late fees in the last several years and asked for partial refunds, plus damages, plus attorney fees, these cases were either settled or won resulting in large financial losses to the video chain. Rather than adopting state by state or region by region acceptable late fees, which may have been very low, based on a three or four dollar video rental, this company fundamentally changed the way it did business opting to make you buy the video if it was not returned a certain number of days after it was due. Then in a marketing campaign it proclaimed the end of late fees.

It is my understanding that many operators on the East coast, especially in several consumer friendly states have also decided to "end" their late fees. Instead of charging a late fee, the operator will not rent a self-storage unit to you unless you provide the operator with a credit card number and ongoing authorization to charge the card. The operators generally bill it (for marketing purposes) that they do not charge late fees. For example: you can always pay your rent on time and we will not charge the credit card but if you have to go running out of town for a sick

family member, etc., then rather than being charged a late fee we will as a courtesy on “x” day of the month charge your rent against the credit card, thus you never pay a late fee. The Facility is not exposed to litigation and the facility looks consumer friendly. In the states listed above you also have an idea of what a reasonable late fee as defined by your legislature however, that leaves about 42 states plus territories where we do not have a well defined answer to that question for self-storage. If you believe that the attorneys who filed the video rental lawsuits are not looking for other companies that charge lots of late fees to lots of people each month to keep the litigation “train” running, you are mistaken. While there is no defined reasonable late fee in approximately 42 states, there are a few things that appear to be universal truths regarding late fees in every state. 1) A late fee must be a reasonable estimation of the costs you incur as a result of the tenant breaching their lease (default) by not paying rent. The late fee may not be designed to be a punishment (punitive) for failing to pay the rent. 2) A late fee can be imposed only once per service period. Generally this is once per month. Once a tenant is in default for the month he cannot be in default a second time in the same month, if he is still in default the first time. Thus a late fee on the 5th and another one on the 15th is generally unacceptable and represents exposure and risk for the Self-Storage operator; and 3) No matter how you try to disguise additional late fees courts see through them. For example, if you say rent is \$75.00 a month but if paid before the 5th its \$65.00 but if paid after the 10th its \$85.00 the court has always recognized this to be a double late fee. There are all sorts of clever ways to disguise a late fee, I have to see one that the court did not “get”.

You may wish to consider adopting a plan such as the one I discussed above to avoid late fees in general so that you do not expose yourself to this unnecessary risk. Otherwise speak with your attorney to make sure that your late fees that you are charging, in your attorney’s opinion, are not exposing to the potential for litigation over your late fee.

Remember one class action lawsuit over late fees will more than eat up any “profit” you may derive from a late fee, just in attorney fees and other costs.

You can send your questions, comments, or suggestions for future topics to Jeffrey Greenberger at info@selfstoragelegal.com or mail them to Jeffrey Greenberger c/o Katz Greenberger & Norton LLP, 105 E. Fourth Street, Suite 400, Cincinnati, Ohio 45202 or you can reach Mr. Greenberger at (513) 721-5151, or visit his website at www.selfstoragelegal.com.