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# Landlord News

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## AVOID THE IDENTITY THEFT BLUES (THE PITFALLS OF TELEPHONE LEASE APPLICATIONS)

Residents have traditionally applied in person. A weak rental market exerts pressure to increase applications. Managers adopt countless strategies to increase applications. One strategy to increase applications is to waive the requirement that the resident apply in person. Telephone applications ("Phone Apps") allow residents to apply over the phone. Phone Apps are not new. Out of state residents have applied over the phone or by fax, or by a combination of both for sometime. However, Phone Apps have traditionally been the exception and not the rule.

The new trend for some managers is to encourage all Phone Apps. More applications is the goal. Taking Phone Apps increases applications. Increasing applications increases the chances

of filling vacancies. However, Phone Apps are not without risk. Identity theft is rampant. Some argue that Phone Apps significantly assist, promote, and perpetuate identity theft. Victims of identity theft may seek to hold you financially liable. You should weigh

the benefits of Phone Apps against the risks before adopting a blanket Phone App policy.

Phone Apps are primarily verbal information. The applicant provides the information over the phone to someone transcribing the application. Phone applicants are required to provide key identification information by fax or email. This is the main potential pitfall of Phone Apps. Lack of verification. Whose identification is coming over the fax? The applicant? Or an identity theft victim?



## Colorado Clean Indoor Air Act Impact On Multi-Family Housing

On July 1, 2006 the new Colorado Clean Indoor Air Act became law. Although most of the publicity and news focus has been on the fact that this new law makes Colorado bars and restaurants entirely smoke free other provisions within this new law have drawn less attention. One of the lesser known provisions are those that affect all common areas of public and private buildings.

The Act provides for no smoking in any indoor area including "restrooms, lobbies, hallways, laundry rooms and other common areas in public and private buildings, condominiums, and other multiple-unit residential facilities." This also includes the entryways of these facilities. Entryway is defined as "the outside of the front or main doorway leading into a building or facility that is not exempted from part 2 under section §25-14-205" of the Colorado Clean Indoor Air Act. "Entryway" also includes the area of public or private property within a specified radius of 15 feet outside of the doorway unless a local authority has a different radius that is greater than 15 feet.



The Act clearly states that, "It is unlawful for a person who owns, manages, operates or otherwise controls the use of a premises that is subject to Part 2 to violate any provision of this Part 2. If you do violate this law you may be found guilty of a Class 2 petty offense and if convicted you "shall be punished by a fine not to exceed two hundred dollars for the first violation within a calendar year, a fine not to exceed three hundred dollars for a second violation within a calendar year, and a fine not to exceed five hundred dollars for each additional violation within a calendar year".

Although this Act does not apply to "the outdoor area of any business" (C.R.S.D.A §25-15-205 (g)) you

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When a resident applies by phone, you cannot verify the resident is who he claims to be.

Managers conduct background checks on applicants. Background checks review credit, rental history, and criminal history. The Fair Credit



Reporting Act (FCRA) is a federal law that applies to all credit checks. The FCRA regulates credit bureau companies, lending, and financial institutions who report to credit bureau agencies.

The FCRA applies to businesses besides credit reporting agencies and lending institutions. The FCRA applies to property managers and owners who obtain credit information.

Under the FCRA (15 U.S.C. § 1681b) anyone who obtains credit related information in the form of a credit bureau, credit history, credit summary, and then stores that information is deemed to be using it as a "consumer report." When someone uses a consumer report, the FCRA often applies. The Federal Trade Commission enforces the FCRA. The FTC's position is that the FCRA covers property managers when they check credit and other background information, including obtaining credit related information from third party verification companies.



The FCRA requires employers to obtain written permission from an applicant or current employee before doing a background check. The FCRA does not specifically require housing providers to obtain written authorization to perform a credit check. However, a logical and common sense interpretation of the FCRA means that the same rule would apply. If you take Phone Apps, you must obtain written authorization from a resident to run a credit check. The Landlord Protection Agency holds this opinion too. Their website states that it is illegal under the FCRA to pull a resident's credit related information without the resident's written authorization. The Phone App process cannot be entirely verbal. You have to have a signature. You only increase your potential liability under the FCRA if you fail to obtain written authorization to

check credit when taking Phone Apps.

This brings us squarely back to the identity theft issue. If someone does not apply in person, how are you going to obtain required signatures? Sure it's possible to get the signature. You can get it by fax or some electronic format such as a signed PDF document. You can get drivers licenses and other identification by way of fax or PDF. But without having met the applicant, you cannot verify the applicant's identity. Lack of identification verification makes Phone Apps problematic. Criminals use their victim's information and identification not only to use their existing credit, but to obtain credit, apply for credit cards and even housing. For this reason, the Landlord Protection Agency advocates an application process in which you get a copy of the applicant's driver's license or other valid form of I.D. in order to verify that the person you are screening is really the person whose references you are checking.



Congress enacted another federal law to deal with credit related and identity theft issues. The Fair and Accurate Credit Transactions Act ("FACT Act"), gives consumers an entirely new set of rights. Your potential liability for identity theft, based these new rights, has not been fully adjudicated through the court process. It is currently unclear who a consumer can sue or bring into a lawsuit based on identity theft. Under the FCRA, there is no doubt that a prospective renter is a "consumer". Consumers have broad rights under both the FCRA and FACT Act. Obtaining written authorization arguably should insulate you from liability against lawsuits based on these laws. However, no court has determined this. Lawyers are always pushing the envelope, and probably would argue that there is liability even if you had written authority.

Obtaining written authorization during the Phone App process may not cut off all potential liability. The imposter (criminal) may be providing a written authorization. Would you be legally responsible if you accepted the application of an imposter? The imposter renting under the victim's name creates potential legal problems for the victim. Your approval of an imposter's application may

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limit the victim's future credit opportunities. If the imposter breaks the lease, the victim is going to be responsible for lease break charges and will probably be assigned a collection agency. More remote but not impossible is a situation in which the imposter uses the rental property for illegal purposes such as a drug lab or a place to fence stolen property.

Negligence is based on the concepts of duty and care. The law imposes legal duties in some situations. Negligence occurs when you breach a duty by failing to meet the standard of care that a reasonable person would use in the same or similar situation. For example, you drive over the speed limit on an icy road. A reasonable person would not do this, but rather would drive under the speed limit because of the icy conditions. If you can't stop in time and cause an accident, you are negligent because you have breached your duty to drive at a speed dictated by the weather conditions.

When it comes to identity theft, the concept of negligently assisting identity theft is an evolving concept. The issue is whether, under a negligence standard, you owe a duty of care to an unknown person (an identity theft victim) to make sure that a criminal is not improperly using the victim's identity to lease an apartment. No court has reported a decision on this evolving legal theory. However, a few states have allowed lawsuits under a new tort theory called "negligent enablement of imposter of fraud." Alabama has recognized this legal theory in a case where a lender granted credit to applicants over the phone. The court found the lender liable because the lender failed to obtain sufficient information to accurately verify the applicant's identify. Based on this decision, theoretically, an identity theft victim could sue anyone who takes personal information over the phone from someone for credit related reasons.

Other courts have rejected this cause of action on the basis that the duty to an unknown third



situations. Negligence occurs when you breach a duty by failing to meet the standard of care that a reasonable person would use in the same or similar situation. For example, you drive over the speed limit on an icy



party is too remote. Colorado has not addressed this issue, nor have any federal courts in the Tenth Circuit (our federal regional jurisdiction). Nevertheless, legal commentators on identity theft have predicted that more states may adopt this negligent enablement claim. Whether there is liability to an unknown third party or not, one thing is clear: identity theft is a huge problem and Phone Apps without in person verification arguably perpetuate ID theft.

If you get written approval to run background checks via faxes, mail, etc, you can process the application. This alone does not appear to violate any laws. Yet, in doing so, we feel that the management company is taking on potential legal liability, possible bad press and other risks. There may be legislation coming soon on this issue. Further, if a housing provider accepted the application of an imposter, it could be faced with tough decisions on how to handle the person's tenancy upon suspicion of identity theft. When you really think about it, the housing provider becomes a potential victim of the identity theft as well. Everyone victimized by identity theft suffers. Our firm spends a lot of time on risk analysis and this is one of those issues where we think the downside outweighs the upside. Thus, overall and on balance, Phone Apps should remain the exception, and not be adopted as the everyday policy.



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may post a swimming pool for no smoking if you choose to do so. (C.R.S.A. §25-14-206(I)) The owner or manager of any place not specifically listed in section §25-14-204, including a place otherwise exempted under section §25-14-205, may post signs prohibiting smoking or providing smoking and nonsmoking areas. Such posting shall have the effect of including such place, or the designated nonsmoking portion thereof, in the places where smoking is prohibited or restricted pursuant to this part of Section 2.



## August Lunch Is At South Location

The August Client Lunch on Friday August 18th is at our South location Piccolo's located at South Monaco Blvd and East Hampden. The luncheon runs from 11:30 a.m. until 1:00 p.m. and affords our clients an opportunity to meet many of their peers in the multi-family housing industry.

The monthly free client lunch is attended by all of the Firm attorneys and professional staff. Managing partner Mark Tschetter makes a presentation of a current legal topic of interest to apartment professionals and then opens the floor for legal questions and discussion of topics of interest to those who are in attendance.

Attendance at these luncheons continues to be excellent and if you have not taken the opportunity to attend one we urge you to do so. You can make a reservation through our website [www.htspc.com](http://www.htspc.com), click on the events and fill in the information or by calling Bethany or Crystal at the office 303-699-3484.



### IMPORTANT AUGUST DATES

**August 10th Non Monetary Evictions**

**August 15th Advanced Fair Housing**

**August 18th Client Luncheon**

**\*September 4th Firm Closed for Labor Day Holiday**

## Reasons Why The English Language Is Hard To Learn

- 1) The bandage was wound around the wound.
- 2) The farm was used to produce produce.
- 3) The dump was so full that it had to refuse more refuse.
- 4) We must polish the Polish furniture.
- 5) He could lead if he would get the lead out.
- 6) The soldier decided to desert his dessert in the desert.
- 7) Since there is no time like the present, he thought it was time to present the present.
- 8) A bass was painted on the head of the bass drum.
- 9) When shot at, the dove dove into the bushes.
- 10) I did not object to the object.
- 11) The insurance was invalid for the invalid.
- 12) There was a row among the oarsmen about how to row.
- 13) They were too close to the door to close it.
- 14) The buck does funny things when the does are present.
- 15) A seamstress and a sewer fell down into a sewer line.
- 16) To help with planting, the farmer taught his sow to sow.
- 17) The wind was too strong to wind the sail.
- 18) After a number of injections my jaw got number.
- 19) Upon seeing the tear in the painting I shed a tear.
- 20) I had to subject the subject to a series of tests.
- 21) How can I intimate this to my most intimate friend?

