

# **COLORADO ATTORNEY GENERAL SAYS NO TO CREDIT CARD FEES**

Credit card usage has exploded. Trillions of dollars are charged every year on Visa and Mastercard. Credit cards have replaced checks as the preferred payment method for good reason. Given their ease of use and rewards programs, some tenants want to charge every bill on their cards, including their monthly rent and utilities. Landlords also have significant incentive to take credit cards as a form of payment. Credit card payments don't frequently bounce. A tenant may not have money, but they may have credit available on their credit card to pay the rent. Credit card payments can be automatically scheduled and have the advantages of all electronic payments. No paper, no muss, no fuss. The tenant's rent is paid every month. The tenant gets their frequent flyer miles, and you get the rent paid on time. Everybody wins.

Of course, credit card issuers wouldn't be in business if they didn't make money. Companies involved with credit cards make money in a variety of ways. Credit card issuers make most of their money by charging transaction fees on each transaction. The merchant (seller of goods or services) pays the credit card transaction fees. When a tenant pays his rent by credit card, you are the merchant. Fees can be as high as three percent. If the tenant's rent were \$1,000, you would receive \$970 if the tenant paid the rent with a credit card that has a three percent fee.

Most of our clients are not willing to accept \$970 monthly rent for a \$1000 apartment. A community simply can't afford to discount rent revenue by three percent, especially when the rent may already be discounted through concessions. For this reason, credit card fees have to be passed onto tenants in order to make credit cards a viable payment option. However, because most credit card transactions for rentals are processed through Internet portals run by payment processing vendors, most landlords are not even aware of the credit card fee issue.

For example, Credit Card Co. runs an Internet portal for landlords. Tenants can log onto the site and pay their rent by credit card. When Terry Tenant pays his \$1,000 monthly rent with his American Express, Credit Card Co. has to pay American Express

\$30. However, Larry Landlord isn't going to sign up with Credit Card Co. if Larry only gets \$970 of the \$1,000 monthly rent. Thus, Credit Card Co. charges Terry Tenant a "convenience fee" of \$35 for the convenience of being able pay on the website via credit card. Credit Card Co. now has the money to pay everybody, and make some money as well. Credit Card Co. never makes Larry Landlord aware of the convenience fee charges, or that such charges could be in violation of Colorado law.

The Colorado Attorney General (AG) has taken the position that any attempt to pass credit card fees onto tenants (consumers) is illegal under Colorado law. Based on their position, the Colorado Attorney General ("AG") has challenged the legality of charging tenants credit card fees. The AG's position is based on the AG's interpretation of a Colorado statute. The law at issue states that "no seller or lessor in any sales or lease transaction or any company issuing credit or charge cards may impose a surcharge on a holder who elects to use a credit or charge card in lieu of payment by cash, check, or similar means. A surcharge is any additional amount imposed at the time of the sales or lease transaction by the merchant, seller, or lessor that increases the charge to the buyer or lessee for the privilege of using a credit or charge card".

Based on our extensive legal research, we disagree with the AG's position. Under the law, you should be able to pass on credit card fees to tenants for the privilege of paying by credit card. The law cited by the AG to support the AG's position is part of the Colorado Consumer Credit Code ("CCC"). The CCC was adopted to protect consumers from unscrupulous vendors and predatory lending practices. The CCC imposes upon violators, penalties, including potential treble damages, attorney's fees, and possible punitive damages.

Courts outside of Colorado have specifically held that residential leases are not "consumer credit transactions". While no Colorado court has held that the CCC doesn't apply to residential leases, both the Colorado CCC and federal law define "Consumer Leases". A residential lease is not covered by the definition of Consumer Lease under either Colorado or Federal law. Because a residential lease is not a consumer credit transaction, the Colorado CCC, including the provision relied upon by the AG, does not

apply to residential leases. Since the CCC doesn't apply to residential leases, landlords should be free to pass on credit card fees.

Surprisingly, even though the AG agrees that residential leases are not "consumer credit transactions", the AG still takes the position that landlords can't impose credit card fees when tenants pay their rent by credit card. The AG argues that the restriction on fees applies to all leases and not just consumer leases covered by the CCC. In interpreting laws passed by the Colorado General Assembly, courts rely on principles of statutory interpretation. A hallmark of statutory interpretation is that a law's applicability is limited to its purpose. Because the AG's argument violates statutory construction principles by extending the CCC well beyond the purpose of the law (consumer credit transactions), in our opinion, courts should be more likely to hold that credit card fees are not barred when rent is paid with a credit card.

The AG's position also ignores the fact that communities are not the party imposing the credit card fees. Assuming that the CCC does apply, the CCC shouldn't prohibit current industry practices. As discussed above, communities do not accept credit card payments directly from tenants. Rather, communities use a third party vendor to run an Internet portal for the benefit of their tenants. The third party vendor running the tenant Internet portal charges the tenant a "convenience fee".

Thus, in almost every case, the landlord is not charging credit card fees or surcharges when tenants pay by credit card. Regardless of this fact, and the fact that a community was not receiving any of the "convenience fee", the AG still took the position that this arrangement was barred by the CCC. If you haven't discussed this issue with your Internet portal vendor, you should do so immediately. If your Internet portal vendor is imposing credit card fees, surcharges, or "convenience fees" when tenants pay by credit card, the AG could challenge the arrangement. Regardless of what your vendor says, you should obtain written legal opinions from your Internet portal's legal counsel that such arrangement is legal. If your vendor says it's not a problem, your Internet portal company should be willing to agree in writing to reimburse you for any damages suffered by you if the arrangement is found to violate the law.

While the AG believes that the imposition of credit card fees on tenants paying their rent by credit card is a settled area of law, the law is far from settled. However, because no one usually lines up to fight city hall, the AG's opinion may never be challenged, and thus rule supreme. Depending on how many properties might be involved in a fight with the AG's office over this issue, the monetary stakes could be enormous. In addition to the damages, there are always the attorneys' fees in any litigation. The government uses tax dollars (our money) to pay the attorneys who work for the AG's office. A party fighting this issue against the AG could conceivably spend hundreds of thousands of dollars in attorneys' fees. So, even if somebody wanted to fight city hall, the sheer scope of the monetary downside would likely prevent somebody from ever taking the AG's office on over this issue. Making clarification of the law by the Colorado General Assembly the only viable option to address this problem.